BRB No. 99-0800 BLA

WALTER A. MUNCY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCH VALLEY COAL CORPORATION	)	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 on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Walter A. Muncy, Warriormine, West Virginia, *pro se*.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order on Remand (92-BLA-1659) of Administrative Law Judge Clement J. Kichuk denying benefits 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). This case involving a 1990 duplicate claim[1] is before the Board for the third time. In the initial

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on November 20, 1973. Director's Exhibit 40. On April 1, 1980, the district director notified claimant that his claim was denied by

decision, Administrative Law Judge Sheldon R. Lipson, after crediting claimant with over thirteen years of coal mine employment, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Finding the evidence insufficient to establish complicated pneumoconiosis, Judge Lipson also found that claimant was precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, Judge Lipson denied benefits. By Decision and Order dated March 27, 1995, the Board held that claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309 as a matter of law. *Muncy v. Clinch Valley Coal Corp.,* BRB No. 94-0248 BLA (Mar. 27, 1995) (unpublished). Although the Board affirmed Judge Lipson's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3), the Board vacated Judge Lipson's findings pursuant to 20 C.F.R. §§718.304 and 718.204(c)(4) and remanded the case for further consideration.

Due to Judge Lipson's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. Although the administrative law judge found that the x-ray and CT scan evidence was insufficient to establish the existence of complicated pneumoconiosis, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge, however, found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Accordingly, the administrative law judge denied benefits. By Decision and Order dated August 18, 1998, the Board affirmed the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) as unchallenged on appeal. *Muncy v. Clinch Valley Coal Corp.,* BRB No. 97-1601 BLA (Aug. 18, 1998) (unpublished). The Board also affirmed the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.* The Board, however, vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c)(4) and remanded the case for further consideration. *Id.*

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reason of abandonment. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on April 6, 1990. Director's Exhibit 1.

On remand for the second time, the administrative law judge found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718. In his consideration of whether the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge considered the opinions of Drs. Vasudevan, Endres-Bercher and Chithambo.[2] The administrative law judge noted that Dr. Vasudevan found that claimant's May 11, 1990 pulmonary function studies revealed mild to moderate restrictive lung function and that claimant's May 11, 1990 arterial blood gas study showed mild hypoxemia. Decision and Order on Remand at 4; Director's Exhibit 13. The administrative law judge, however, properly found that Dr.

[2]The administrative law judge accurately noted that the Board previously held that he had properly discredited Dr. Cardona's opinion regarding total disability as unreasoned. Decision and Order on Remand at 4; *see Muncy v. Clinch Valley Coal Corp.,* BRB No. 97-1601 BLA (Aug. 18, 1998) (unpublished).

Vasudevan's interpretations of claimant's pulmonary function and arterial blood gas studies were entitled to less weight than Dr. Endres-Bercher's interpretations of claimant's objective tests[3] based upon Dr. Endres-Bercher's superior qualifications.[4] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order on Remand at 4-5. The administrative law judge, therefore, properly credited Dr. Endres-Bercher's opinion that claimant was not totally disabled from a pulmonary standpoint over Dr. Vasudevan's contrary opinion. Finally, the administrative law judge, after noting that Dr. Chithambo's finding of total disability was "arguably equivocal in nature,"[5] properly discredited Dr. Chithambo's finding of total disability because it was based in part upon a pulmonary function study that was questioned by a better qualified consulting physician, Dr. Hippensteel.[6] *See Street v.*

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[3]In a report dated March 13, 1991, Dr. Endres-Bercher interpreted a non-qualifying March 13, 1991 pulmonary function study as normal with no indication of an obstructive or restrictive disorder. Director's Exhibit 45. Dr. Endres-Bercher also interpreted a non-qualifying March 13, 1991 arterial blood gas study as normal. *Id.*

In a report dated April 2, 1992, Dr. Endres-Bercher noted that claimant's non-qualifying April 2, 1992 pulmonary function study revealed "no evidence for obstructive or restrictive lung disease." Employer's Exhibit 8. Dr. Endres-Bercher further opined that claimant's non-qualifying April 2, 1992 arterial blood gas study did not "demonstrate any significant hypoxemia at rest." *Id.*

[4]Dr. Endres-Bercher is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 14. Dr. Vasudevan's qualifications are not found in the record.

[5]Dr. Chithambo opined that claimant's "decreased exercise tolerance, combined with the spirometry study which indicates moderate obstructive lung disease *suggests* that [claimant] is not able to continue with his previous occupation as a coal miner." Claimant's Exhibit 1 (emphasis added).

[6]Dr. Hippensteel reviewed Dr. Chithambo's April 7, 1992 pulmonary function study. Dr. Hippensteel noted that claimant, on his best effort, showed evidence of mild obstruction. Employer's Exhibit 38. Although Dr. Hippensteel noted that claimant's FVC was slightly below normal, he further noted that he would need lung volumes to confirm whether or not restriction was present. *Id.* Dr. Hippensteel concluded that:

> Although this study has two efforts that correlate within 5% and technically are valid, this study is incomplete and gives no evidence whether [claimant] had reversible obstruction or whether his mildly

Consolidation Coal Co., 7 BLR 1-65 (1984); Decision and Order on Remand at 6-7. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).[7]

> lowered FVC might be referable to obstruction. This means that this data is valid as derived, but does not give a complete objective test regarding his function.

Employer's Exhibit 38.

Dr. Hippensteel is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 14. Dr. Chithambo's qualifications are not found in the record.

[7]Claimant also challenges the administrative law judge's finding that claimant is not entitled to the irrebuttable presumption set out at 20 C.F.R. §718.304. The Board's previous holding on this issue, however, constitutes the law of the case and governs our determination herein. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990)*; Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we reaffirm the administrative law judge's finding pursuant to 20 C.F.R. §718.304.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge