BRB No. 05-0171 BLA

EMORY A. WADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GARDEN CREEK POCAHONTAS COMPANY	)	
	)	
	)	DATE ISSUED: 08/23/2005
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 Second Remand Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Ashley M. Harman and William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand Denying Benefits (99-BLA-0205) of Administrative Law Judge Daniel F. Sutton rendered 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 claim, which is currently being considered pursuant to claimant's request to modify the denial of benefits pursuant to 20 C.F.R. §725.310 (2000), is before the Board for the third time. In its most recent decision, upon review of claimant's appeal, the Board affirmed the administrative law judge's finding that claimant did not establish invocation of the irrebuttable presumption

of totally disabling pneumoconiosis at 20 C.F.R. §718.304, implementing 30 U.S.C. §921(c)(3). *Wade v. Garden Creek Pocahontas Co.*, BRB No. 02-0819 BLA (Sep. 9, 2003)(unpub.). However, the Board remanded this case for the administrative law judge to determine whether the evidence established the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and, if reached, whether the total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[1] *Wade*, slip op. at 5.

On remand, the administrative law judge found that the medical evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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[1] The Board also instructed the administrative law judge to weigh together the positive x-ray evidence with all the other relevant evidence to determine whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a), under *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge did not reach this issue on remand because he found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment.

[2] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Forehand, Castle, Michos, Dahhan, Spagnolo, Jarboe, and Morgan in light of the physicians' respective qualifications. Decision and Order on Remand at 5-10; Director's Exhibits 133, 145, 147; Claimant's Exhibit 32; Employer's Exhibit 2, 4-5, 8-11. Dr. Forehand opined that claimant is totally disabled by a respiratory impairment, whereas Drs. Castle, Michos, Dahhan, Spagnolo, Jarboe, and Morgan concluded that he is not disabled by a respiratory or pulmonary impairment, but rather, suffers from a total cardiac disability. The administrative law judge indicated that he was "not persuaded that [Dr. Forehand's] reasoning adequately supports his conclusions," and he gave "greater weight to the reasoned opinion from Dr. Castle, which is supported by five other physicians, that [claimant's] disability is cardiac in nature, not respiratory." Decision and Order at 10. The administrative law judge therefore found that the medical opinion evidence, when considered along with all the contrary probative evidence, did not meet claimant's burden of proving the existence of a total respiratory disability by a preponderance of the evidence. Decision and Order at 10.

Claimant contends that the administrative law judge failed to weigh together all of the relevant evidence regarding the presence of a total respiratory disability. This contention lacks merit. The administrative law judge recognized that he had to "'weigh all of the relevant probative evidence together, both like and unlike,'" and he did so. Decision and Order at 9, quoting *Shedlock v Bethlehem Mines Corp*., 9 BLR 1-195, 1-198 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). The administrative law judge found that claimant's pulmonary function studies were non-qualifying,[3] but that his qualifying blood gas study results, if viewed in isolation, tended to establish a totally disabling respiratory impairment. However, the administrative law judge also recognized that the physicians of record disagreed as to the significance of claimant's blood gas study results.

As summarized by the administrative law judge, Dr. Forehand viewed claimant's blood gas studies reflecting hypoxemia as evidence of a disabling lung impairment, while Drs. Castle, Michos, Dahhan, Spagnolo, Jarboe, and Morgan viewed those test results as a manifestation of cardiac disease, not a respiratory or pulmonary impairment. The administrative law judge was within his discretion to find the opinion of Dr. Castle, as supported by those of the other five physicians, to be better reasoned and more persuasive than Dr. Forehand's opinion, and substantial evidence supports his finding. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir.

[3] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Because the administrative law judge found that claimant did not establish the presence of a total respiratory disability only after a "weighing of all relevant evidence," Decision and Order at 10, we reject claimant's allegation that the administrative law judge failed to weigh together the contrary and probative evidence. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Shedlock*, 9 BLR at 1-198.

Additionally, claimant argues that his "treating physicians should be given probative weight." Claimant's Brief at 8. Contrary to claimant's contention, the administrative law judge was not required to give greater weight to treating physicians' opinions.[4] *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-88, 22 BLR 2-564, 2-571 (4th Cir. 2002). Throughout the remainder of claimant's brief, he asserts his entitlement to benefits, alleges various flaws in the medical opinions credited by the administrative law judge, and argues that the evidence was not weighed in light of his coal mine dust exposure. Claimant's remaining arguments amount to a request to reweigh the evidence, which the Board cannot do. *Anderson*, 12 BLR at 1-113. We therefore affirm the administrative law judge's finding that the medical opinion evidence, viewed in context of the record, did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) is therefore affirmed.

Because claimant has failed to establish total respiratory disability, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27.

[4] Claimant does not reference a specific treating physician's opinion; apparently he refers to the physicians who have treated him for coronary artery disease and a myocardial infarction. Director's Exhibits 126, 127 (hospitalization and treatment notes). The administrative law judge considered these records. Decision and Order at 9 n.4.

Accordingly, the administrative law judge's Decision and Order on Second Remand Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge