BRB No. 10-0267 BLA

WADE BAILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOUR A COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 12/08/2010
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Wade Bailey, Arjay, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2005-BLA-05962) of Administrative Law Judge Kenneth A. Krantz denying benefits on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] After crediting claimant with fifteen years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). However, the administrative law judge also found that the evidence was insufficient to establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

Employer responds to this appeal, urging affirmance of the administrative law judge's denial of benefits. Employer, however, also maintains that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.202(a)(4), 725.309. The Director, Office of Workers' Compensation Programs, has not filed a response to claimant's appeal.

[1] Claimant filed an initial claim for benefits on February 1, 1993, which was denied by the district director on July 13, 1993, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the present subsequent claim on April 14, 2004. Director's Exhibit 3.

[2] By Order dated May 16, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Bailey v. Four A Coal Co.*, BRB No. 10-0267 BLA (May 16, 2010)(unpub. Order). The Director, Office of Workers' Compensation Programs, responded, stating that there is no need to address the impact of Section 1556 on this case because claimant's subsequent claim was filed prior to January 1, 2005, the effective date of the amendments. Based on our review, we agree with the Director that the amendments do not apply to this case, based on the April 14, 2004 filing date of the claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[3] 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 in a living miner's claim under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In the absence of contrary, probative evidence, if claimant provides evidence meeting the standards of 20 C.F.R. §718.204(b)(2)(i)-(iv), his total disability is established. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). Pulmonary function and arterial blood gas studies may establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(ii). Total disability may also be established under 20 C.F.R. §718.204(b)(2)(iii) if there is evidence that a miner is suffering from cor pulmonale with right-sided congestive heart failure. *See Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). Claimant may also prove total disability if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that his respiratory or pulmonary condition prevents or prevented him from engaging in his usual coal mine work or comparable and gainful work. 20 C.F.R. §718.204(b)(2)(iv). However, in a living miner's claim, lay testimony is not sufficient, in and of itself, to establish total disability. *See* 20 C.F.R. §718.204(d); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four pulmonary function studies, dated March 11, 2004, June 1, 2004, July 26, 2005, and March 18, 2008.[4] Director's Exhibits 15, 30, 34; Claimant's Exhibit 1; Employer's

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] The administrative law judge noted that claimant's height was recorded as 66.5 inches, on the studies dated June 1, 2004 and July 26, 2005, but as 68 inches on the

Exhibits 3, 8. The administrative law judge initially noted that, although the March 11, 2004 study produced qualifying values, Dr. Vuskovich, a reviewing physician, determined that it was invalid due to poor effort.[5] Decision and Order at 24; Director's Exhibit 34 at 4. The administrative law judge stated, "considering that each of the more recent pulmonary tests showed the [c]laimant's lung function to be within a normal range, I find Dr. Vuskovich's opinion to be reliable and I will give the non-qualifying tests more weight." Decision and Order at 24. The administrative law judge concluded that "the March 11, 2004 pulmonary function study is invalid and the [c]laimant has not met his burden to show total disability." *Id*.

We affirm the administrative law judge's findings under 20 C.F.R. §718.204(b)(2)(i), as they are rational and supported by substantial evidence. The administrative law judge acted within his discretion in crediting Dr. Vuskovich's invalidation of the March 11, 2004 study, as Dr. Vuskovich's opinion was supported by the three more recent studies, which demonstrated that claimant's lung function was within normal limits. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); Decision and Order at 24. Because the administrative law judge rationally found that the sole qualifying study of record was invalid, his determination that claimant did not meet his burden under 20 C.F.R. §718.204(b)(2)(i) is supported by substantial evidence and is, therefore, affirmed. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984).

We also affirm the administrative law judge's finding that, because the two blood gas studies of record, dated June 1, 2004 and June 26, 2005, are non-qualifying, claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 22; Director's Exhibit 15; Employer's Exhibit 4.

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studies dated March 11, 2004 and March 18, 2008. Director's Exhibits 15, 30; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge resolved the height discrepancy on the pulmonary function studies by relying on the 68 inch measurement from claimant's most recent 2008 study. Decision and Order at 23. However, the administrative law judge specifically noted that he "evaluated the varying studies and have found that overall the pulmonary function tests are non-qualify[ing] at both heights." *Id*.

[5] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

While the administrative law judge did not make a specific finding at 20 C.F.R. §718.204(b)(2)(iii), this error is harmless as there is no evidence in the record from which to conclude that claimant has cor pulmonale with right-sided congestive heart failure. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In addition, while the administrative law judge did not specifically consider the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), we decline to remand this case for further consideration, as the medical opinion evidence is insufficient, as a matter of law, to establish total disability.[6] *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278. Thus, claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Therefore, we affirm the administrative law judge's determination that claimant failed to establish total disability, an essential element of entitlement, and we affirm the administrative law judge's denial of benefits.[7] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[6] Dr. Dahhan initially examined claimant on March 19, 1993, and opined that he was not totally disabled. Director's Exhibit 1. In the current claim, treatment records include a report from a nurse practitioner on August 18, 2003, which contains a diagnosis of coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD), but the report does not address whether claimant is totally disabled. Director's Exhibit 30. Dr. Baker examined claimant on June 1, 2004, upon the request of the Department of Labor, and determined that claimant did not have any pulmonary impairment due to his chronic bronchitis. Director's Exhibit 15. Dr. Dahhan examined claimant on July 26, 2005, and reviewed additional records in order to determine that claimant does not have a pulmonary impairment contributed to, or aggravated by, coal dust exposure and retains the respiratory capacity to perform his previous coal mine employment or a similar position. Employer's Exhibit 1. Dr. Rosenberg prepared a report, dated July 21, 2006, based on a review of records, and concluded that claimant is not disabled, from a respiratory perspective, from performing his previous coal mine employment or similarly arduous labor. Employer's Exhibit 6. In a supplemental report, dated May 18, 2009, Dr. Rosenberg reiterated his opinion that claimant does not have any respiratory impairment or gas exchange abnormality that would disable him from performing his previous coal mine employment. Employer's Exhibit 7. In a report, dated March 21, 2008, Dr. Hays diagnosed claimant with coal workers' pneumoconiosis but did not offer any opinion as to whether claimant is totally disabled. Claimant's Exhibit 1.

[7] Because we affirm the administrative law judge's denial of benefits, it is not necessary to address employer's assertions of error with regard to the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 725.309(d).

Accordingly, the administrative law judge's Decision and Order 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