BRB No. 99-0215 BLA

FREDDIE L. ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Paul E. Jones (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-676) of Administrative Law Judge Thomas F. Phalen, Jr. on a 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). The administrative law judge found, and the parties stipulated to, at least twenty-three years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 3. The administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)

[1] Claimant filed his claim for benefits on April 11, 1997.

and 718.203, but insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant contends that the evidence of record is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant contends that the administrative law judge erred in his weighing of the medical opinion evidence pursuant to Section 718.204(c)(4).[2] We disagree. The administrative law judge rationally concluded that the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4) as none of the physicians of record found "a significant respiratory impairment due to coal dust exposure." Decision and Order at 12. Director's Exhibits 11-13; Employer's Exhibits 1, 4; Decision and Order at 12; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir.1989); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986). Contrary to claimant's argument, Dr. Baker's opinion of minimal to no pulmonary impairment does not provide a sufficient basis for the administrative law judge to draw an inference of total disability. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright, supra*. Further, contrary to claimant's contention, Dr. Myers's checking of a box indicating that claimant was capable of performing coal mine employment, does not render the opinion unreasoned. *See Hall v. Director, OWCP*, 12 BLR 1-133 (1989); *modified on recon.*, 14 BLR 1-1 (1989). Further, the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis does not require the administrative law judge to discredit Dr. Broudy's opinion simply because the physician did not diagnose pneumoconiosis. *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). Nor, contrary to claimant's argument, does a diagnosis of simple pneumoconiosis give rise to a presumption of total disability without supporting medical evidence. *See Gee*, *supra*; *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'd sub*

[2] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204(c)(1)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

nom. Greenwich Collieries v. Director, OWCP, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge