BRB No. 98-0396 BLA

LARRY M. LACY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEN-LICK & TIP TOP COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
	)	
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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Larry M. Lacy, West Liberty, Kentucky, *pro se*.

Cynthia B. Pectol (Ferreri, Fogle, Pohl & Picklesimer), Lexington, Kentucky, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (97-BLA-659) of Administrative Law Judge Richard A. Morgan denying benefits 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 at least thirteen years of qualifying coal mine employment, and adjudicated this claim, filed on July 27, 1992, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), but insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1)-(4).

Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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. 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 be entitled to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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).

[1] The administrative law judge's findings pursuant to Sections 718.202(a)(1), (4), 718.203(b), and his findings regarding the length of claimant's coal mine employment, which are not adverse to claimant, are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. Turning to the issue of total respiratory disability, the administrative law judge accurately determined that only three of the nine pulmonary function studies of record produced qualifying values pursuant to Section 718.204(c)(1).[2] Of these, the administrative law judge found that two were invalid,[3] and the remaining valid and qualifying test of February 9, 1995 was outweighed by the six non-qualifying pulmonary function studies obtained both before and after that date. Decision and Order at 10-12, 24; *see generally Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bolyard v. Peabody Coal Co.*, 6 BLR 1-767 (1984); *Wike v. Bethlehem Mines Corp.*, 7 BLR 1-593 (1984); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). The administrative law judge thus reasonably found that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1).

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[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. §718.204(c)(1), (2).

[3] The administrative law judge determined that Dr. Broudy, the physician who administered the qualifying pulmonary function study of March 4, 1992, recorded that claimant's effort was not optimal, and Dr. Fino, a pulmonary expert who reviewed the tracings, opined that the test was not valid. Decision and Order at 11, 24; Director's Exhibits 51, 55. Dr. Anderson did not obtain MVV values for his qualifying study of November 1, 1994, thus the test was non-conforming and was deemed invalid by two reviewing experts, Drs. Kramer and Fino. Decision and Order at 11, 24; Director's Exhibits 53, 55.

The administrative law judge also accurately determined that claimant could not establish total respiratory disability pursuant to Section 718.204(c)(2), as none of the six blood gas studies of record produced qualifying values. Decision and Order at 12-13, 24. Likewise, the administrative law judge properly found that Section 718.204(c)(3) was not applicable because the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 23.

Lastly, in evaluating the evidence pursuant to Section 718.204(c)(4), the administrative law judge reviewed the medical opinions of record, the physicians' qualifications, and their underlying documentation. The administrative law judge determined that a majority of physicians agreed that claimant had a mild to moderate respiratory impairment, which Drs. Fritzhand, Anderson, Lane and Westerfield found totally disabling, but which Drs. Myers, Jarboe, Broudy, Wright and Fino opined would not disable claimant from performing his usual coal mine employment. Decision and Order at 13-18, 24-25. The administrative law judge acted within his discretion in according little weight to the opinion of Dr. Fritzhand, as he found the physician's credentials were not of record,[4] *see generally Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730 (1983), and Dr. Fritzhand did not exhibit familiarity with the exertional requirements of claimant's usual coal mine employment. Decision and Order at 24-25; *see generally Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The administrative law judge also permissibly accorded less weight to the opinion of Dr. Anderson because he based his conclusions in part upon the results of his qualifying pulmonary function studies, which the administrative law judge determined were invalid and thus unreliable. Decision and Order at 25; *see generally Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Baker, supra*. Based upon the numerical preponderance of opinions by well-qualified physicians who found that claimant's respiratory impairment was not disabling, which were buttressed by the weight of the objective evidence of record, and in view of claimant's usual coal mine employment

[4] The administrative law judge additionally gave less weight to Dr. Lane's opinion on the ground that the physician's qualifications were not of record. Decision and Order at 25. Although a review of the record reveals that Dr. Lane's Curriculum Vitae is contained at Director's Exhibit 51 and indicates he is Board-certified in Internal Medicine and possesses other relevant qualifications, the administrative law judge's error is harmless, inasmuch as he provided alternative, valid reasons for his credibility determinations at Section 718.204(c)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

duties as a surface mine superintendent and claimant's testimony that he continued to perform heavy manual labor for two to three hours per day in the logging business, *see* Hearing Transcript at 19, the administrative law judge reasonably found that claimant failed to establish total disability pursuant to Section 718.204(c)(4). Decision and Order at 25; *see generally Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); *Anderson*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel*, *supra*. The administrative law judge's findings pursuant to Section 718.204(c)(1)-(4) are supported by substantial evidence, within his discretion as trier of fact, and in accordance with law. Therefore, they are affirmed.

Inasmuch as claimant has failed to establish total respiratory disability, a requisite element of entitlement under 20 C.F.R. Part 718, *see Trent*, *supra*, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge