BRB No. 08-0440 BLA

R.D.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG K COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/17/2009
	)	
and	)	
	)	
ASHLAND COAL, 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 on Remand – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

R.D.M., Minnie, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denying Benefits (04-BLA-0139) of Administrative Law Judge Joseph E. Kane (the administrative law judge) on a claim filed on June 9, 1999, 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 is before the Board for the third time.[1] Pursuant to claimant's most recent appeal, the Board affirmed the finding of Administrative Law Judge Daniel J. Roketenetz that claimant established ten years of coal mine employment, and that claimant had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), based on employer's concession. The Board also affirmed Judge Roketenetz's findings that total disability was not demonstrated under 20 C.F.R. §718.204(b)(2)(i) and (iii) because the pulmonary function studies of record were non-qualifying[2] and the record contained no evidence of cor pulmonale with right-sided congestive heart failure. However, the Board vacated Judge Roketenetz's finding that total disability was not established by blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii) because he erroneously found that all of the blood gas studies were non-qualifying, when, in fact, two of the studies were qualifying. Additionally, the Board vacated Judge Roketenetz's finding that the medical opinion evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), because his analysis of the medical opinion evidence was based, in part, on his erroneous analysis of the blood gas study evidence. Consequently, the Board remanded the case for the administrative law judge to reconsider the issue of total disability under 20 C.F.R. §718.204(b). [*R.D.M.*] *v. Big Coal Co.*, BRB No. 06-0372 BLA (Dec. 28, 2006) (unpub.).

Pursuant to the Board's instructions, the administrative law judge reconsidered all of the blood gas studies on remand, including the two qualifying studies, but found that these qualifying studies were outweighed by the "overwhelming majority" of the non-qualifying studies.[3] Consequently, the administrative law judge found that total disability was not established at Section 718.204(b)(2)(ii) by the blood gas study evidence. Turning to the medical opinion evidence at Section 718.202(b)(2)(iv), the administrative

[1] The lengthy procedural history of this case is set forth in the Board's prior decision. [*R.D.M.*] *v. Big Coal Co.*, BRB No. 06-0372 BLA (Dec. 28, 2006) (unpub.).

[2] A "qualifying" blood gas study yields values that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendix C. Such a study is evidence of a totally disabling respiratory condition. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[3] The blood gas study evidence consists of four studies administered on January 19, 1990, a study administered on January 26, 1990, and a study administered on February 2, 1991, on February 12, 1991, on March 5, 1991, on November 1, 1994, on July 19, 1997, on October 9, 1999, on January 19, 2000, on May 12, 2003, and on June 29, 2005. *See* Decision and Order on Remand at 14.

law judge also found that it was insufficient to demonstrate total respiratory disability, because the medical opinions finding total disability were not sufficiently reasoned. Hence, because the evidence failed to establish total respiratory disability at Section 718.204(b)(2)(i)-(iv), the administrative law judge denied benefits.

On appeal, claimant contends that he is entitled to benefits. Specifically, claimant contends that he has not received a complete, credible pulmonary evaluation because the administrative law judge found that the opinions of Drs. Sundaram and Mettu, finding total disability, were not credible. Claimant also contends that his statements regarding his respiratory condition were not properly considered. Finally, claimant asserts that if he could have afforded and retained an attorney, he would have been able to obtain benefits. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not intend to participate in this appeal.

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. *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 rational, supported by substantial evidence, and in accordance with law.[4] 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

At the outset, we address claimant's specific arguments. Contrary to claimant's contention, he was provided with a complete, credible pulmonary evaluation by both Drs. Sundaram and Mettu, who found claimant to be disabled. Claimant is not, however, entitled to a dispositive opinion. *See* 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see also Hodges v. Bethenergy Mines*, 18 BLR 1-84 (1994). In this case, the administrative law judge accorded some weight to the opinions of both Drs.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

Sundaram and Mettu, but properly found that the opinions of Drs. Dahhan, Broudy and Fino, that claimant did not have a disabling respiratory impairment, were better reasoned and, therefore, entitled to greater weight. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-400 (1982). Further, contrary to claimant's allegation, his testimony regarding his breathing problems and respiratory condition cannot, by itself, establish total disability at Section 718.204(b). *See Fields v. Director, OWCP*, 10 BLR 1-19, 22 (1987). Finally, we note that claimant was previously represented by counsel and was provided a hearing on his claim on October 23, 2001, but when this case was most recently before the Office of Administrative Law Judges, claimant stated that he did not want a hearing and requested that a decision be based on the record. *See* Department of Labor Form dated November 28, 2005.

Pursuant to the Board's remand instructions, the administrative law judge considered the two qualifying blood gas studies administered on January 19, 1990 during claimant's hospitalization for respiratory distress.[5] Director's Exhibit 12. Regarding these test results, the administrative law judge noted, "The attending physician, Dr. Breener [sic], commented that Claimant's blood gasses returned to normal levels within several days, and Claimant was discharged." Decision and Order on Remand at 8; Director's Exhibit 12. Further, the administrative law judge determined that these qualifying tests were outweighed by the "overwhelming, majority" of the non-qualifying tests, which were more recent and provided "a more accurate assessment of Claimant's respiratory capacity, as Claimant was not hospitalized when these tests were administered." Decision and Order on Remand at 8. Therefore, the administrative law judge properly concluded that the blood gas study evidence, as a whole, failed to demonstrate total respiratory disability at Section 718.204(b)(2)(ii). *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fazio v. Consolidation Coal Co.*, 8 BLR 1-223, 1-224 (1985); *cf. Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984); Decision and Order on Remand at 8. Hence, we affirm the administrative law judge's determination that total respiratory disability was

[5] The administrative law judge noted that claimant was admitted to intensive care at Appalachian Regional Healthcare on January 19, 1990, after experiencing difficulty breathing and confusion following a blast in the underground mines. The attending physician, Dr. Brenner, believed claimant had been exposed to "multiple noxious fumes[,] including blasting powder, nitroglycerine, carbon monoxide, and coal dust." Director's Exhibit 12. Claimant was treated with IV fluids, oxygen, and heated aerosol. Blood gas tests initially showed impairment, but during his seven-day stay, claimant showed gradual improvement. On the day of his release, his blood gasses were normal without oxygen. Claimant was advised to take an additional week off from work and to quit smoking. Decision and Order on Remand at 7.

not demonstrated under Section 718.204(b)(2)(ii).

Turning to the medical opinion evidence, relevant to a finding of total disability at Section 718.204(b)(2)(iv), the record contains the opinions of Drs. DeGuzeman, Mettu, and Sundaram, who all opined that claimant was totally disabled, and the contrary opinions of Drs. Dahhan, Broudy and Fino. Director's Exhibits 10, 12, 64; Employer's Exhibits 1, 34. The administrative law judge properly found that Dr. DeGuzeman's opinion was entitled to diminished weight because, even though Dr. DeGuzeman was claimant's treating physician, he failed to identify the documentation upon which he relied, or to explain the basis for his diagnosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 511, 22 BLR 2-625, 2-643 (6th Cir. 2003) (the opinions of treating physicians get the deference they deserve based on their power to persuade); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); Decision and Order on Remand at 9.

In assessing the probative value of Dr. Mettu's opinion, that claimant was totally disabled, the administrative law judge accorded it "some weight," even though it was based, in part, on non-qualifying objective testing, as this factor alone is not a basis for finding a medical opinion unreasoned. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000). Nonetheless, the administrative law judge properly found it lacking in sufficient detail and explanation to be dispositive on the issue of total disability. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order on Remand at 10.

Likewise, the administrative law judge found Dr. Sundaram's opinion, that claimant suffered from a "severe impairment," entitled to minimal weight because it was unexplained and contradicted by the majority of the medical opinions finding either, that claimant did not have a respiratory impairment or that he suffered from only a mild or minimal respiratory impairment. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order on Remand at 10; Director's Exhibits 10, 12, 64; Employer's Exhibits 1, 3, 4.

In contrast, the administrative law judge accorded controlling weight to the opinions of Drs. Dahhan and Broudy, who found that claimant did not have a respiratory impairment, and Dr. Fino, who found that claimant has a non-disabling mild respiratory impairment, as their opinions were better reasoned and documented, *i.e.*, they were supported by the weight of the objective testing of record and they contained full discussions of claimant's medical record. *See Clark*, 12 BLR at 1-155. Consequently, the administrative law judge properly found that the medical opinion evidence failed to establish total disability at Section 718.204(b)(2)(iv). Further, the administrative law

judge rationally found that claimant failed to affirmatively establish total respiratory disability under Section 718.204(b), by a preponderance of the evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Accordingly, we affirm that determination.

Because the administrative law judge's determination that claimant failed to establish total respiratory disability pursuant to Section 718.204(b) is rational, contains no reversible error, and is supported by substantial evidence, we affirm his determination that claimant failed to satisfy his burden of establishing this requisite element of entitlement under Part 718. *See* 20 C.F.R. §718.204(b); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Hence, we affirm the administrative law judge's determination that entitlement to benefits is precluded.

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge