BRB No. 06-0473 BLA

MARCUS COMBS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 01/30/2007
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY INVESTMENTS, 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 Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Marcus Combs, Beaver Dam, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (05-BLA-5397) of Administrative Law Judge Daniel F. Sutton rendered 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). Claimant

filed his claim for benefits on February 25, 2002. Director's Exhibit 2. The administrative law judge credited claimant with forty-three years of coal mine employment, as stipulated by the parties, and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203. However, the administrative law judge found that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202-718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge correctly found that two of the three pulmonary function studies of record were nonqualifying.[1] Decision and Order at 12; Director's Exhibit 11; Employer's Exhibit 2. Although the remaining April 4, 2005 pulmonary function study was qualifying, the administrative law judge properly found that it was not in substantial compliance with the applicable quality

[1] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

standards for this type of evidence.[2] *See* 20 C.F.R. §§718.101(b), 718.103; Decision and Order at 10, 12; Claimant's Exhibit 1. Because the April 4, 2005 study was not in substantial compliance with the applicable quality standards, the administrative law judge correctly found that it was insufficient to establish total disability. *See* 20 C.F.R. §718.101(b)(providing that medical evidence which is not in "substantial compliance" is "insufficient to establish the fact for which it is proffered"). We therefore affirm the administrative law judge's finding that the pulmonary function studies did not establish total disability pursuant to Section 718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge accurately found that both blood gas studies of record were nonqualifying. Decision and Order at 12; Director's Exhibit 11; Employer's Exhibit 2. We therefore affirm the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[3]

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Simpao, Repsher, and Fino. Dr. Simpao opined that claimant has a mild impairment that prevents him from "perform[ing] the physical labor required by his last coal mining job as a repairman." Director's Exhibits 11, 27-3. By contrast, Drs. Repsher and Fino concluded that claimant has no respiratory or pulmonary impairment and retains the respiratory capacity to perform his last coal mining job, even assuming it required heavy or arduous labor. Employer's Exhibits 2, 3.

The administrative law judge permissibly found that Dr. Simpao did not explain how either the ventilatory perfusion mismatch that Dr. Simpao noted on claimant's blood gas study or the pulmonary function study he interpreted as "normal" supported his

[2] The administrative law judge accurately found that the April 4, 2005 pulmonary function study lacked any statement from the administering physician or technician indicating claimant's ability to understand and follow instructions, or his degree of cooperation in performing the study. Decision and Order at 10 n.10, 12; 20 C.F.R. §718.103(b)(5). Additionally, the administrative law judge accurately determined that the report of the April 4, 2005 study noted "poor test reproducibility" and listed a 33.5% variation between claimant's FEV1 values, in excess of the 5% variation limit allowed in the quality standards for pulmonary function testing. *See* 20 C.F.R. Part 718, App. B(2)(ii)(G); Claimant's Exhibit 1.

[3] The administrative law judge did not discuss whether claimant could establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Any error by the administrative law judge was harmless, since a review of the record discloses no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

opinion that claimant cannot perform his last coal mine job. *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 and n.4 (1993); Director's Exhibit 11 at 3. Additionally, since claimant's testimony was that his last coal mine job for several years was as a hoist engineer, which was "a less demanding job" than that of a repairman, Decision and Order at 12, the administrative law judge reasonably found that Dr. Simpao's opinion was based on an inaccurate understanding of claimant's usual coal mine employment.[4] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In view of the "deficiencies in Dr. Simpao's opinion," Decision and Order at 13, and in light of the contrary opinions from Drs. Repsher and Fino, the administrative law judge permissibly found that claimant did not meet his burden to prove by a preponderance of the evidence that he is totally disabled. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv), which we therefore affirm.

Because claimant failed to establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

[4] As summarized by the administrative law judge, claimant testified that he worked as a hoist engineer from approximately 1975 until his retirement in 1991. Decision and Order at 3; Hearing Transcript (Tr.) at 38-39, 42-43; Director's Exhibit 3. Claimant indicated that this job required him to sit for three hours, stand for five, and lift eighty to ninety pounds, twenty times per day. Decision and Order at 3; Director's Exhibit 3. Previously, claimant worked as a repairman. Director's Exhibit 3. Claimant also testified that he was able to perform the duties of a hoist engineer, but not those of a repairman, until his retirement in 1991. Tr. at 63-64. Review of the record reflects that claimant also testified that his job as a hoist engineer required "no physical labor." Tr. at 41.

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