BRB No. 06-0614 BLA

WAYNE CLARK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NBC ENERGY, INCORPORATED	)	
	)	DATE ISSUED: 01/31/2007
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 Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Wayne Clark, Tram, Kentucky, *pro se*.

David H. Neely (Neely & Reynolds), Prestonsburg, Kentucky, 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-5515) of Administrative Law Judge Paul H. Teitler, rendered on an initial claim filed on February 5, 2004 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). The administrative law judge credited claimant with ten years of coal mine employment.[1] The administrative law judge found that the medical evidence did not

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 4, 5, 6, 7, 8. Accordingly, this case arises within the jurisdiction of

establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's 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 Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In considering whether claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered two pulmonary function studies dated April 24, 2004 and June 10, 2004. Decision and Order at 9; Director's Exhibits 11, 36. The administrative law judge correctly found that both pulmonary function studies were non-qualifying. Decision and Order at 9; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*). Because substantial evidence supports the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), the finding is affirmed.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge summarized the results of two blood gas studies dated April 24, 2004 and June 10, 2004. Director's Exhibits 11, 36. The administrative law judge correctly found that both blood gas studies were non-qualifying at rest and with exercise, and they were interpreted as within normal limits by the physicians who administered them. Decision and Order at 9; *Perry*, 9 BLR at 1-2. Because substantial evidence supports the administrative law judge's finding that there was no blood gas study evidence to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), we must affirm it.

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge correctly found that the record contains no evidence of cor pulmonale with right-sided congestive

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the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

heart failure. *Burks v. Hawley Coal Mining Corp.*, 2 BLR 1-323 (1979). Accordingly, that method of establishing total disability is inapplicable to this claim.

The medical opinion evidence of record indicates that none of the examining physicians opined that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Anderson's 1985 deposition testimony indicated that claimant had the pulmonary capacity to perform hard manual labor outside the mines. Director's Exhibit 40 at 26; Decision and Order at 10. Dr. Penman's 1985 deposition testimony indicated that claimant had the capacity to perform manual labor away from a dusty environment, and that claimant's weight could be contributing to his shortness of breath. Director's Exhibit 40 at 45, 46; Decision and Order at 10. Dr. Ammisetty diagnosed claimant with chronic bronchitis due to occupational dust exposure, but stated it had a mild effect on claimant's impairment. Director's Exhibit 11 at 16; Decision and Order at 10. Dr. Fino examined claimant and concluded that claimant is neither partially nor totally disabled from performing his last coal mining job. Director's Exhibit 36 at 8; Decision and Order at 10-11. Because none of the medical opinions indicates that claimant has a totally disabling respiratory impairment, the administrative law judge reasonably found that claimant failed to establish total disability by medical opinion. *Perry*, 9 BLR at 1-2; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Accordingly, we affirm the administrative law judge's conclusion that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because claimant failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), a necessary element of entitlement under Part 718, we affirm the denial of benefits.

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