BRB No. 97-0844 BLA

LINZIE L. HUNT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SCALF ENGINEERING COMPANY, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
HITE PREPARATION COMPANY	)	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 Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

John Earl Hunt (Sturgill & Hunt Law Offices), Prestonsburg, Kentucky, for claimant.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for Scalf Engineering Company, Incorporated.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (90-BLA-2208) of Administrative Law Judge Clement J. Kichuk 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, involving a 1987 claim, is before the Board for the second time. In a Decision and Order dated July 22, 1992, Administrative Law Judge Peter McC. Giesey, after crediting claimant with ten years of coal mine employment, found the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Judge Giesey also 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). Although Judge Giesey found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3), he found the medical opinion evidence sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c)(4). Accordingly, Judge Giesey awarded benefits. By Decision and Order dated August 11, 1994, the Board affirmed Judge Giesey's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3) as unchallenged on appeal. *Hunt v. Scalf Engineering Co.*, BRB No. 92-2259 BLA/A (Aug. 11, 1994)(unpublished). The Board, however, noted that subsequent to the issuance of Judge Giesey's Decision and Order, the United States Supreme Court invalidated the "true doubt" rule as contrary to the requirements of the Administrative Procedure Act. *See* 5 U.S.C. §556(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct 2251, 18 BLR 2A-1 (1994). Because Judge Giesey's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(c)(4) were based upon his utilization of the subsequently invalidated "true doubt" rule, the Board vacated Judge Giesey's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(c)(4), and remanded the case for further consideration. *Id.* Scalf Engineering Company, Incorporated (Scalf) subsequently filed a motion for reconsideration. In granting Scalf's motion for reconsideration, the Board affirmed Judge Giesey's finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis.

Due to Judge Giesey's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Scalf 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.[1]

[1]Inasmuch as no party challenges the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board 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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). We disagree. The administrative law judge properly accorded the greatest weight to the opinions of Drs. Broudy, Dahhan, Fino, Lane and Branscomb, that claimant was not totally disabled from a pulmonary standpoint, based upon their superior qualifications.[2] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order on Remand at 16. Drs. Broudy, Dahhan, Fino and Lane are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 56; Scalf's Exhibit 1; Hite Preparation Company's (Hite's) Exhibits 4, 5. Dr. Branscomb is Board-certified in Internal Medicine. Hite's Exhibit 9. The only other Board-certified pulmonary specialists of record, Drs. Anderson and Harrison,[3] did not opine that claimant suffered from a totally disabling respiratory or pulmonary impairment.[4] Director's Exhibits 46, 49. The physicians who opined that claimant was totally disabled from a respiratory standpoint, Drs. Arnett, Hieronymous, Sundaram, Clarke and Martin, are not Board-certified in either Internal Medicine or Pulmonary Disease.[5] Director's Exhibit 51. Inasmuch as the administrative law judge provided a proper basis for crediting the opinions of Drs. Broudy, Dahhan, Fino, Lane and Branscomb, the Board need not address the reasons which the administrative law judge provided for discrediting the opinions of Drs. Arnett, Hieronymous, Sundaram, Clarke and Martin. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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[2]The administrative law judge also accorded greater weight to Dr. Vuskovich's opinion based upon his status as an internist who "qualifies in the practice of occupational medicine." Decision and Order on Remand at 16. We note that Dr. Vuskovich's qualifications are not found in the record. However, the administrative law judge's reliance upon Dr. Vuskovich's opinion is harmless inasmuch as the remaining physicians with the best qualifications of record each opined that claimant was not totally disabled from a pulmonary standpoint. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3]Drs. Anderson and Harrison are each Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 51.

[4]Dr. Anderson opined that claimant has the respiratory physiological capacity to perform the work of a coal miner. Director's Exhibit 46. Dr. Harrison noted that claimant, based upon the results of his pulmonary function and arterial blood gas studies, could perform arduous manual labor. Director's Exhibit 49.

[5]Drs. Arnett, Hieronymous and Martin are Board-certified in Family Practice. Director's Exhibits 51. The record does not indicate that Drs. Clarke and Sundaram are Board-certified in any specialty. *Id.*

We, therefore, affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c)(4).

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(c), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See 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*). Consequently, we need not address the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge