BRB No. 04-0926 BLA

GARY SMALLWOOD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 05/25/2005
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	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.

James M. Kennedy (Baird & Baird, P.S.C.) Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2003-BLA-5699) of Administrative Law Judge Rudolf L. Jansen on a claim filed on February 12, 2001 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). After crediting claimant with 10.63

years of coal mine employment, the administrative law judge found that the evidence failed to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings under Sections 718.202(a)(1), (a)(4) and 718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief on the merits of this appeal.[1]

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

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error. Under Section 718.204(b)(2)(iv), claimant alleges that the opinion of Dr. Simpao is well reasoned and documented, is sufficient to establish total disability, and should not have been rejected by the administrative law judge. Claimant argues that the Board has previously held that it is an error to reject a medical opinion solely because it is based on non-conforming pulmonary function studies. The administrative law judge acknowledged that Dr. Simpao based his disability assessment on claimant's symptoms and the results of claimant's examination, x-ray, pulmonary function study, blood gas

[1] The parties do not challenge the administrative law judge's decision to credit claimant with 10.63 years of coal mine employment, or his findings that a totally disabling respiratory or pulmonary impairment was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

study and electrocardiogram. Decision and Order-Denying Benefits at 9. Contrary to claimant's contention, the administrative law judge properly found Dr. Simpao's opinion, that claimant's mild respiratory impairment would not allow him to perform his last coal mine employment, poorly reasoned because "Dr. Simpao did not explain his conclusion in light of his designation of the pulmonary function study as showing normal values." Decision and Order-Denying Benefits at 13; *see Fields v. Island Coal Co.*, 10 BLR 1-19, 1-21-22 (1987); Director's Exhibit 12.

In addition, the administrative law judge permissibly found the contrary opinions of Drs. Broudy and Repsher, that claimant retains the respiratory capacity to perform coal mine work, well reasoned and documented by the normal results of their pulmonary testing. Decision and Order-Denying Benefits at 13; *Fields*, 10 BLR at 1-21-22; Employer's Exhibits 10, 11. Accordingly, the administrative law judge rationally found that the opinions of Drs. Broudy and Repsher outweighed Dr. Simpao's opinion and that claimant failed to establish total disability under Section 718.204(b)(2)(iv). *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

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 with Dr. Simpao's assessment that claimant's mild impairment is totally disabling. Here, a comparison was not required, as the administrative law judge rationally determined that Dr. Simpao's impairment assessment was unexplained in light of the normal objective testing and was therefore not well reasoned or documented. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 526, 22 BLR 2-107, 2-123 (6th Cir. 2000). Moreover, 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.[2] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal* Co., 19 BLR 1-18 (1994); *see also Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Additionally, claimant argues that because pneumoconiosis is a progressive and irreversible disease, it can "be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or

[2] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is 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 we did not reach 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)(i), (ii).

comparable and gainful work." Claimant's Brief at 8. With this assertion, claimant identifies no error in the administrative law judge's determination that claimant did not prove that he is totally disabled. For the reasons discussed above, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because claimant failed to establish the existence of a totally disabling respiratory impairment, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge