BRB No. 09-0256 BLA

JAMES F. GRAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POE COAL COMPANY	)	
	)	
and	)	
	)	
UNITED STATES FIDELITY & GUARANTY	)	DATE ISSUED: 12/23/2009
	)	
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 Upon Remand Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

James F. Gray, Berry, Alabama, *pro se*.

Kathy R. Davis (Carr Allison), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Upon Remand Denying Benefits (2006-BLA-05642) of Administrative Law Judge Robert D. Kaplan rendered on a request for modification of the denial of 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 case is before the Board for the third time and involves a lengthy procedural history that is detailed in the Board's prior decision. *J.G.* [*Gray*] *v. Poe Coal Co.*, BRB No. 07-0702 BLA, slip op. at 3-4 (May 29, 2008) (unpub.). In considering claimant's prior appeal, the Board held that the administrative law judge should have treated claimant's third and fourth claims, filed May 24, 2004 and November 4, 2004 respectively, as requests for modification.[1] *Id.* Therefore, the Board vacated the denial of benefits and remanded the case to the administrative law judge with instructions to address all relevant evidence of record.

On remand, the administrative law judge considered the evidence submitted subsequent to the denial of claimant's initial claim on June 15, 1983. The administrative law judge found that the existence of clinical pneumoconiosis was established pursuant to Section 718.202(a)(1), but further determined that the medical opinion evidence did not support a finding of pneumoconiosis at Section 718.202(a)(4). The administrative law judge then weighed all of the newly submitted evidence together and found that it was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Based upon this determination, the administrative law judge found that claimant could not establish that he had pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(b). The administrative law judge also found that the newly submitted evidence was insufficient to establish total disability and total disability due to pneumoconiosis under Section 718.204(b)(2), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, submitted a letter stating that he will not file a substantive response unless specifically requested to do so by the Board.

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.[2] 33 U.S.C. §921(b)(3), as

[1] The amendments to the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, became effective on January 19, 2001. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant was employed in the coal mine industry in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 5, 6.

incorporated into the Act 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 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; *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*).

Upon consideration of the administrative law judge's findings under Section 718.204(b)(2) in the adjudication of this claim, we affirm his determination that the evidence of record is insufficient to establish that claimant is suffering from a totally disabling respiratory or pulmonary impairment.[3] Pursuant to Section 718,204(b)(2)(i), the administrative law judge rationally found that the qualifying pulmonary function test performed on November 1, 1999, was outweighed by the nonqualifying studies performed on August 31, 1995 and February 28, 2005.[4] *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); Decision and Order on Remand at 8, 11; Director's Exhibits 1, 9. The administrative law judge also correctly found that the blood gas studies performed on March 15, 1983, August 31, 1995 and February 28, 2005 were non-qualifying pursuant to Section 718.204(b)(2)(ii), and that there was no evidence of cor pulmonale with right-sided congestive heart failure to support a finding of total disability pursuant to Section 718.204(b)(2)(iii). Decision and Order on Remand at 8, 12; 2007 Decision and Order at 10; Director's Exhibits 1, 9.

[3] Considering the administrative law judge's 2007 Decision and Order and his Decision and Order on Remand together, the administrative law judge addressed all of the medical evidence of record, with the exception of Veterans Administration (VA) records dating from 1982. In light of the administrative law judge's permissible determination that the evidence dating from the 1983 claim is entitled to very little weight due to its age, the omission of an explicit weighing of the VA records does not constitute error requiring remand. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order on Remand at 6; 2007 Decision and Order at 7-8; Director's Exhibit 1.

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

With respect to the medical opinion evidence relevant to Section 718.204(b)(iv), the administrative law judge rationally determined that Dr. Shah did not diagnose a totally disabling impairment and Dr. Hasson "was of the opinion that claimant was not totally disabled." Decision and Order on Remand at 12; 2007 Decision and Order at 10 n.4; *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986) (*en banc*); Director's Exhibit 1. Similarly, the administrative law judge acted within his discretion as fact-finder in finding that Dr. Strickland's opinion, that claimant had a "severe airflow obstruction," was insufficient to establish total disability, as Dr. Strickland based his conclusion upon the 1999 pulmonary function study that was outweighed by the nonqualifying studies of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; Decision and Order on Remand at 12; Director's Exhibit 1. The administrative law judge also rationally found that Dr. Hawkins's opinion, that claimant's mild respiratory impairment rendered him unable to perform his last coal mine job because he should avoid exposure to dust, chemicals and fumes, does not constitute an opinion that claimant is totally disabled under the Act. *See Zimmerman v. Director, OWCP*, 871, F.2d. 564. 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *White v. New White Coal Co.*, 3 BLR 1-1 (2004); Decision and Order on Remand at 12; Director's Exhibit 9. Moreover, the administrative law judge acted within his discretion as fact-finder in determining that, even if Dr. Hawkins indicated that claimant's mild respiratory impairment was totally disabling, his opinion would be entitled to no weight, as he did not explain his conclusion in light of claimant's normal physical examination and non-qualifying pulmonary function and blood gas tests. *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 12; Director's Exhibit 9.

In light of the administrative law judge's findings under Section 718.204(b)(2)(i)-(iv), he rationally concluded that the evidence of record, as a whole, was insufficient to establish total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order on Remand at 13; 2007 Decision and Order at 11. The administrative law judge's finding that total disability was not established at Section 718.204(b) is, therefore, affirmed. Based upon our affirmance of the administrative law judge's determination that claimant did not establish total disability, an essential element of entitlement, we must also affirm the denial of benefits.[5] *See Trent*, 11 BLR at 1-27.

[5] Because we have affirmed the denial of benefits on the ground that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we need not address the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge