BRB No. 99-0732 BLA

WANDA BIRDWELL (Daughter of ARTHUR POE, JR.)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Wanda Birdwell, Whithall, Tennessee, *pro se*.

Dorothy L. Page (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals Decision and Order Denying Benefits on Remand (96-BLA-0368) of Administrative Law Judge Joan Huddy Rosenzweig, denying benefits on a claim filed pursuant to the provisions of Title IV of

[1]Claimant is Wanda Birdwell, daughter of Arthur Poe, Jr., the miner. The miner filed the instant duplicate claim for benefits with the Department of Labor on December 19, 1994. Director's Exhibit 1. The miner died on June 6, 1996. Claimant's Exhibit 1. Claimant is the surviving relative and representative of the miner's estate.

the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.. §901 *et seq*. The case is before the Board for the second time. Previously, the Board affirmed the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), but remanded the case to the administrative law judge for reconsideration the evidence, regarding total disability at 20 C.F.R. §718.204(c)(1) and (c)(4). *Birdwell v. Director, OWCP*, BRB No. 98-0113 BLA (Oct. 6, 1998)(unpub.). On remand, the administrative law judge found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge denied the claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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). The Director, Office of Workers' Compensation Programs, asserts that the administrative law judge's findings that the evidence fails to establish total respiratory disability at Section 718.204(c) is supported by substantial evidence, and accordingly, urges affirmance of the denial of benefits.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the administrative law judge's findings at Section 718.204(c)(1), the administrative law judge found that the May 19, 1976, qualifying pulmonary function study administered by Dr. Shull, noted that claimant's cooperation and comprehension were "fair".[2] Decision and Order at 3; Director's Exhibit 17. The administrative law

[2]As used herein, "qualifying" indicates a test yielding values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R Part 718, Appendices B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

judge determined that this study constituted less than optimal effort and accorded it diminished weight. *Id.* Similarly, with respect to the October 27, 1987, qualifying pulmonary function study administered by Dr. Gilley, the administrative law judge accorded it no weight, because Dr. Gilley noted that claimant's effort and cooperation was "very poor", and therefore difficult to assess claimant's total disability. Decision and Order at 13; Director's Exhibit 19; *see Trent, supra; Gambino v. Director, OWCP*, 6 BLR 1-134 (1983). The administrative law judge correctly found that all of the other pulmonary function studies of record produced non-qualifying values and rationally. Decision and Order at 13. She concluded that the 1976 study was outweighed by all of the non-qualifying pulmonary function studies of record, based upon a preponderance of the evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987). We affirm, therefore, the administrative law judge's finding at Section 718.204(c)(1) that claimant has not meet his burden of proof as supported by substantial evidence.[3]

The administrative law judge determined that "while the record is not crystal clear regarding [claimant's] last coal mine employment, it does appear that he ran a coal cutter during his last period of employment in the mines." Decision and Order at 5. The administrative law judge further concluded that "running a coal cutter-which is a sizable piece of machinery–constitutes moderate to heavy labor." *Id*. at n. 3

In evaluating the evidence relevant to Section 718.204(c)(4), the administrative law judge noted that the Board instructed her to consider the opinions of Drs. Fritzhand and Gilley with the exertional requirements of the miner's claim on remand. Dr. Fritzhand's opinion stated that the miner could "do mild to moderate activity without ass[ociated] [shortness of breath]." Director's Exhibit 17. The administrative law judge provided alternative reasons for concluding that Dr. Fritzhand's opinion was insufficient to establish total disability. First, the administrative law judge determined that Dr. Fritzhand's opinion is either vague or equivocal and entitled to little, if any weight, since the physician did not address claimant's physical limitations in conjunction with the exertional requirements of claimant's usual

[3]The administrative law judge's finding that the evidence is insufficient to establish total respiratory disability pursuant to 20 C.F.R.§718.204(c)(2) - (3) was affirmed in our previous Decision and Order. *Birdwell v. Director, OWCP*, BRB No. 98-0113 BLA (Oct. 6, 1998)(unpub.).

coal mine employment and the report does not contain any discussion of claimant's coal mine employment. Decision and Order at 5-6. Second, the administrative law judge determined that, "assuming *arguendo*" that claimant's last coal mine employment as a coal cutter requires moderate to heavy exertion and that Dr. Fritzhand's assessment of claimant's exertional limitations "leads to a conclusion that claimant's impairment resulted in total disability within the meaning of Section 718.204(c)(4)," the physician's opinion is not a reasoned opinion. Decision and Order at 6, 13. The administrative law judge rationally concluded that in light of the non-qualifying objective studies, Dr. Fritzhand failed to provide an explanation, or reference, to what "factors" he relied on in concluding that claimant could only perform mild to moderate activity and thus, his opinion was not reasoned and entitled to "no weight." *Id*.; *see Rowe v. Director, OWCP*, 710 F. 2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark, supra; Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

The administrative law judge also considered two reports submitted by Dr. Gilley. In the first, dated July 2, 1985, Director's Exhibit 18, Dr. Gilley opined that claimant had a mild ventilatory impairment and that claimant exhibited "no significant impairment of lung function." The administrative law judge permissibly concluded that Dr. Gilley's 1985 opinion when compared to claimant's usual coal mine employment requiring moderate to heavy labor was insufficient to establish total respiratory disability at Section 718.204(c)(4). *See King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Massey v. Eastern Associated Coal Corp*., 7 BLR 1-37 (1984). She also found that Dr. Gilley's October 30, 1987, report, wherein Dr. Gilley listed the miner's limitations as follows: "walking, one-half mile on level, climb1-2 flights, lift 50 pound, and carry one-half block" was a mere recitation of symptoms, as the physical limitations set forth in the report were almost verbatim as described by the miner when he described his complaints and symptoms. Director's Exhibit 19; Decision and Order at 14. The administrative law judge rationally concluded that, as such, this opinion was insufficient to establish total respiratory disability. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1989); *Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984); *see also Scott v. Mason Coal Co.* 60 F.3d 1138, ___ BLR __, (4th Cir. 1995); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 623, __ BLR __, (3d Cir. 1990); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, __ BLR __, (11th Cir. 1989). Moreover, the administrative law judge permissibly concluded that all of the relevant evidence weighed together failed to establish total respiratory disability at Section 718.204(c). *See Clark, supra; Fields, supra;* Decision and Order at 14-15. We affirm , therefore, the administrative law judge's finding at Section 718.204(c), as it is supported by substantial evidence and is in accordance with applicable law. As this finding precludes entitlement pursuant to the Part 718 regulations, *see Trent, supra; Perry, supra*, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand awarding 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