BRB No. 05-0669 BLA

RAY CRAWFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JAMES RIVER COAL SERVICE, a/k/a MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 02/28/2006
	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Ray Crawford, London, Kentucky, *pro se*.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (03-BLA-5816) of Administrative Law Judge Joseph E. Kane 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). This case involves a claim filed on January 3, 2002. After crediting claimant with twenty-seven years of coal mine employment, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence was

insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). 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 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*).

The administrative law judge properly noted that all of the pulmonary function and arterial blood gas studies of record are non-qualifying.[1] Decision and Order at 9; Director's Exhibits 13, 14; Employer's Exhibit 2. We, therefore, affirm the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii).

Because there is no evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 9.

In considering whether the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge

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[1]A "qualifying" pulmonary function study or arterial blood gas study yields values that 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 that exceed the requisite table values.

accurately noted that all of the physicians of record,[2] namely Drs. Baker, Rosenberg, Dahhan and Repsher, opined that claimant retained the capacity, from a pulmonary standpoint, to perform his usual coal mine employment.[3] Decision and Order at 9-10; Director's Exhibit 12; Employer's Exhibits 2, 3, 5, 7, 8. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an

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[2]At the hearing on December 17, 2003, claimant informed the administrative law judge that he did not have any additional evidence to submit into the record. Transcript at 8. However, on January 24, 2005, claimant submitted Dr. Anand's December 13, 2004 report to the administrative law judge. The administrative law judge excluded Dr. Anand's December 13, 2004 report because it had not been sent to all of the other parties at least twenty days before the hearing. *See* 20 C.F.R. §725.456(b); Decision and Order at 2. The administrative law judge found that claimant did not establish that the other parties had consented to the admission of this evidence. *Id.* The administrative law judge also found that claimant failed to establish "extraordinary circumstances" to justify the admission of this evidence. *Id.* at 2 n.2. The administrative law judge should have addressed whether claimant made a showing of "good cause" why such evidence was not exchanged twenty days prior to the hearing, rather than addressing whether claimant demonstrated "extraordinary circumstances." *See* 20 C.F.R. §725.456(b). However, in this case, claimant has not put forth any explanation for why he did not comply with the twenty day rule set forth at 20 C.F.R. §725.456(b)(2). An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Under the facts of this case, we hold that the administrative law judge did not abuse his discretion in excluding Dr. Anand's December 13, 2004 report from the record.

[3]Drs. Baker and Repsher diagnosed a mild pulmonary impairment. *See* Director's Exhibit 12; Employer's Exhibit 3. Although a mild impairment may be totally disabling, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), the administrative law judge, in this case, reasonably found that the opinions of Drs. Baker, Rosenberg, Dahhan and Repsher, that claimant retained the capacity, from a pulmonary standpoint, to perform his usual coal mine employment, did not carry claimant's burden to establish total disability under Section 718.204(b)(2)(iv). Decision and Order at 9-10. Unlike the situation in *Cornett*, in this case, there is no conflicting medical evidence that would allow the administrative law judge to reach a different conclusion.

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 Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge