

BRB No. 04-0925 BLA

CARL COMBS)	
)	
Claimant-Petitioner)	
)	DATE ISSUED: 05/25/2005
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2003-BLA-05866) of Administrative Law Judge Rudolf L. Jansen rendered on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed his initial claim for black lung benefits on September 15, 1992, which was denied in 1993. Director's Exhibit 1. Claimant filed the present claim on May 15, 2001. Decision and Order at 8; Director's Exhibit 2. In his Decision and Order issued on August 6, 2004, which is the subject of this appeal, the administrative law judge noted his duty to consider the newly submitted evidence in conjunction with the evidence of record associated with the initial claim to determine whether claimant established any of the elements of entitlement previously adjudicated against him. The administrative law judge noted that claimant

had previously failed to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). However, based on the concession by the Director, Office of Workers' Compensation (the Director), that claimant suffers from pneumoconiosis, the administrative law judge concluded that the record established a material change in conditions, *see* 20 C.F.R. §725.309(d), and reviewed all of the medical evidence of record to determine entitlement on the merits. Upon review of the entire record, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical evidence. Claimant also alleges that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. The Director responds that the administrative law judge properly denied benefits and that the Director met his obligation to provide claimant with a complete and credible pulmonary evaluation.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Initially, we affirm the administrative law judge's unchallenged findings that claimant failed to establish total disability pursuant to 20 C.F.R. §§718.204(b)(2)(i)-(iii).¹ *Stark v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7, 11-12; Director's Exhibits 12-13; Employer's Exhibits 1-2, 5. Regarding Section 718.204(b)(iv), claimant argues that Dr. Baker's opinions meet the criteria to establish total disability. Claimant asserts that the opinions are well reasoned and well documented. Claimant also contends that Dr. Baker did not rely solely on claimant's invalid pulmonary function studies. Claimant also asserts that the administrative law

¹ The administrative law judge's finding is supported by substantial evidence as there are no qualifying pulmonary function studies or blood gas studies of record and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhibits 12-13; Employer's Exhibits 1, 2, 5.

judge must consider the exertional requirements of claimant's usual coal mine employment in considering an opinion on total disability. Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant also maintains that the administrative law judge erred in failing to address claimant's age and work experience in determining that claimant is not totally disabled.

In considering the medical opinion evidence, the administrative law judge noted that Dr. Baker's March 3, 2001, report recorded claimant's work and smoking histories, the results of claimant's physical examination, x-ray, and pulmonary function and blood gas studies.² Decision and Order at 6; Director's Exhibit 10. The administrative law judge determined that Dr. Baker diagnosed claimant with "a 10-25% impairment of the whole person and should avoid further occupational dust exposure." *Id.* The administrative law judge noted that Dr. Baker's assessment was derived from the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. *Id.* The administrative law judge determined that Dr. Baker's opinion was insufficient to establish total disability because Dr. Baker "did not opine whether Claimant has the respiratory capacity to engage in similar labor in a dust-free environment," and based his opinion, "in part on an invalid pulmonary function study." Decision and Order at 11.

We affirm the administrative law judge's findings as they are rational and supported by substantial evidence.³ *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1985)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). The administrative law judge rationally found that Dr. Baker's statement that claimant should limit further exposure to coal dust is not equivalent to a finding of total disability. Decision and Order at 11; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). The administrative law judge also acted within his discretion in finding that Dr. Baker's diagnosis of an impairment was entitled to little weight because the doctor relied in part on an invalid pulmonary function

² The administrative law judge also discussed Dr. Baker's examination report dated September 25, 1991. Decision and Order at 6, Director's Exhibit 1.

³ Dr. Baker diagnosed a "Class II impairment based on FEV1 between 60% and 80% of predicted" based on Table 5-12, Page 107, Chapter Five, *Guides to the Evaluation of Permanent Impairment, Fifth Edition*," and "a second impairment based on the presence of Pneumoconiosis which is based on Section 5.8, Page 106, Chapter Five, *Guides to the Evaluation of Permanent Impairment, Fifth Edition*," which provides that persons who have pneumoconiosis should avoid further coal dust exposure. Director's Exhibit 13. Dr. Baker reported that this second impairment "would imply the patient is 100% occupationally disabled for work in [the] coal mining industry or other similar dusty occupations." *Id.*

study, thus undermining his conclusion. Decision and Order at 11; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000). Thus, we affirm the administrative law judge's determination to accord Dr. Baker's opinion little weight on the issue of total disability.

We also find no merit in claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment to Dr. Baker's assessment of claimant's physical limitations. In this case, a comparison was not required as the administrative law judge rationally determined that Dr. Baker's opinion was undermined by his reliance, in part, on an invalid pulmonary function study, thus rendering a comparison of the doctor's assessment to the exertional requirements of claimant's coal mine work unnecessary. *Cornett*, 227 F.3d 569, 577, 22 BLR 2-107, 2-124; *see also Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

Finally, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act. *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is also misplaced. In *Bentley*, the Board held that age, work experience, and education are relevant only to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2). We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv).

We must also reject claimant's assertion that remand to the district director is required because the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, was discredited by the administrative law judge under Section 718.204(b)(2)(iv). Claimant contends that since the administrative law judge assigned less weight to Dr. Hussain's opinion because it was based in part upon an invalid pulmonary function study, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 6. The Director responds that while "it is true that the test was invalid, that does not translate into a failure of the Director to discharge his duty." Director's Brief at 8.

The Act requires that “[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The Director fails to meet this duty where “the administrative law judge finds a medical opinion incomplete,” or where “the administrative law judge finds that the opinion, although complete, lacks credibility.” *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The administrative law judge noted that Dr. Hussain examined claimant on August 17, 2001, and “provided a full pulmonary workup.” Decision and Order at 6. The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the examination form. Decision and Order at 6-7; Director’s Exhibit 11A; *see* 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge, however, found that Dr. Hussain’s opinion was entitled to less weight because it was based in part upon an invalid pulmonary function study. Decision and Order at 10. In compliance with the applicable regulation, and as part of Dr. Hussain’s evaluation, claimant underwent a pulmonary function study on August 17, 2001, which was invalidated due to suboptimal effort by Dr. Burki. Decision and Order at 5; Director’s Exhibit 11A. As a result, and in accordance with the regulation, *see* 20 C.F.R. §725.406(c), claimant underwent a second pulmonary function study on November 2, 2001, which was furnished by the Director to provide claimant another opportunity to produce satisfactory results upon putting forth adequate effort, but this study was also invalidated by Dr. Burki due to suboptimal effort. *Id.* Consequently, since claimant was provided two opportunities to satisfactorily perform a pulmonary function study and failed to do so, through no fault of the Director, there is no merit to claimant’s argument that the Director did not fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. 20 C.F.R. §725.406(c).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR 1-26; *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark*, 12 BLR 1-149; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Claimant’s failure to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26.

Because claimant has not raised any meritorious allegations of error with respect to the administrative law judge's determination that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2), an essential element of entitlement, we must affirm the administrative law judge's finding and the denial of benefits. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge