BRB No. 07-0648 BLA

M.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BULA HALL COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 04/25/2008
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

M. P., Betsy Lane, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (05-BLA-5453) of Administrative Law Judge Alice M. Craft on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant filed his first application for benefits on April 28, 1986. Director's Exhibit 1. Because claimant failed to pursue this claim, the claim was deemed

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited the parties' stipulation that claimant worked in qualifying coal mine employment for ten years. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis based on the newly submitted evidence pursuant to 20 C.F.R. §718.202(a) and that, therefore, claimant demonstrated that one of the applicable conditions of entitlement previously adjudicated against him had changed since the denial of the prior claim became final under 20 C.F.R. §725.309(d). Next, the administrative law judge considered all the evidence of record *de novo*, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's decision denying benefits. Employer responds to claimant's *pro se* appeal, urging affirmance of the administrative law judge's denial of benefits.[2] The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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

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abandoned and administratively closed on September 22, 1986. Claimant filed a subsequent application on January 31, 1991, which the district director initially denied on July 18, 1991 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action on this claim and it was administratively closed on October 1, 1991. On October 1, 2003, claimant filed a third application for benefits, which is the subject of this appeal. Director's Exhibit 3.

[2] While employer asserts that the administrative law judge's Decision and Order should be affirmed based on claimant's failure to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), employer avers that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer argues further that, in the event the Board affirms the administrative law judge's Decision and Order denying benefits, the administrative law judge's error under Section 718.202(a) is harmless. Employer's Response to *Pro Se* Appeal at 8-15.

with 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 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.[3] *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 and the evidence of record, we conclude that the administrative law judge's Decision and Order Denying Benefits is rational, supported by substantial evidence and in accordance with law.[4] Relevant to Section 718.204(b)(2)(i), there are six pulmonary function studies of record, all of which yielded non-qualifying values.[5] Director's Exhibits 1, 17; Employer's Exhibits 1, 3. The administrative law judge properly found that the pulmonary function study evidence produced non-qualifying values, and therefore, failed to demonstrate total respiratory disability. 20 C.F.R. §718.204(b)(2)(i); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 18. Likewise, the administrative law judge properly determined that the six arterial blood gas studies of record produced non-qualifying values. Director's Exhibits 1, 17; Employer's Exhibit 1, 3. Hence, we affirm the administrative law judge's determination that total respiratory disability was not demonstrated under Section 718.204(b)(2)(ii). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 19. Similarly, we affirm the

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment occurred in the state of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

[4] Initially we note that claimant appeared at the formal hearing before the administrative law judge without the assistance of counsel. Based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 5-7.

[5] A "qualifying" pulmonary function study or blood gas study yields 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 and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

administrative law judge's determination that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be demonstrated by that means. 20 C.F.R. §718.204(b)(2)(iii); *see Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); Decision and Order at 18.

Relevant to Section 718.204(b)(2)(iv), the medical opinion evidence consists of the opinions of seven physicians, namely Drs. Dahhan, Fino, Fritzhand, Myers, Baker Ammisetty, and Verma. Drs. Dahhan, Fino, Fritzhand, and Myers opined that from a respiratory standpoint, claimant has the physiological capacity to continue his previous coal mine work, while Dr. Baker rendered the contrary opinion that claimant does not possess the physiological capacity to return to his usual coal mine employment. Director's Exhibit 1; Employer's Exhibits 1, 3, 4, 5. Dr. Ammisetty diagnosed moderate obstruction and a pulmonary impairment but did not assess whether claimant's pulmonary impairment is disabling and would preclude his return to his usual coal mine work. Director's Exhibits 17, 21.

In assessing the probative value of the various medical opinions, the administrative law judge initially found that the opinions of Drs. Myers and Fritzhand, whose physical examinations, diagnostic testing, and medical reports were administered when claimant filed his prior claim for benefits in January 1991, were less persuasive because these opinions were not only "remote in time," but also not indicative of claimant's current pulmonary condition since more recent pulmonary function studies demonstrated a decline in claimant's impairment. *See Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-85 (6th Cir. 1993) (later evidence may be more reliable than earlier evidence where later evidence illustrates expected deterioration in miner's physical condition, rather than improvement); Decision and Order at 19; Director's Exhibit 1. Finding that claimant's usual coal mine work was as a truck driver at a strip mine and entailed light to moderate physical labor, the administrative law judge found the probative value of Dr. Baker's opinion diminished because Dr. Baker opined that claimant was unable to perform sustained heavy labor. Accordingly, the administrative law judge properly found that Dr. Baker's opinion did not constitute a determination of total disability in view of the light to moderate exertional requirements of claimant's regular coal mine employment. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002), *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 19; Director's Exhibit 1. Similarly, the administrative law judge found that Dr. Ammisetty's finding of a pulmonary impairment was ambiguous, since it was unclear whether Dr. Ammisetty definitively diagnosed claimant as disabled or merely found him impaired. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19

(1987); Decision and Order at 19-20; Director's Exhibits 17, 21. The administrative law judge also rationally discounted Dr. Ammisetty's assessment that claimant had a moderate obstruction because Dr. Ammisetty, unlike Drs. Dahhan and Fino, failed to discuss claimant's lung condition relative to the regular duties of claimant's usual coal mine work. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-219, 20 BLR 2-360, 374 (6th Cir. 1996) (comparing physician's disability assessment with exertional requirements of usual coal mine employment); Decision and Order at 20. On the contrary, the administrative law judge assigned greater weight to the opinions of Drs. Dahhan and Fino, physicians who are Board-certified in internal medicine and pulmonary disease, because their opinions were consistent with the non-qualifying diagnostic studies and were based on familiarity with the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Thus, because the administrative law judge's crediting of the opinions of Drs. Dahhan and Fino is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's determination that the medical opinion evidence failed to demonstrate that claimant was totally disabled pursuant to Section 718.204(b)(2)(iv).[6] *See Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296-1297, 13 BLR 2-418, 2-425 (7th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order at 19; Employer's Exhibits 1, 3-5.

After weighing the evidence relevant to Section 718.204(b)(2)(i)-(iv), the administrative law judge rationally found that it failed to affirmatively establish total respiratory disability. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Accordingly, we affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2), a requisite element of entitlement under Part 718, and her determination that claimant is not entitled to

[6] Dr. Verma, claimant's treating physician, noted that he prescribed a breathing machine and certain medications, and reported only that claimant has developed breathing problems in the past few years. Claimant's Exhibit 1. The administrative law judge properly found that Dr. Verma's opinion was insufficient to establish total respiratory disability since Dr. Verma did not opine whether claimant suffered from a totally disabling respiratory impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order at 19; Claimant's Exhibit 1.

benefits.[7] *See* 20 C.F.R. §718.204(b)(2); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[7] Our affirmance of the administrative law judge's determination that claimant failed to established total respiratory disability pursuant to Section 718.204(b) obviates the need to address employer's argument that the administrative law judge erred in finding the existence of pneumoconiosis under Section 718.202(a).