BRB No. 09-0485 BLA

PAUL R. DIALS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/23/2010
	)	
MARTIN COUNTY COAL CORPORATION	)	
	)	
and	)	
	)	
A.T. MASSEY c/o WELLS FARGO	)	
	)	
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 – Denial of Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Subsequent Claim (2008-BLA-5091) of Administrative Law Judge Larry S. Merck, with respect to a subsequent claim[1] filed on December 12, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). After crediting claimant with seventeen years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge concluded that, although claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), he failed to prove that he is totally disabled due to the disease at 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred by considering evidence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4) and by considering the CT scan evidence with regard to the establishment of clinical pneumoconiosis. Claimant concedes that while the administrative law judge's error regarding his pneumoconiosis findings may be harmless, it could have impacted his weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant asserts that the administrative law judge erred in finding that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii), (iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[2]

[1] Claimant filed his initial claim for benefits on April 10, 1991, which was denied by the district director due to abandonment. Director's Exhibit 1. Claimant took no further action until filing the current subsequent claim. Director's Exhibit 2. Pursuant to 20 C.F.R. §725.409(c), "[f]or purposes of [20 C.F.R.]§725.309, a denial by reason of abandonment shall be deemed a finding that claimant has not established any applicable conditions of entitlement." 20 C.F.R. §725.409(c).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding of seventeen years of coal mine employment and his findings that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm, on the same ground, the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) or total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). *Id*.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 filed pursuant to 20 C.F.R. Part 718, 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Upon review of the Decision and Order, the arguments on appeal, and the evidence of record, we affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b), as it is rational and supported by substantial evidence. In making his findings at 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge initially considered the results from claimant's three newly submitted blood gas studies. The blood gas study performed by Dr. Rasmussen on March 12, 2007, produced qualifying results. Director's Exhibit 11. However, the blood gas studies performed by Drs. Dahhan and Jarboe, on June 12, 2007, and September 27, 2007, respectively, were non-qualifying. Director's Exhibit 13; Employer's Exhibit 1. The administrative law judge found, based on the preponderance of non-qualifying results and the two most recent non-qualifying studies, that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 23.

Claimant asserts that the administrative law judge erred in failing to determine that the qualifying blood gas study obtained by Dr. Rasmussen established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). According to claimant, "the question should be what claimant's performance is on his worst pulmonary day," Claimant's Brief at 17. We reject claimant's contention, as he has not identified any case law or statutory language in support of his argument and there is nothing in the regulations indicating that the administrative law judge is required to apply such a principle. *See* 20 C.F.R. §718.204(b)(2)(ii). Rather, the administrative law judge acted within his discretion in determining that the blood gas studies of record did not support a finding of total disability, as the preponderance of the studies of record were non-qualifying. *See*

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Schetroma v. Director, OWCP, 18 BLR 1-17 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see* Director's Exhibits 11, 13; Employer's Exhibit 1. Accordingly, we affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

In considering whether claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accorded Dr. Rasmussen's opinion, that claimant does not have the pulmonary capacity to perform his previous coal mine employment, "less weight" because Dr. Rasmussen relied on an exercise blood gas study that he described as showing a severe impairment in oxygen exchange, when "the two later blood gas studies were non-qualifying and showed minimal impairment." Decision and Order at 24. In contrast, the administrative law judge gave "full probative weight" to the opinion of Dr. Jarboe, that claimant is capable of performing his usual coal mine employment or comparable employment, as it was well-documented and well-reasoned. *Id*. The administrative law judge noted that Dr. Jarboe based his opinion on a review of all of the evidence, and that his opinion was supported by the non-qualifying pulmonary function studies and the more recent non-qualifying blood gas studies. *Id*. The administrative law judge concluded that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. The administrative law judge further determined, based on the preponderance of all of the evidence of record, and the more recent evidence, that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2). *Id*. at 24-25.

Claimant argues that the administrative law judge erred in crediting Dr. Jarboe's opinion, in light of the physician's failure to understand the arterial blood gas study results obtained by Dr. Rasmussen. Further, claimant alleges that Dr. Rasmussen was the only physician to properly relate claimant's pulmonary impairment to his relevant coal mine employment.[4] Claimant's contentions are without merit, as the administrative law judge acted within his discretion as fact-finder in giving "less weight" to Dr. Rasmussen's opinion because it was not well-supported by the objective evidence of record. Decision and Order at 24; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th

[4] Claimant also argues that the administrative law judge's improper finding at 20 C.F.R. §718.202(a)(4), that the CT scan evidence and the opinions of Drs. Jarboe and Rasmussen were insufficient to establish the existence of clinical pneumoconiosis, may have negatively impacted his weighing of the evidence relevant to total disability. We decline to address this contention, as claimant has not identified the errors that the administrative law judge allegedly made under 20 C.F.R. §718.204, in reliance on his findings at 20 C.F.R. §718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Cir. 2002); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc on recon.*).

The administrative law judge also rationally determined that, in contrast, Dr. Jarboe's opinion was entitled to "full probative weight," as it was based upon a review of all of the newly submitted medical evidence and was better supported by the objective evidence of record. Decision and Order at 24; *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). Contrary to claimant's allegations, Dr. Jarboe's testimony revealed that he understood the results of the blood gas study performed by Dr. Rasmussen but still disagreed with his technique and findings.[5] *See* Employer's Exhibit 6 at 25-29. Further, the administrative law judge did not discount Dr. Rasmussen's opinion because Dr. Jarboe questioned the validity of the blood gas study he performed, but rather he determined that Dr. Rasmussen's opinion was not consistent with the subsequent, non-qualifying studies. Decision and Order at 24.

In addition, we reject claimant's assertion that the administrative law judge erred in crediting Dr. Jarboe's opinion, as Dr. Jarboe did not assess claimant's ability to perform his specific coal mine duties. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit held that, if a physician diagnoses a mild respiratory impairment and opines that the miner is able to perform his last coal mine job, the administrative law judge must evaluate whether the physician considered the exertional requirements of the miner's usual coal mine employment. In this case, however, Dr. Jarboe stated that claimant's pulmonary function studies showed "a mild restrictive ventilatory defect" that was "of no clinical significance," based on claimant's normal total lung capacity and normal diffusing capacity. Employer's Exhibit 6 at 19-20. Dr. Jarboe further indicated that the blood gas studies that he obtained, and those performed by Drs. Dahhan and Rasmussen, did not conclusively establish the presence of any impairment in gas exchange on exercise. Employer's Exhibits 1, 6 at 26, 30. Because Dr. Jarboe essentially determined that the

[5] The blood gas study performed by Dr. Rasmussen contained two resting values obtained at different times. *See* Director's Exhibit 11. In his deposition, Dr. Rasmussen explained that the first value was derived from a blood sample taken at rest and the second value was a "baseline" figure derived from a blood sample taken after the claimant stood on a treadmill for three minutes. Employer's Exhibit 4 at 16-17. In Dr. Jarboe's deposition, he discussed the two sets of "resting" values, and the time that each blood sample was drawn, and opined that, based on either resting value, Dr. Rasmussen's data did not show a significant impairment of gas exchange. Employer's Exhibit 6 at 25-27.

objective evidence did not establish that claimant has a clinically significant respiratory or pulmonary impairment, it was not necessary for the administrative law judge to consider whether Dr. Jarboe demonstrated knowledge of the exertional requirements of claimant's usual coal mine work. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124.

The administrative law judge permissibly determined, therefore, that Dr. Jarboe's opinion was better-reasoned and better-documented than Dr. Rasmussen's opinion and rationally found that it outweighed Dr. Rasmussen's opinion on the issue of total disability.[6] *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). We also affirm the administrative law judge's finding that, based on a consideration of all of the evidence of record, claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b).[7]

As claimant did not establish that he has a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits.[8] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Because we have affirmed the denial of benefits, we need not reach claimant's allegations of error regarding the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.204(c). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] Claimant also maintains that the administrative law judge erred in crediting Dr. Dahhan's opinion, that claimant is not totally disabled, at 20 C.F.R. §718.204(b)(2)(iv). In light of our affirmance of the administrative law judge's finding that Dr. Jarboe's well-documented and well-reasoned opinion outweighed Dr. Rasmussen's opinion on the issue of total disability, we decline to address these allegations of error. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] In claimant's initial claim, none of the pulmonary function or blood gas studies were qualifying and none of the physicians opined that claimant had a totally disabling respiratory impairment. *See* Director's Exhibit 1.

[8] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim, as the evidence does not demonstrate the existence of a totally disabling respiratory or pulmonary impairment.

Accordingly, the administrative law judge's Decision and Order – Denial of Subsequent Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge