

BRB No. 07-0955 BLA

J.S.)
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 Claimant-Petitioner)
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 v.)
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 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 08/28/2008
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Request for Modification but Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

J.S., Childs, Pennsylvania, *pro se*.

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Claimant's Request for Modification But Denying Benefits (2006-BLA-5400) of Administrative Law Judge Janice K. Bullard (the administrative law judge) 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). The administrative law judge credited claimant with eleven and one-quarter years of qualifying coal mine employment, and found that new evidence submitted in support of modification, considered in conjunction with the earlier evidence, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and thus established a change in conditions pursuant to 20 C.F.R. §725.310. However, the administrative law judge found that the

evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 with law.¹ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe 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, a 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. While the administrative law judge properly found that the newly submitted evidence was sufficient to establish both the existence of legal pneumoconiosis at Section 718.202(a)(4) and a change in conditions at Section 725.310, she permissibly concluded that the evidence of record was insufficient to establish total respiratory disability at Section 718.204(b)(2)(i)-(iv). In so finding, the administrative law judge determined that none of the pulmonary function tests of record produced qualifying results, and thus, claimant could not establish total disability at Section 718.204(b)(2)(i).² Decision and Order at 13-14; Director's Exhibit

¹ The law of the United States Court of Appeals for the Third Circuit is applicable, because the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3-4.

² A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.202(b)(i), (ii).

29; Claimant's Exhibit 2. Similarly, the administrative law judge determined that the qualifying blood gas study conducted by Dr. Salko on October 19, 2006, and the non-qualifying blood gas study conducted by Dr. Levinson on December 20, 2006, were contemporaneous and in equipoise, and thus claimant failed to meet his burden of establishing total disability at Section 718.204(b)(2)(ii) by a preponderance of the evidence. Decision and Order at 14; Director's Exhibit 30; Claimant's Exhibit 2; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Because the record contained no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant failed to establish total respiratory disability at Section 718.204(b)(2)(iii). Decision and Order at 14.

In assessing the conflicting medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge accurately summarized Dr. Salko's reports³ and acknowledged his status as claimant's treating physician, but declined to accord his opinion determinative weight pursuant to 20 C.F.R. §718.104(d)(5). The administrative law judge determined that Dr. Salko based his diagnosis of restrictive and obstructive lung disease upon the October 19, 2006 pulmonary function study results, which demonstrated a mild degree of pulmonary abnormality but exceeded the regulatory criteria's disability standards by a "comfortable margin." Decision and Order at 15; Claimant's Exhibits 1, 2. Because Dr. Salko did not explain how these results supported his assessment of disability, the administrative law judge found that it was not possible to determine whether Dr. Salko's underlying documentation adequately supported his opinion. *Id.*; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Furthermore, although Dr. Salko reported that the October 19, 2006 blood gas study results were "indicative" of claimant's primary lung disease, the administrative law judge noted that Dr. Salko did not explain how the qualifying values from this single test were more indicative of claimant's pulmonary condition than the other non-qualifying objective tests of record. Decision and Order at 16; *Clark*, 12 BLR at 1-155. As Dr.

³ The administrative law judge summarized the reports as follows: In an August 22, 2005 report, Dr. Salko noted a significant decline in claimant's condition, citing symptoms of shortness of breath, coughing and weakness which he related directly to claimant's "Black Lung Claim." Director's Exhibit 19. A supplemental report dated November 1, 2005 asserted that claimant's respiratory condition caused an increase in fluid retention that led to incipient congestive heart failure. Pulmonary function test results indicated "some degree" of restrictive and obstructive lung disease, while blood gas study results indicated primary lung disease, and Dr. Salko concluded that claimant was totally disabled due to pneumoconiosis arising out of coal mine employment. Claimant's Exhibit 1. Finally, in a second supplemental report dated February 8, 2007, Dr. Salko discussed Dr. Levinson's opinion and reiterated his own opinion that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 2.

Salko also failed to discuss the effects of claimant's multiple non-respiratory conditions, as documented in the treatment notes, upon claimant's ability to perform his usual coal mine employment, the administrative law judge acted within her discretion in finding that Dr. Salko's diagnosis of a totally disabling respiratory impairment was insufficiently explained, and thus unreasoned.⁴ Decision and Order at 15; *see Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995). Conversely, the administrative law judge permissibly credited Dr. Levinson's opinion, that claimant is not significantly impaired from a pulmonary standpoint, on the ground that it was better supported by the objective medical evidence. Decision and Order at 16; Director's Exhibit 28; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

The administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iv) are supported by substantial evidence and thus are affirmed. Further, since the administrative law judge found that the medical evidence was insufficient to establish total disability, lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because claimant has failed to establish total respiratory disability, a requisite element of entitlement, we affirm the administrative law judge's denial of benefits.

⁴ Dr. Salko's treatment notes reflected claimant's treatment for numerous conditions, including congestive heart failure, mental loss and the residual effects of a cerebrovascular accident that rendered claimant bound to a wheelchair. Director's Exhibits 11, 12.

Accordingly, the administrative law judge's Decision and Order Granting Claimant's Request for Modification But Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge