BRB No. 02-0670 BLA

GROVER MUNCY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	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 on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Grover Muncy, Warfield, Kentucky, *pro se*.[1]

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

[1]Susie Davis, with the Kentucky Black Lung Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge=s decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, representing himself, appeals the Decision and Order on Remand (95-BLA-1447) of Administrative Law Judge Paul H. Teitler 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).[2] The case is before the Board for the fourth time. In a Decision and Order dated January 10, 1997, the administrative law judge, after crediting claimant with twenty-nine years of coal mine employment, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge also found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated December 22, 1997, the Board noted that the administrative law judge had not considered Employer's Exhibits 3-28, exhibits that the Board noted were apparently admitted into the record. *Muncy v. Wolf Creek Collieries*, BRB No. 97-0690 BLA (Dec. 22, 1997) (unpublished). The Board, therefore, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(b) and (c) (2000) and remanded the case "for reconsideration and/or to allow the administrative law judge to provide reasons for excluding and/or not considering Employer's Exhibits 3-28...." *Id.*

On remand, the administrative law judge noted that he did not consider Employer's Exhibits 3-28 because they were not a part of the record. The administrative law judge explained that while employer had submitted the exhibits at the May 23, 1996 hearing, they had apparently been lost. The administrative law judge further noted that employer, despite being provided with an adequate opportunity to resubmit the exhibits, failed to do so. The administrative law judge, therefore, explained that he was unable to consider this evidence. Upon reconsideration of the evidence, the administrative law judge again found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4) (2000). The administrative law judge also found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated June 30, 2000, the Board held that employer was, albeit inadvertently, denied procedural due process and that fundamental fairness required that the case be remanded to the administrative law judge so that employer could be afforded an opportunity to resubmit Employer's Exhibits 3-28. *Muncy v. Wolf Creek Collieries*, BRB No. 99-0286 BLA (June 30, 2000) (unpublished). The Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4) and 718.204(b) and (c) (2000) and remanded the case for reconsideration of all the relevant evidence. *Id.* The Board also held that the administrative law judge erred in his determination of the date of claimant's commencement of benefits. *Id.*

On remand for the second time, the administrative law judge found that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. By Decision and Order dated December 11, 2001, the Board affirmed the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Muncy v. Wolf Creek Collieries*, BRB No. 01-0309 BLA (Dec. 11, 2001) (unpublished). The Board, however, vacated the administrative law judge's finding that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. *Id.* The Board, therefore, remanded the case to the administrative law judge for reconsideration of the evidence pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and 718.204(b) and (c). *Id.*

On remand for the third time, the administrative law judge found that the evidence was insufficient to establish total disability.[3] Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. 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 20 C.F.R. Part 718 in a living miner's claim, a 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 establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In his consideration of the pulmonary function study evidence, the administrative law judge properly found that claimant's pulmonary function studies taken on July 6, 1993, July 20, 1993, October 13, 1993 and June 10, 1994 produced non-qualifying values.[4] 2002 Decision and Order on Remand at 4; Director's Exhibits 9, 15; Employer's Exhibit 1. The administrative law judge did not address claimant's most recent November 4, 1995 pulmonary function study. *See* Employer's Exhibit 3. However, because claimant's November 4, 1995 pulmonary function study is non-qualifying, the administrative law judge's failure to consider this study constitutes harmless error.[5] *See Larioni v. Director,*

[4]A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values which exceed the requisite table values.

[5]The administrative law judge also failed to address claimant's post-bronchodilator pulmonary function study conducted on July 20, 1993. Although claimant's post-bronchodilator study on July 20, 1993 produced borderline qualifying values, *see* Director's Exhibit 15, we note that subsequent pulmonary function studies conducted on October 13, 1993, June 10, 1994 and November 4, 1995 produced non-qualifying values. *See* Director's Exhibit 9; Employer's Exhibits 1, 3. In light of the overall weight of the pulmonary function study evidence, the administrative law judge's failure to consider the post-bronchodilator portion of claimant's July 20, 1993 pulmonary function study constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

OWCP, 6 BLR 1-1284 (1986). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(i).

In his consideration of the arterial blood gas study evidence, the administrative law judge considered claimant's studies conducted on October 13, 1993, June 10, 1994, November 4, 1995[6] and June 21, 1996. 2002 Decision and Order on Remand at 4-5; Director's Exhibit 11; Employer's Exhibits 1, 3; ALJ's Exhibit 1. The administrative law judge acknowledged that claimant's June 10, 1994 arterial blood gas study produced qualifying values,[7] but noted that claimant's previous arterial blood gas study conducted on October 13, 1993 and claimant's subsequent arterial blood gas studies conducted on November 4, 1995 and June 21, 1996 produced non-qualifying values. 2002 Decision and Order on Remand at 5. The administrative law judge further noted that claimant's most

[6]Although the administrative law judge did not include the results of claimant's resting and exercise arterial blood gas studies taken on November 4, 1995 in his chart of the arterial blood gas study evidence, he subsequently referred to this evidence. *See* 2002 Decision and Order on Remand at 4-5. Both the resting and exercise portions of claimant's November 4, 1995 pulmonary function study are non-qualifying. *See* Employer's Exhibit 3.

[7]The administrative law judge noted that Dr. Dahhan questioned the validity of claimant's June 10, 1994 pulmonary function study, noting the possibility that there may have been some venous blood contaminating the arterial sample. 2002 Decision and Order on Remand at 5; Employer's Exhibit 3. The administrative law judge further noted that Dr. Dahhan suggested that claimant may have been having pulmonary congestion due to his cardiac arrhythmia and coronary artery disease at the time of his 1994 study. *Id.* Dr. Dahhan indicated that claimant's reported hypoxia, if present in 1994, was not permanent. *Id.*

recent arterial blood gas studies conducted on November 4, 1995 and June 21, 1996 are non-qualifying. 2002 Decision and Order on Remand at 5; Employer's Exhibit 3; ALJ's Exhibit 1. Because it is supported by substantial evidence, the administrative law judge's finding that the arterial blood gas study evidence is insufficient to establish total disability is affirmed. 20 C.F.R. §718.204(b)(2)(ii).

Moreover, because there is no evidence of record indicating that claimant suffered from cor pulmonale with right sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

In his consideration of the medical opinion evidence, the administrative law judge considered the opinions of Drs. Clarke, Wells, Broudy, Younes, Dahhan and Guberman. The administrative law judge properly found that the opinions of Drs. Clarke, Wells and Guberman were not sufficiently reasoned since they failed to explain how the results of claimant's objective studies supported their opinions of total pulmonary disability.[8] *See*

[8]Dr. Clarke interpreted claimant's July 6, 1993 pulmonary function study as "in keeping with mild restrictive pulmonary disease and mild chronic obstructive airways disease." Director's Exhibit 15. The administrative law judge properly questioned Dr. Clarke's opinion because he did not explain how his interpretation of claimant's pulmonary function study as revealing a mild impairment supported his finding of total disability. 2002 Decision and Order on Remand at 10.

Dr. Wells checked a box indicating that claimant was not capable, from a pulmonary standpoint, of doing his usual coal mine employment. Director's Exhibit 15. In explaining the basis for his opinion, Dr. Wells merely noted that "[f]urther exposure to dust will result in compromise to [claimant's] respiratory system." *Id.* Consequently, Dr. Wells' explanation is insufficient to support a finding of a totally disabling respiratory or pulmonary impairment. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989) (A medical opinion that merely advises against returning to work in a dusty environment is insufficient to establish a totally disabling respiratory or pulmonary impairment); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

Dr. Guberman examined claimant on June 21, 1996. In an undated report, Dr. Guberman opined that "[d]ue to the chronic obstructive pulmonary disease, hypoxemia, atrial fibrillation, hypertension, diabetes mellitus and also orthopedic problems, [claimant] is considered disabled for all types of employment." ALJ's Exhibit 1. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), a claimant must establish that his respiratory or pulmonary impairment is totally disabling. Non-respiratory and non-pulmonary impairments have no bearing on establishing total disability under this provision. *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991). Because Dr. Guberman found claimant

Director, OWCP v. Rowe, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); 2002 Decision and Order on Remand at 12.

The administrative law judge found that Dr. Younes indicated that claimant did not suffer from any pulmonary impairment. *See* 2002 Decision and Order on Remand at 9. In his July 1, 1994 report, Dr. Younes indicated that claimant was "disabled based on [the] arterial blood gas test result." Director's Exhibit 10. Dr. Younes, however, did not opine that claimant suffered from a "totally" disabling pulmonary impairment. Consequently, Dr. Younes' opinion is insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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totally disabled based upon a combination of respiratory and non-respiratory conditions, the administrative law judge properly found that Dr. Guberman's opinion is insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). 2002 Decision and Order on Remand at 9.

The administrative law judge properly found that Drs. Broudy and Dahhan opined that claimant was not totally disabled from a pulmonary standpoint.[9] 2002 Decision and Order on Remand at 9; Employer's Exhibits 1, 3.

Inasmuch as the administrative law judge properly discredited the opinions of Drs. Clarke, Wells and Guberman, the only opinions of record that support a finding of total disability, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's 2002 Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[9]In a report dated October 13, 1999, Dr. Broudy opined that claimant retained the respiratory functional capacity to perform the work of an underground coal miner or to do similarly arduous labor. Employer's Exhibit 1.

In a report dated November 6, 1995, Dr. Dahhan opined that claimant, from a respiratory standpoint, retained the physiological capacity to continue his previous coal mining work. Employer's Exhibit 3.

BETTY JEAN HALL
Administrative Appeals Judge