BRB No. 01-0406 BLA

RALPH RICHMOND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Phillip H. Snelling (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Rita Roppolo (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-BLA-0986) of Administrative Law Judge Donald W. Mosser 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).[1] The administrative law judge considered the claim, which was filed

[1]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

on September 4, 1998, pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). After crediting claimant with four and one-half years of coal mine employment, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) (2000), and total disability under 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, he denied benefits. On appeal, claimant challenges the administrative law judge's length of coal mine employment finding and findings under Sections 718.202(a)(4) (2000) and 718.204(c)(4) (2000). The Director, Office of Workers' Compensation Programs (the Director), responds in support of the 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. 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).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. In its Petition for Review and brief, claimant takes the position that the challenged regulations would not affect the outcome of this case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

In order to establish entitlement to benefits under 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*).

With regard to total disability, claimant contends that the administrative law judge erred in rejecting Dr. Marder's medical opinion and in crediting Dr. Cander's contrary medical opinion.[2] Dr. Marder examined claimant on October 20, 1998, diagnosed claimant with coal workers' pneumoconiosis, and stated that claimant has a "mild impairment by pulmonary function study." Director's Exhibit 7. Dr. Marder further opined that, given the difficulty of claimant's coal mine employment which involved shoveling and drilling coal, and working in dusty environments, claimant is totally disabled from performing his coal mine job. Director's Exhibit 7, Claimant's Exhibits 1, 3. In contrast, Dr. Cander, who reviewed the medical evidence of record, opined that claimant does not suffer from pneumoconiosis, and stated that "there is no evidence of disabling chronic lung disease of any etiology." Director's Exhibit 17.

Claimant raises several arguments in challenging the administrative law judge's weighing of the two medical opinions. Claimant contends that the administrative law judge erred in discounting Dr. Marder's opinion on the ground that the doctor relied upon a coal mine employment history of six and one-half years, as opposed to the four and one-half years of coal mine employment which the administrative law judge found to be established. Claimant further argues that the administrative law judge incorrectly discounted Dr. Marder's opinion on the basis that the doctor relied upon pulmonary function study results which the administrative law judge found are questionable and essentially invalid because claimant put forth submaximal effort. The Director agrees with claimant that the administrative law judge erred in rejecting Dr. Marder's opinion on these two bases, but contends that the administrative law judge's errors are harmless in view of the administrative law judge's otherwise proper bases for discounting Dr. Marder's opinion and crediting the opinion of Dr. Cander. We hold that to the extent the administrative law judge improperly discounted Dr. Marder's opinion by finding that Dr. Marder relied upon an exaggerated coal mine

[2]The opinions of Drs. Marder and Cander are the only two medical opinions of record probative on the issue of total disability. Director's Exhibits 7, 17, 29; Claimant's Exhibits 1, 3.

employment history and invalid pulmonary function test results, such errors were harmless in light of the administrative law judge's alternate reasons for discounting Dr. Marder's opinion in favor of Dr. Cander's opinion, discussed *infra*. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

The administrative law judge properly accorded determinative weight to Dr. Cander's opinion, finding that Dr. Cander's opinion is well-reasoned and consistent with the objective medical evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 8; Director's Exhibits 17, 29. The administrative law judge properly discounted Dr. Marder's opinion as not well-reasoned, finding that Dr. Marder's opinion is inconsistent with the objective medical evidence produced at the time of his examination. *See Clark, supra*; Decision and Order at 8; Director's Exhibit 7; Claimant's Exhibits 1, 3. This objective evidence consists of a normal arterial blood gas study and a non-qualifying pulmonary function study administered on October 20, 1998, the results of which the administrative law judge rationally concluded were "near normal."[3] Decision and Order at 8; Director's Exhibit 6. Claimant's contention that Dr. Marder's opinion is entitled to greater weight than Dr. Cander's opinion in light of Dr. Marder's qualifications and status as an examining physician is misplaced. Although Dr. Marder is Board-certified in occupational diseases and Dr. Cander is not,[4] and although Dr. Marder examined claimant, the administrative law judge was not required to credit Dr. Marder's opinion on these bases where he found that Dr. Marder's opinion was not well-reasoned, and was thus flawed. *See Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, there is no merit to claimant's contention that Dr. Marder's opinion should have been accorded determinative weight on the ground that Dr. Marder understood the exertional requirements of claimant's last coal mine employment, while Dr. Cander did not. Notwithstanding that Dr. Cander reviewed all of the medical evidence of record, including Dr. Marder's report in which Dr. Marder noted that claimant

[3]The administrative law judge correctly stated that the pulmonary function study relied upon by Dr. Marder produced non-qualifying, near normal values. Decision and Order at 7-8; Director's Exhibit 6. The administrative law judge further correctly stated, "[m]oreover, Dr. Cohen, who performed the study, noted that [claimant's] effort was 'submaximal' and that he had normal lung volumes and diffusion and only 'mildly reduced FEV1 and FEV1/FVC ratio.'" Decision and Order at 8; Director's Exhibit 6. The administrative law judge concluded that, therefore, the validity of the study is "questionable." Decision and Order at 8.

[4]Both Drs. Marder and Cander are Board-certified in internal medicine. Director's Exhibits 7, 16.

performed heavy labor shoveling and drilling coal, Dr. Cander's finding that claimant does not have *any* pulmonary impairment need not have been expressed in terms of the exertional requirements of claimant's coal mine employment. *See Wetzel, supra*. We, therefore, affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4) (2000). *See* 20 §718.204(b)(iv). Additionally, we affirm, as unchallenged on appeal, the administrative law judge's determination that claimant failed to establish total disability pursuant to Section 718.204(c)(1)-(3) (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 20 C.F.R. §718.204(b)(i)-(iii); Decision and Order at 8.

Because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204 (b)(i)-(iv), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits. *See* 20 C.F.R. §718.204(b); *Trent, supra*; *Gee, supra*; *Perry, supra*. We, therefore, need not address claimant's contentions with respect to the administrative law judge's length of coal mine employment and Section 718.202(a)(4) (2000) findings.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge