BRB No. 99-0421 BLA

DENNIS R. VARNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	Date Issued:
	)	
CHEYENNE EAGLE MINING COMPANY, INCORPORATED	)	
	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
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 - Denial of Benefits of Robert J. Hillyard, Administrative Law Judge, United States Department of Labor.

Dennis R. Varney, Pikeville, Kentucky, *pro se*.

Sylvia D. Davis (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (98-BLA–0340) of Administrative Law Judge Robert L. Hillyard 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 found that claimant established twenty-two and one-half years of coal mine employment, and based on the filing date, applied the regulations found at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis arising from coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), but found the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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).

In order to establish entitlement to benefits under Part 718, 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 prove any one of these elements precludes entitlement. *Adams v. Director, OWCP,* 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*).

The administrative law judge found that the evidence of record contains a total of ten sets of pulmonary function values. The administrative law judge rationally determined that the report of the October 13, 1993 test by Dr. Mettu was not entitled to any weight, as it contained no tracings and was invalidated by Dr. Fino. Director's Exhibit 16; Employer's Exhibit 3; *see Prater v. Hite*

Preparation Co., 829 F.2d 1363, 10 BLR 2-297 (6th Cir. 1987). The administrative law judge found that the April 4, 1995 test yielded qualifying results,[1] and was validated by Drs. Westerfield and Burki, but invalidated by Dr. Fino. Director's Exhibits 13, 22; Employer's Exhibit 3. The administrative law judge permissibly found that this test was entitled to "some weight," but noted that a pulmonary function study administered soon afterwards on May 19, 1995 produced nonqualifying results. Decision and Order at 18; *see Prater, supra*; *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1989). The administrative law judge found that the March 7, 1995 study by Dr. Myers yielded qualifying results on the pre-bronchodilator test only, which was invalidated by Drs. Myers and Fino, but found acceptable by Dr. Burki. Director's Exhibits 12, 17, 49. Due to the questionable effort shown by claimant, the administrative law judge permissibly found this study entitled to diminished weight. Decision and Order at 17; *see Prater, supra*. The June 18, 1997 test by Dr. Broudy yielded qualifying results on the pre-bronchodilator test only, and Dr. Broudy noted that claimant's effort was suboptimal. As a result, Drs. Burki, Branscomb and Fino invalidated the study, and the administrative law judge permissibly found it entitled to little weight. Director's Exhibits 50, 51; *see Prater, supra*.

The administrative law judge properly weighed all the pulmonary function studies evidence together at Section 718.204(c)(1), and found that there was variable or suboptimal effort in four of the ten tests, and that all four qualifying tests were invalidated by at least one physician. Decision and Order at 18. The administrative law judge further noted that at least three tests in which claimant used suboptimal effort still produced nonqualifying results. *Id*. Despite the fact that they were invalidated, the administrative law judge acted within his discretion in treating these nonqualifying results as entitled to some weight as evidence that claimant is not totally disabled, in light of the effort dependent nature of pulmonary function studies. *See Prater*, *supra*. In addition, he permissibly accorded substantial weight to the April 30, 1997 nonqualifying test obtained by

[1] 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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Dr. Fritzhand on the grounds that claimant's comprehension and cooperation were noted as good. Director's Exhibit 14. As the administrative law judge provided valid reasons for according little weight to the studies which were invalidated, we affirm his finding that the pulmonary function study evidence is insufficient to establish total disability at Section 718.204(c)(1). *See Prater, supra*.

The administrative law judge considered the three blood gas studies of record and found that as all yielded nonqualifying results, they are insufficient to establish total disability at Section 718.204(c)(2). Director's Exhibits 16, 49, 50; *see Schetroma v. Director, OWCP* 18 BLR 1-19 (1993). Additionally, as the record is devoid of any evidence of cor pulmonale with right sided congestive heart failure, total disability cannot be established pursuant to Section 718.204(c)(3).

The administrative law judge next considered the medical opinion evidence at Section 718.204(c)(4), which consists of the opinions of eight physicians and one lay person. The administrative law judge found that Drs. Broudy, Myers, Wright, Branscomb and Fino deemed claimant able, from a respiratory standpoint, to do his last coal mine employment or a job of comparable physical demand. Director's Exhibits 21, 49, 51; Employer's Exhibit 3. The administrative law judge permissibly found the opinions of Drs. Broudy, Myers and Wright to be supported by the objective medical evidence and, therefore, entitled to substantial weight. Decision and Order at 19; *Peabody v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997). The administrative law judge further permissibly determined that although Drs. Branscomb and Fino did not examine claimant, their opinions are well supported, well documented, and well reasoned and are, therefore, entitled to some weight. *See Hill, supra*; *Church v. Eastern Associated Coal Co.,* 20 BLR 1-8 (1996).

With respect to the remaining opinions, Dr. Mettu found a severe obstructive airway disease with decreased MVV. Director's Exhibit 16. The administrative law judge rationally found that as Dr. Mettu's opinion is based solely on the report of the pulmonary function study administered on October 13, 1993, which contained no tracings and was invalidated by Dr. Fino, his opinion is unreliable and is, therefore, entitled to little weight. Decision and Order at 19; *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). Additionally, the record contains the opinions of Drs. Fritzhand and Westerfield, that claimant is disabled from a respiratory standpoint. Director's Exhibits 15, 18, 22, 23, 52. The administrative law judge found that as Dr. Fritzhand's opinion was based upon nonqualifying objective tests, and Dr. Westerfield relied upon a pulmonary

function study which was invalidated by Dr. Fino, their opinions are outweighed by the opinions of Drs. Broudy, Myers, Wright, Branscomb and Fino.[2] *See Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994). Therefore, we affirm the administrative law judge's weighing of the medical reports as rational and within his discretion as trier-of-fact, and affirm his finding that the evidence is insufficient to establish total disability at Section 718.204(c)(4). *See Seals v. Glen Coal Co.,* 19 BLR 1-80 (1995)(*en banc*)(Brown, J., concurring).

The administrative law judge then properly weighed all of the evidence together at Section 718.204(c) and found that claimant failed to establish total disability by a preponderance of the evidence. *See Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*). As the administrative law judge properly found that claimant failed to establish total disability at Section 718.204(c), an essential element of entitlement, we must affirm the denial of benefits. *See*

[2]In addition, the administrative law judge noted the presence in the record of Dr. Templin's opinion in which he stated that claimant could not return to his usual coal mine employment due to a back injury and a learning disability. Director's Exhibit 20. Inasmuch as Dr.Templin did not diagnose a totally disabling respiratory or pulmonary impairment, the administrative law judge acted properly in declining to treat his opinion as sufficient to establish total disability under Section 718.204(c)(4). Decision and Order at 19; *see Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Moreover, because Section 718.204 requires the opinion of a medical doctor, the opinion of Mr. Woolwine, who is not a physician, is insufficient to establish any element of entitlement thereunder. Director's Exhibit 19.

Adams, supra; Trent, supra; Gee, supra; Perry, supra. Since we affirm the denial of benefits, we need not address the administrative law judge's findings at Section 718.202(a) and 718.203(b), as error, if any, therein would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge