BRB No. 12-0332 BLA

BILLY JOSEPH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/26/2013
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits in an Initial Claim (2009-BLA-5903) of Administrative Law Judge Larry S. Merck, rendered on a claim filed on September 5, 2008, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge found that claimant established twenty-nine years of surface coal mine employment and that he worked at least fifteen years in conditions that were substantially similar to those of an underground mine. The administrative law judge, however, determined that the evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at

amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] Additionally, the administrative law judge found that claimant failed to establish any of the requisite elements for entitlement to benefits pursuant to 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he does not have a totally disabling respiratory or pulmonary impairment for invocation of the amended Section 411(c)(4) presumption. Claimant also challenges the administrative law judge's determination that he failed to establish the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant asserts that the administrative law judge erred in finding that he is not totally disabled and was unable to invoke the amended Section 411(c)(4) presumption. After consideration of claimant's arguments on appeal, the evidence of record and the administrative law judge's findings, we conclude that substantial evidence supports a finding that claimant does not have a totally disabling respiratory or pulmonary impairment.

[1] On March 23, 2010, amendments to the Act, contained in Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010), were enacted that affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner worked at least fifteen years in underground coal mine employment, or in surface mines in conditions substantially similar to those of an underground mine, and also has a totally disabling respiratory impairment.

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

Contrary to claimant's contention, the administrative law judge properly found that, because the pulmonary function and arterial blood gas tests were non-qualifying[3] for total disability, and there was no evidence of record to establish that claimant has cor pulmonale with right-sided congestive heart failure, claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 8-9, 9 n.7; *see* Director's Exhibits 11, 12, 18; Claimant's Exhibit 1. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed three medical opinions by Drs. Ammisetty, Hardin and Mettu.[4] We specifically reject claimant's argument that the administrative law judge abused his discretion in finding that the opinions of Drs. Ammisetty and Hardin were not well-reasoned. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 12, 14.

The administrative law judge rationally found that Dr. Ammisetty's opinion was entitled to less weight since he did not explain his statement that claimant's smoking history would cause his pulmonary function test values to appear "normal." Decision and Order at 12; Director's Exhibits 12, 16; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Additionally, the administrative law judge properly found that

[3] A "qualifying" pulmonary function or arterial blood gas test 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 and C. A "non-qualifying" pulmonary function or arterial blood gas test yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] Dr. Ammisetty prepared a report on October 21, 2008, based on his examination of claimant, and opined that claimant is totally disabled from a respiratory or pulmonary impairment. Director's Exhibit 12. Dr. Ammisetty also provided a response to the district director's request for clarification of his opinion on February 9, 2009, wherein he reiterated his opinion. Director's Exhibit 16. Dr. Mettu examined claimant on April 13, 2009, and opined that claimant does not suffer from any respiratory or pulmonary impairment. Director's Exhibit 18. Dr. Hardin, claimant's treating physician since 1986, prepared a report dated June 6, 2009, wherein he opined that claimant suffers from a significant pulmonary disease due to coal mine employment. Director's Exhibit 19. Dr. Hardin also provided a supplemental opinion, dated February 20, 2011, wherein he opined that claimant does not retain the pulmonary function to return to his previous coal mine employment. Claimant's Exhibit 1.

Dr. Ammisetty based his disability opinion, in part, on an x-ray that the administrative law judge determined was negative for pneumoconiosis.[5] Decision and Order at 12.

With regard to Dr. Hardin, the administrative law judge noted that he based his disability opinion, in part, on the results of a February 20, 2011 *non-qualifying* pulmonary function test, contained in claimant's treatment records. Decision and Order 14. The administrative law judge observed that, while the quality standards at 20 C.F.R. Part 718 were inapplicable to the February 20, 2011 test, because it was obtained in the course of treatment, he "still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on the entitlement issue." Decision and Order at 12, *quoting* 65 Fed. Reg. 79,928 (Dec. 20, 2000). Because the test "did not reflect the degree of cooperation and effort of the [c]laimant and did not include any flow volume loops," the administrative law judge stated: "I cannot determine if this [pulmonary function test] is a reliable indicator of [c]laimant's pulmonary condition." Decision and Order at 8. To the extent that the administrative law judge gave the February 20, 2011 pulmonary function test "little probative weight," we affirm the administrative law judge's finding that Dr. Hardin's disability opinion, based on that test, is not sufficiently reasoned to satisfy claimant's burden to establish total disability. *Id*.; *see* 20 C.F.R. §718.104(d)*; Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc).

In contrast, the administrative law judge determined that Dr. Mettu explained his opinion, that claimant is not totally disabled, in light of his examination findings, claimant's work and medical histories, and claimant's pulmonary function and arterial blood gas tests. Decision and Order at 12. We affirm the administrative law judge's decision to assign controlling weight to Dr. Mettu's opinion because the administrative law judge rationally found that it was better supported by the objective medical evidence in this case. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 14.

We consider claimant's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because the administrative law judge acted within his discretion in rendering his credibility determinations, we affirm his finding that

[5] An x-ray dated October 21, 2008, taken in conjunction with Dr. Ammisetty's examination, was read by Dr. Narra, a Board-eligible radiologist, as positive for pneumoconiosis, but as negative by Dr. Barrett, dually qualified as a Board-certified radiologist and B reader. Director's Exhibits 12, 13. The administrative law judge credited Dr. Barrett's negative reading, based on his qualifications as a dually qualified radiologist. Decision and Order at 16.

claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and his overall determination that claimant did not establish a totally disabling respiratory impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

Thus, we affirm the administrative law judge's finding that claimant is not entitled to invocation of the amended Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4). Additionally, because claimant did not establish total disability, a requisite element of element of entitlement,[6] we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[7] *See Anderson,* 12 BLR at 1-113.

[6] In order to establish entitlement to benefits in a living miner's claim filed 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. Failure to establish any one of these elements precludes entitlement. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[7] Because we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. Part 718, for failure to establish total disability, it is not necessary that we address claimant's assertions of error regarding the existence of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits in an Initial Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge