BRB No. 07-0491 BLA

A.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADDINGTON, INCOPORATED	)	DATE ISSUED: 01/17/2008
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

A.M., Switzer, West Virginia, *pro se*.

Francesca Tan (Jackson Kelly P.L.L.C.), Morgantown, West Virginia, for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Deputy 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (2006-BLA-5291) of Administrative Law Judge Michael P. Lesniak 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). The administrative

law judge found that the claimant established twenty-three years of qualifying coal mine employment, and adjudicated this claim, filed on January 27, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. Decision and Order at 2. The administrative law judge determined that the evidence of record was insufficient to establish either the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Claimant specifically argues that the blood gas studies of record fail to reflect his exercise capacity, and that Dr. Mullins's change of position on the issue of total disability is suspect. Employer has responded, urging affirmance, and the Director, Office of Workers' Compensation Programs, has chosen not to participate in this 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 and is in accordance with law.[1] *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Regarding the issue of total respiratory disability, the administrative law judge rationally found that Section 718.204(b)(2)(iii) was inapplicable, as the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 9.

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3-7.

Additionally, the administrative law judge accurately reviewed the pulmonary function tests of record, and determined that although the March 16, 2005 study produced qualifying results, Director' Exhibit 11, the two subsequent tests conducted on September 12, 2005 and November 16, 2005 were non-qualifying.[2] Employer's Exhibits 1, 2. As Drs. Mullins, Zaldivar, and Crisalli, the three physicians who conducted the tests, agreed that the most recent test results were normal and demonstrated that claimant was not totally disabled, the administrative law judge rationally concluded that claimant had failed to carry his burden pursuant to Section 718.204(b)(2)(i). Decision and Order at 9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Likewise, the administrative law judge's determination that the blood gas studies of record all produced non-qualifying values and thus did not support a finding of total disability pursuant to Section 718.204(b)(2)(ii) is supported by substantial evidence. *Id*.; Decision and Order at 9. Claimant maintains that Dr. Mullins was the only physician to conduct a blood gas study after exercise, and that "[t]o deny my benefits without giving me the same opportunity as other claimants is simply unjust." Claimant's argument is without merit. The regulations provide that post-exercise blood gas studies need not be conducted where exercise is medically contraindicated. *See* 20 C.F.R. §718.105(b); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997). As Dr. Mullins's post-exercise blood gas studies produced non-qualifying values, and Drs. Crisalli and Zaldivar both noted that exercise was contraindicated due to claimant's cardiac condition, the administrative law judge properly found that claimant failed to meet his burden at Section 718.204(b)(2)(ii). Employer's Exhibits 1, 2; *Id*.

Lastly, the administrative law judge accurately reviewed the medical opinions of Drs. Mullins,[3] Crisalli[4] and Zaldivar[5] pursuant to Section 718.204(b)(2)(iv), and found

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[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendices B, C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[3] Dr. Mullins conducted an examination of the claimant on March 16, 2005. Her finding of the existence of pneumoconiosis was based on Dr. Rasmussen's reading of a March 16, 2005 x-ray as 1/1 for pneumoconiosis. Director's Exhibit 11. Additionally, based on the results of the March 16, 2005 pulmonary function study, Dr. Mullins found claimant to be totally disabled. Director's Exhibit 11.

[4] Dr. Crisalli examined claimant on October 13, 2005, reported no radiographic evidence of pneumoconiosis, noted no evidence of obstruction based on pulmonary function tests and diagnosed claimant with no evidence of pneumoconiosis, or pulmonary impairment, but rather with coronary artery disease. Dr. Crisalli further concluded that

that the evidence unanimously supported a finding of no total disability. Decision and Order at 10. Contrary to claimant's contention that Dr. Mullins's change of position on total disability is suspect, the administrative law judge properly credited Dr. Mullins's opinion as set forth in her March 7, 2006 deposition. Decision and Order at 9-10; Employer's Exhibit 3; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Dr. Mullins explained that initially she had considered that claimant was totally disabled based on the qualifying results of a March 16, 2005 pulmonary function test, Director's Exhibit 11, however, after review of the most recent pulmonary function studies conducted in September and December 2005, she no longer believed claimant was impaired, even though she acknowledged the presence of radiographic coal worker's pneumoconiosis. Decision and Order at 9-10; Employer's Exhibit 3.

The administrative law judge's finding that claimant did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) is rational and supported by substantial evidence. Thus, it is affirmed. *Compton*, 211 F.3d at 208-09, 22 BLR at 2-169-70. Because claimant has failed to establish total disability, an essential element of entitlement, we affirm the administrative law judge's denial of benefits. Thus, we need not reach the issue of the existence of pneumoconiosis. *See Anderson*, 12 BLR at 1-114.

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claimant retained the pulmonary capacity to continue his previous coal mine employment. Employer's Exhibits 1, 4.

[5] Dr. Zaldivar examined claimant on December 8, 2005 and found no x-ray evidence of pneumoconiosis, and a minimal reversible obstruction on pulmonary function tests, which he attributed to poor effort on the claimant's part. Dr. Zaldivar concluded that claimant's lung volumes were normal, his blood gas studies were normal, and there was no evidence to suggest pneumoconiosis or any pulmonary impairment. Employer's Exhibit 2. Dr. Zaldivar further concluded that claimant was fully capable of performing his usual coal mine employment. Employer's Exhibits 2, 5.

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