BRB No. 08-0317 BLA

G.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PONTIKI COAL CORPORATION	)	
	)	
and	)	
	)	
MAYCO, INCORPORATED	)	DATE ISSUED: 12/02/2008
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner, & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

Employer appeals the Decision and Order – Award of Benefits (07-BLA-5066) of Administrative Law Judge Larry S. Merck on a subsequent claim[1] filed pursuant to the

[1] Claimant filed his first application for benefits on May 10, 1999, which was denied by the district director on August 26, 1999, based on claimant's failure to establish any element of entitlement. Director's Exhibit 1. Claimant's second application, filed on October 13, 2005, is pending herein on appeal. Director's Exhibit 3.

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 adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718, and credited claimant with twenty-four years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Next, the administrative law judge found that the evidence of record, in its entirety, was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's determination that the evidence of record is sufficient to demonstrate total respiratory disability under Section 718.204(b). In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office Workers' Compensation Programs, is not participating 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).

[2] We affirm the administrative law judge's determinations that claimant established: twenty-four years of coal mine employment; a change in an applicable condition of entitlement since the prior denial pursuant to 20 C.F.R. §725.309 and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) on the merits, as these determinations are unchallenged on appeal. *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 4, 7-20, 25, 28-30.

We also affirm the administrative law judge's finding that the evidence establishes that claimant's total disability is due to pneumoconiosis (disability causation) at 20 C.F.R. §718.204(c). Although employer asserts generally that substantial evidence does not support disability causation, it fails to assert with sufficient specificity any errors made by the administrative law judge in his consideration of the evidence at Section 718.204(c). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). The administrative law judge's finding that disability causation was established is, therefore, affirmed.

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.[3] *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*).

On appeal, employer contends that the administrative law judge erred in finding total respiratory disability established at Section 718.204(b). Specifically, employer contends that the administrative law judge erred in crediting Dr. Mettu's validation of a qualifying pulmonary function study[4] as it was substantially undermined by the report of Dr. Broudy, who found that claimant did not have a totally disabling respiratory impairment, and the other pulmonary function studies.

Considering the qualifying and non-qualifying pulmonary function studies, the blood gas studies, which were non-qualifying, and the medical opinion evidence together, the administrative law judge concluded that the opinions of Drs. Baker and Hussain, along with the qualifying pulmonary function studies, established total respiratory disability at Section 718.204(b)(2). In so finding, the administrative law judge noted that the pulmonary function study evidence consisted of a December 14, 2005 non-qualifying study, a February 16, 2006 qualifying study, an August 17, 2006 non-qualifying study, and an October 24, 2006 qualifying pulmonary function study.

In weighing the pulmonary function studies, the administrative law judge accorded the greatest weight to the most recent study of October 24, 2006, because it was most indicative of claimant's current pulmonary condition.[5] Further, the administrative law judge noted that the non-qualifying studies resulted in values close to qualifying values. Turning to the medical opinion evidence, the administrative law judge credited the

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

[4] A "qualifying" pulmonary function study or 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, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The two non-qualifying blood gas studies were conducted on December 12, 2005 and August 17, 2006. Director's Exhibit 13; Claimant's Exhibit 1.

opinions of Drs. Baker and Hussain, who opined that claimant had a total respiratory disability, because they were based on objective medical testing, clinical observations, and claimant's history.[6] The administrative law judge accorded less weight to Dr. Broudy's February 6, 2006 consultative opinion,[7] that claimant did not have a totally disabling respiratory impairment, because Dr. Broudy relied on the fact that claimant's pulmonary function study was non-qualifying and failed to consider all of the evidence considered by Dr. Hussain. The administrative law judge further noted that a more recent pulmonary function study, which was administered by Dr. Hussain and validated by Dr. Mettu, was qualifying, thereby contradicting Dr. Broudy's opinion that claimant did not have a totally disabling respiratory impairment.[8]

Contrary to employer's assertion, the administrative law judge properly found that the preponderance of the evidence demonstrated total respiratory disability at Section 718.204(b)(2). Specifically, the administrative law judge reasonably found the most recent pulmonary function study of October 24, 2006, which was qualifying, was more indicative than earlier studies of claimant's current pulmonary condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *accord Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233 (table), 20 BLR 2-67 (4th Cir. 1996) (claimant's entitlement to benefits is measured by his physical condition at the time of the hearing); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984). Further, contrary to employer's contention, the evidence supportive of total respiratory disability, *i.e.*, the most recent pulmonary function study and the medical opinions of Drs. Baker and Hussain, was not undermined by the remaining pulmonary function studies. Of the four pulmonary function studies of record, the administrative law judge found that at least two, including the most recent study, were qualifying and the administrative law judge found that the opinions of Drs. Baker and Hussain were better reasoned and documented than the February 6, 2006 opinion of Dr. Broudy. *See* 20 C.F.R. §718.204(b)(2)(i), (iv); *Clark v. Karst-Robbins*

[6] Dr. Baker examined claimant on October 24, 2006 and Dr. Hussain examined claimant on December 14, 2005. Director's Exhibit 13; Claimant's Exhibit 1.

[7] The administrative law judge noted that Dr. Broudy's medical report dated August 16, 2006 and Dr. Caffrey's medical report dated August 16, 2006 did not address total respiratory disability. Claimant's Exhibit 1; Employer's Exhibit 14.

[8] The administrative law judge noted that Dr. Broudy stated, in his February 6, 2006 report, that his opinion that claimant did not have a totally disabling respiratory impairment was based on the fact that the December 14, 2005 pulmonary function study conducted by Dr. Hussain was non-qualifying.

Coal Co., 12 BLR 1-149, 1-155 (1989)(*en banc*). Consequently, the administrative law judge properly found, after weighing all the relevant evidence, that a preponderance of the evidence established total respiratory disability at Section 718.204(b)(2). *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 28. Because employer has not otherwise challenged the administrative law judge's finding of total respiratory disability at Section 718.204(b), that finding is affirmed.

Accordingly, the Decision and Order – Award of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge