BRB No. 09-0516 BLA

JESSE J. JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARLAN #4 COAL COMPANY	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	DATE ISSUED: 04/27/2010
	)	
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 Benefits in Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Ralph D. Carter (K & L Gates LLP), Washington, D.C., for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denial of Benefits in Subsequent Claim (05-BLA-5761) of Administrative Law Judge Larry S. Merck rendered on a claim

[1] Claimant, Jesse J. Jones, filed his first application for benefits on January 25, 1993. Director's Exhibit 1. On June 30, 1993, the district director denied this claim, and

filed 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*)), as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge credited the parties' stipulation that claimant worked in qualifying coal mine employment for sixteen years. Adjudicating the claim pursuant to 20 C.F.R. Parts 718 and 725, the administrative law judge found that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), thereby establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found the weight of the evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the blood gas study evidence insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(ii), and in failing to find total disability established pursuant to Section 718.204(b)(2)(iv) based on the opinion of Dr. Pederson, claimant's treating physician. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[3]

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

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on August 20, 1993, claimant requested a formal hearing. Director's Exhibit 1. Claimant subsequently withdrew his request for a formal hearing, and indicated that he no longer wished to pursue his claim. The claim was deemed abandoned after claimant failed to respond to the district director's Order to Show Cause - Abandonment of Claim dated October 7, 1993. Director's Exhibit 1. Claimant filed the current subsequent claim for benefits on January 23, 2001. Director's Exhibit 3.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the pending claim was filed prior to January 1, 2005.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7, 29-30.

rational, and are consistent with the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).[4]

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. *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*).

Claimant initially contends that the administrative law judge erred in finding that total respiratory disability was not established by the blood gas study evidence of record at Section 718.204(b)(2)(ii). Specifically, claimant asserts that the three most recent blood gas studies, obtained on February 23, 2001, January 28, 2002, and February 24, 2003, are essentially contemporaneous; that a numerical preponderance of these studies produced qualifying results;[5] that the qualifying 2001 study was validated by Dr. Michos, a Board-certified pulmonologist, Director's Exhibit 12; and that the administrative law judge's reliance on the non-qualifying 2003 study, on the ground that it was the most recent, was "an abdication of rational decisionmaking" that may have tainted his overall weighing of the evidence.[6] Claimant's Brief at 6. Claimant's arguments are without

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

[5] A "qualifying" 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, Appendix C. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(ii).

[6] Claimant additionally asserts that the administrative law judge should have found that the three most recent blood gas studies were sufficient to establish total disability at Section 718.204(b)(2)(ii), particularly since the values obtained on the most recent February 24, 2003 blood gas study were "barely non-qualifying." Claimant's Brief at 5; Director's Exhibit 38. Contrary to claimant's argument, however, the most recent study, with a PCO_2 of 35.0 and a PO_2 of 65.6, had to reflect a PO_2 value of 65.0 or lower in order to qualify, and the administering physician, Dr. Dahhan, opined that claimant did not have a totally disabling respiratory impairment. Director's Exhibit 38. Moreover, in reviewing the medical opinions of record, the administrative law judge determined that Dr. Baker, who obtained the qualifying 2001 study, characterized claimant's pulmonary impairment as "mild," and opined that claimant retained the respiratory capacity to

merit. The administrative law judge accurately reviewed the four blood gas studies of record, noting that the most recent 2003 study and the earliest study, dated March 23, 1993, produced non-qualifying results, while the validated 2001 study and the 2002 study yielded qualifying results. Finding that the most recent study was obtained more than one year after the earlier studies, the administrative law judge acted within his discretion in concluding that the 2003 study was entitled to greater probative weight. Decision and Order at 32-33; *see Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

It is well established that an administrative law judge is granted broad discretion with respect to his consideration of the medical evidence, *see Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 303, 9 BLR 2-221, 2-223 (6th Cir. 1987) (the Board may not set aside an inference merely because it finds the opposite one to be more reasonable); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985), and may properly conclude that the most recent evidence is more reliable than the earlier evidence, *see Schetroma*, 18 BLR at 1-22. As substantial evidence supports the administrative law judge's findings, we affirm his 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 32-33.

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence of record was insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). Claimant asserts that the administrative law judge improperly discredited the opinion of Dr. Pederson, claimant's treating physician, on the ground that Dr. Pederson's assessment of total disability was insufficiently reasoned and documented. Claimant avers that Dr. Pederson referenced a "pulmonological assessment with diagnosis of probable pneumoconiosis," Claimant's Exhibit 4 at 1, as the basis for his diagnosis of pneumoconiosis, thereby incorporating into his report the diagnostic tests conducted by another physician, Dr. Morton, consisting of CT scans, biopsies, chest x-rays, and a bronchoscopy, *see* Claimant's Exhibit 5 at 9. Thus, claimant maintains that Dr. Pederson's conclusions were, in fact, based on objective medical evidence. Claimant's Brief at 6-7. Claimant's arguments lack merit.

In evaluating the medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge accurately reviewed the underlying bases for the physicians' conclusions, and determined that Dr. Pederson premised his opinion, that claimant was totally disabled, on "patient history of shortness of breath/cough." Claimant's Exhibit 4

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perform his usual coal mine employment. Director's Exhibit 12; Decision and Order at 20-21. Similarly, Dr. Broudy, who obtained the qualifying 2002 study, recommended a repeat study, and opined that claimant was not disabled from his mild respiratory impairment. Director's Exhibit 37; Decision and Order at 24.

at 1; Decision and Order at 28, 33. The administrative law judge properly acknowledged Dr. Pederson's status as claimant's treating physician, but permissibly accorded his opinion little weight because the physician failed to either specify any objective evidence upon which his assessment of total disability was based, or indicate an awareness of 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); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 33; Claimant's Exhibit 4. Hence, the administrative law judge determined that the probative value of Dr. Pederson's opinion was undermined because it was inadequately reasoned and documented. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Trumbo*, 17 BLR at 1-88; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 33. By contrast, the administrative law judge determined that Drs. Baker, Broudy and Dahhan were all Board-certified internists and pulmonologists who based their opinion, that claimant retains the respiratory capacity to perform his usual coal mine employment, on "physical examination, history, and objective medical evidence, including the arterial blood gas studies and pulmonary function tests." Decision and Order at 33; Director's Exhibits 12, 37, 38, 56. Finding that the opinions of Drs. Baker, Broudy and Dahhan were well-reasoned and well-documented, the administrative law judge acted within his discretion in according them full probative weight. Decision and Order at 33; *see Fields*, 10 BLR at 1-22. As substantial evidence supports the administrative law judge's findings, we affirm his determination that the medical opinion evidence of record was insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv).[7]

[7] We reject claimant's additional contention that the administrative law judge erroneously substituted his own opinion for that of a physician by determining that claimant's "physical presentation" supported a finding that claimant was not totally disabled. Claimant maintains that the administrative law judge's reliance on claimant's "physical presentation" tainted his weighing of the evidence, justifying a remand for proper consideration of only medical evidence on the issue of total disability. Claimant's argument lacks merit. In his review of the medical opinions of record, the administrative law judge summarized the physical examination findings of the physicians and the underlying documentation for their conclusions. Decision and Order at 20-28. On the issue of total disability, after determining whether the individual medical opinions were sufficiently reasoned and documented, the administrative law judge stated:

> The shared opinion among Drs. Broudy, Baker, and Dahhan is supported by the pulmonary function studies, as well as claimant's physical presentation. Based on the uniformity of opinion and the credentials of the physicians, I find that Claimant has failed to establish total disability by a preponderance of the medical opinion evidence, pursuant to §718.204(b)(2)(iv).

Weighing all relevant evidence together, like and unlike, the administrative law judge acted within his discretion in according greatest weight to the well-reasoned and well-documented medical reports of record. Decision and Order at 34; *see Fields*, 10 BLR at 1-22. Consequently, the administrative law judge found that the weight of the evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2), and we affirm his findings thereunder, as supported by substantial evidence. Because claimant has failed to establish total disability, a requisite element of entitlement under Part 718, we affirm the administrative law judge's determination that entitlement to benefits is precluded in this subsequent claim. *See* 20 C.F.R. §718.204(b)(2); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Decision and Order at 34. We conclude that the administrative law judge did not make an independent assessment regarding claimant's "physical presentation," but instead, relied on the medical assessments of the physicians.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge