BRB No. 99-0760 BLA

WILLIS VANCE, JR.)
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Claimant-Petitioner)
)
v.) DATE ISSUED:
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SHAMROCK COAL COMPANY, INC.)
)
and)
)
EMPLOYERS INSURANCE OF WASAU)
)
Employer/ Carrier-)
Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Rokententz, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky for claimant.

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (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: SMITH, McGRANERY and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order-Denying Benefits (98-BLA-0283) of Administrative Law Judge Daniel J. Rokentenetz 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 administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied the claim.

On appeal, claimant initially asserts that the record is devoid of a complete, credible pulmonary evaluation as required by the Act and the corresponding regulations. Alternatively, claimant asserts that the administrative law judge erred when he found that the evidence failed to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(1) and (4) and a totally disabling respiratory impairment pursuant to Sections 718.204(c)(1) and (4). Claimant also raises arguments relative to Section 718.204(b), despite the fact that the administrative law judge did not render findings thereunder. Employer, in response, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, disagreeing with claimant's contention that the record lacks a complete, credible pulmonary evaluation, as he asserts that Dr. Fritzhand's opinion is sufficient to satisfy this requirement. Additionally, the Director states that he will not address the merits of the appeal.[2]

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[1]Claimant is Willis Vance, Jr., the miner, who filed an application for benefits with the Department of Labor on March 20, 1997. Directors Exhibit 1.

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings of 23 years and 11 months of coal mine employment, that employer is the putative responsible operator, his findings regarding augmentation, that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3), and that it fails to

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, we reject claimant's assertion asserts that record is devoid of a complete, credible pulmonary examination, as required by the Act and applicable regulations. See 30 U.S.C. §923(b); 20 C.F.R. §§718.101; 718.401; 725.405(b). *See Pettry v.* Director, OWCP, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). A complete, credible pulmonary exam is defined as one that addresses all of the elements of entitlement and is found credible by the administrative law judge. *Hodges v. BethEnergy Mines, Inc.,* 18 BLR 1-84(1994). The opinion of Dr. Fritzhand, Director's Exhibit 13, addresses all of the elements of entitlement, and although his conclusions are not favorable to claimant, in this claim, the physician's opinion was found credible by the administrative law judge. Decision and Order at 9. The Director, therefore has satisfied his statutory duty to provide a complete, credible pulmonary exam. in this case. *See Hodges, supra; Pettry, supra; see also Newman v. Director, OWCP,* 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Claimant also challenges the administrative law judge's finding at Section 718.204(c)(1), asserting that the pulmonary function study administered by Dr. Fino's contains an MVV value that qualifies, according to the standards set forth in Part 718, Appendix B. Dr. Fino determined that claimant was 48 years old at the time of test, that he was 69 inches tall, and the doctor

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establish total respiratory disability pursuant to Section 718.204(c)(2) and (3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

recorded an MVV of 94. Employer's Exhibit 1. The regulations at Section 718.204(c)(1)(ii) state that values equal to or less than those listed in Table B5 for male miners in B for an individual of the miner's age and height are required in order to qualify. 20 C.F.R. §718.204(C)(1)(ii). According to the table set forth in Appendix B for a 48 year old miner who is under 69.3 inches tall, an MVV value of 88 or less is required to be qualifying. 20 C.F.R. part 718, Appendix B. Thus, the administrative law judge correctly found that Dr. Fino's pulmonary function study, as well as the other three tests of record, produced non-qualifying values. Decision and Order at 8; Director's Exhibits 10, 11, 12; Employer's Exhibit 1. As these studies do not establish total respiratory disability pursuant to Section 718.204(c)(1), we affirm the administrative law judge's findings pursuant to Section 718.204(c)(4). *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); *Winchester v. Director v. OWCP, 9 BLR 1-177 (1986)*.

Claimant also challenges the administrative law judge's weighing of the medical opinion evidence at Section 718.204(c)(4), asserting that the opinions of Drs. Myers and Fritzhand are sufficient to establish that claimant cannot perform his usual coal mine employment. Dr. Myers opined that claimant is physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work. Director's Exhibit 11. Dr. Fritz stated that "[clt] has the respiratory function to perform his last [coal mine employment]." Director's Exhibit 13. The administrative law judge correctly found that the opinions of Drs. Myers and Fritzhand concluded that claimant was not totally disabled by a respiratory or pulmonary impairment. Decision and Order at 14. As the administrative law judge's determination that these opinions are legally insufficient to sustain claimant's burden of establishing total respiratory disability at Section 718.204(c)(4) is supported by substantial evidence, we affirm this finding. *See Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *aff'd* 49 f. 3d 993, 19 BLR 2-136 (3d Cir. 1995); *Scott v. Mason Coal Corp.*, 14 BLR 1-37 (1990); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986). 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.[3] As these findings preclude entitlement pursuant to the Part 718 regulations, *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the denial of benefits.

[3]We need not address claimant's contentions regarding the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4), nor his arguments relative to Section 718.204(b) which the administrative law judge did not address, as they are rendered moot by our disposition of the case. *See Cochran v. Director, OWCP*, 16 BLR 1-101(1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge