BRB No. 97-1124 BLA

DOMINIC MARTINO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Dominic Martino, Wellsburg, West Virginia, *pro se*.

Cathryn Celeste Helm (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order - Denying Benefits (95-BLA-1790) of Administrative Law Judge Thomas M. Burke with respect to 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).[1] The administrative law judge credited claimant with seven and one-half years of coal mine employment, rather than the ten and three-quarter years alleged by claimant, and considered the claim under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The

[1]Claimant initially filed an application for benefits on February 26, 1986, which was withdrawn at claimant's request on June 18, 1986. Director's Exhibit 26. Claimant's second application for benefits, filed on July 23, 1994, does not, therefore, constitute a duplicate claim under 20 C.F.R. §725.309. *See* 20 C.F.R.§§725.306(b), 725.309(d).

administrative law judge further determined, however, that the evidence of record is insufficient to support a finding of total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied and claimant's appeal followed. The Director, Office of Workers' Compensation Programs (the Director), has responded and contends that although the administrative law judge acted properly in crediting claimant with seven and one-half years of coal mine employment, remand of the present case is required, inasmuch as the administrative law judge did not adequately consider the evidence relevant to Section 718.204(c)(4).

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 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*).

With respect to the issue of the length of claimant's coal mine employment, claimant alleged that he worked as a miner for ten and three-quarter years between 1940 and 1952. Director's Exhibits 2, 26. Upon review of the evidence of record and the administrative law judge's determination, we affirm the administrative law judge's finding that claimant worked for less than ten years as a coal miner, inasmuch as the administrative law judge used a reasonable method of calculation in determining the length of claimant's coal mine employment, described his findings in detail, and considered all of the relevant evidence. Decision and Order - Denying Benefits at 6-7; *see Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*); *Vickery v. Director, OWCP*, 8 BLR 1-480 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985). The administrative law judge rationally determined that the two quarters that claimant worked for James P. Mull and Cove Hill Coal Company, delivering coal to brick manufacturers, did not constitute coal mine employment on the ground that transporting processed coal to ultimate consumers does not qualify as coal mine employment covered by the Act. Decision and Order - Denying Benefits at 6-7; Director's Exhibit 4; *see Foster v. Director, OWCP*, 8 BLR 1-188 (1985); *see also Stroh v. Director, OWCP*, 810 F. 2d 61, 9 BLR 2-212 (3d Cir. 1987).[2] The administrative law judge also acted within his

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant testified that with respect to his last coal mine job as a truck driver

discretion in declining to credit claimant's alleged part-time employment with Martino and Lombardi Coal Company, as claimant's testimony regarding this employment was vague and, in contrast to his testimony regarding full-time employment with this company during summer vacations from school, was uncorroborated. Decision and Order - Denying Benefits at 7; Hearing Transcript at 54-55; *see generally Henderson v. Director, OWCP,* 7 BLR 1-866 (1985).

Regarding the remainder of the administrative law judge's findings concerning the length of claimant's coal mine employment, the administrative law judge rationally relied upon claimant's Social Security Administration records and the co-worker affidavits submitted by claimant to credit him for his full-time employment with Martino and Lombardi Coal Company and Penowa Coal Company. Decision and Order - Denying Benefits at 7; *see Dawson*, *supra*; *Henderson*, *supra*. Although the administrative law judge erroneously omitted one-quarter of employment when he stated that claimant's work for these employers totaled seven and one-half years, remand for reconsideration of this issue is not required, as an additional quarter of coal mine employment would not make available to claimant any presumption regarding the source of the pneumoconiosis established under Section 718.202(a)(1). Decision and Order - Denying Benefits at 4; *see* Director's Exhibit 4; 20 C.F.R. §718.203(b); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Turning to the issue of total disability, we affirm the administrative law judge's finding that claimant did not prove that he is suffering from a totally disabling respiratory or pulmonary impairment under 718.204(c)(1)-(4), as the administrative law judge's conclusions are supported by substantial evidence and contain no reversible error. With respect to Section 718.204(c)(1), the administrative law judge properly determined that of the four pulmonary function studies of record, the single qualifying study, obtained by Dr. Sanchez on April 17, 1996, was insufficient to establish total disability.[3] The administrative law judge acted rationally in discrediting this study based upon Dr. Sanchez's description of claimant's effort as poor. Decision and Order - Denying Benefits at 8; Claimant's Exhibit 6; *see Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). Substantial evidence also supports the administrative law judge's finding that the blood gas studies of record are insufficient to establish total disability under Section 718.204(c)(2), inasmuch as three of the four studies of record are nonqualifying. Director's Exhibit 13; Claimant's Exhibit 6. With respect to Section 718.204(c)(3), the administrative law judge properly found that claimant could not establish

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for Penowa Coal Company, the main truck depot was located in Pennsylvania and the tipples to which he hauled coal were primarily in Pennsylvania. Hearing Transcript at 34-35, 62-53; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables in Appendices B and C to 20 C.F.R. Part 718. A nonqualifying study exceeds those values.

total disability under this subsection on the ground that the record contains no evidence suggesting that claimant has cor pulmonale with right sided congestive heart failure. Decision and Order - Denying Benefits at 9.

Under Section 718.204(c)(4), the administrative law judge determined that the reports of Drs. Hedges, Sanchez, and Cipoletti do not contain a conclusion regarding the presence of a totally disabling respiratory or pulmonary impairment. Decision and Order - Denying Benefits at 9-11; Director's Exhibit 26; Claimant's Exhibits 5, 6. The administrative law judge further found that Dr. Spagnolo concluded that claimant is not suffering from a totally disabling breathing impairment. Decision and Order - Denying Benefits at 11; Director's Exhibit 28. Finally, the administrative law judge determined that Dr. Reddy's finding of a thirty-percent pulmonary impairment and a mild degree of airflow obstruction do not support a finding of total disability when compared to the exertional requirements of claimant's usual coal mine work as a truck driver. Decision and Order - Denying Benefits at 11; Director's Exhibit 12. The administrative law judge concluded, therefore, that claimant failed to establish total disability under Section 718.204(c)(4).

The administrative law judge's finding regarding the medical opinion of Dr. Cipoletti is affirmed, as the administrative law judge determined correctly that Dr. Cipoletti did not offer an opinion as to whether claimant is suffering from a totally disabling respiratory or pulmonary impairment. Claimant's Exhibit 5; *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). The administrative law judge also acted within his discretion in finding that Dr. Hedges's characterization of claimant's obstructive disease as mild and Dr. Reddy's description of claimant's airflow obstruction as mild do not support a finding of total disability. Director's Exhibits 12, 26; *see King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985). The administrative law judge also determined correctly that Dr. Spagnolo's opinion does not establish total disability, as the doctor stated that claimant does not have a disabling breathing impairment. Director's Exhibit 28; *see Budash*, *supra*.

With respect to the administrative law judge's consideration of Dr. Sanchez's opinion, the Director maintains that the administrative law judge erred in neglecting to compare Dr. Sanchez's diagnosis of mild-to-moderate obstructive airway disease to the exertional requirements of claimant's last coal mine job. The Director acknowledges that Dr. Sanchez did not indicate that claimant is suffering from a mild-to-moderate impairment, but contends that such a finding is implicit in Dr. Sanchez's reliance upon pulmonary function study results which the doctor interpreted as showing a reduction in claimant's respiratory capacity. Director's Motion to Remand at 10, n.6; Claimant's Exhibit 6. We reject the Director's contention. In his medical report, Dr. Sanchez did not quantify the level of impairment stemming from the mild-to-moderate obstructive disease revealed on claimant's pulmonary function studies nor did he set forth his assessment of claimant's physical limitations. Claimant's Exhibit 6. The administrative law judge did not, therefore, abuse his discretion in treating Dr. Sanchez's diagnosis of mild-to-moderate obstructive airway *disease* as a medical opinion which does not term claimant totally disabled or otherwise address the severity of

claimant's impairment in such a way as to permit the administrative law judge to infer that claimant is totally disabled. *See Budash*, *supra*; *Gee*, *supra*. Thus, we affirm the administrative law judge's finding that claimant did not establish total disability under Section 718.204(c)(4).

Inasmuch as we have affirmed the administrative law judge's determination that the evidence of record is insufficient to support a finding of total disability pursuant to Section 718.204(c)(1)-(4), an essential element of entitlement, we must also affirm the denial of benefits.[4] *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

[4]We decline to address the administrative law judge's finding under 20 C.F.R. §718.202(a)(1) and the absence of a finding under 20 C.F.R. §718.203(c). In light of our affirmance of the administrative law judge's determination that claimant did not establish that he is totally disabled under 20 C.F.R. §718.204(c)(1)-(4), any errors therein are harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge