BRB No. 08-0411 BLA

C.E.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 01/30/2009
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

C.E.C., Mt. Hope, West Virginia, *pro se*.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (2004-BLA-6624) of Administrative Law Judge Stephen L. Purcell 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).[1] The administrative law judge credited claimant with 2.68 years of qualifying coal mine employment, and adjudicated this claim, filed on October 30, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. After determining that the issue of the

[1] The parties agreed to cancel the hearing and requested a decision on the record. Decision and Order at 2.

existence of pneumoconiosis was not contested,[2] the administrative law judge found that the evidence of record was sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), but insufficient to establish total respiratory disability 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 findings regarding the length of coal mine employment and total disability at Section 718.204(b). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, challenging the administrative law judge's weighing of the pulmonary function study evidence at Section 718.204(b)(2)(i).

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *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 supported by substantial evidence, are rational, and are consistent with applicable law.[3] 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 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, 718.203, 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).

Claimant initially challenges the administrative law judge's finding as to the length of his coal mine employment, asserting that the actual time he was employed in the coal mining industry was twenty-two years, off and on. The administrative law judge reviewed the relevant evidence of record and acknowledged claimant's allegations of employment "off and on" as a motorman, brakeman and construction driver from 1972 to 1991, but found no credible evidence documenting this employment. In so finding, the

[2] The Director conceded the presence of pneumoconiosis. Director's Exhibit 14.

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

administrative law judge noted that claimant's testimony was vague and that there was no evidence that established how many hours per week, or weeks per year, claimant worked during that period, or how much time elapsed between job assignments. Decision and Order at 5-6. Moreover, the administrative law judge was unable to discern from the record whether claimant's duties as a construction driver constituted qualifying coal mine employment. Decision and Order at 6; *see* 20 C.F.R. §725.202; *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990)(*en banc*). Consequently, the administrative law judge acted within his discretion in crediting claimant with 2.68[4] years of coal mine employment from 1945 to 1950, based on claimant's work history form, Director's Exhibit 3, the Coal Mine Employment Determination form, Director's Exhibit 6, the Social Security Administration records, Director's Exhibit 5, and the district director's calculation of employment, Director's Exhibit 12. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). As the administrative law judge's findings as to the length of claimant's qualifying coal mine employment are supported by substantial evidence, they are affirmed. We note, furthermore, that even if claimant were able to establish twenty-two years of coal mine employment, as alleged, it would not affect claimant's entitlement to benefits, as the administrative law judge found that claimant's pneumoconiosis arose in part out of coal mine employment pursuant to Section 718.203(c) without benefit of the ten year presumption. *See* 20 C.F.R. §718.203(b); *Sertich v. Director, OWCP*, 7 BLR 1-233 (1984).

Regarding the merits, claimant generally contends that the administrative law judge erred in failing to find total disability established. In his consideration of the evidence at Section 718.204(b)(2), the administrative law judge accurately determined that the two blood gas studies of record produced non-qualifying values,[5] and properly concluded that claimant could not establish total disability at Section 718.204(b)(2)(ii). Decision and Order at 4, 9; Director's Exhibit 9; Claimant's Exhibit E. Additionally, the administrative law judge determined that there was no evidence of cor pulmonale with right-sided congestive heart failure, and properly concluded that claimant could not establish total disability at Section 718.204(b)(2)(iii). Decision and Order at 9.

[4] The "coal mine employment credited" on the Coal Mine Employment Determination form was incorrectly added together to total 2.68 years instead of 2.69 years. Director's Exhibit 6.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

In evaluating the medical opinions of record pursuant to Section 718.204(b)(2)(iv), the administrative law judge permissibly found that the opinion of Dr. Garretson, that claimant had a moderately severe restrictive defect and a mild obstructive defect, was insufficient to support a finding of total respiratory disability because the ventilatory study the physician relied upon was not contained in the record and thus, its validity could not be determined. Decision and Order at 10-11; Claimant's Exhibits D, E; *cf. Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge determined that the ventilatory study conducted by Dr. Thompson was also not contained in the record, and properly found that Dr. Thompson's report was insufficient to establish total disability because the physician offered no opinion as to the extent of any respiratory or pulmonary impairment found. Decision and Order at 10; Claimant's Exhibit A; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Similarly, the administrative law judge permissibly found that Dr. Doyle's opinion, that claimant's capacity for work was "impaired" by pneumoconiosis, was insufficient to establish total disability, as the physician failed to indicate the extent to which claimant's capacity for work was impaired; he provided no rationale for his conclusions; and he did not demonstrate an awareness of the exertional requirements of claimant's usual coal mine employment. Decision and Order at 10; Director's Exhibit 10; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields*, 10 BLR 1-19. Lastly, the administrative law judge acted within his discretion in finding that the opinion of Dr. Porterfield, that claimant suffered a twenty percent impairment and was totally disabled from performing his last coal mine employment, was not well-reasoned and could not support a finding of total disability, as the physician failed to explain how the underlying documentation supported his conclusions; he demonstrated no knowledge of the exertional requirements of claimant's job duties; and his opinion was based on an incorrect and overstated length of coal mine employment. Decision and Order at 9-10; Director's Exhibit 9; *see Lane*, 105 F.3d 166, 21 BLR 2-34; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19. The administrative law judge's findings pursuant to Section 718.204(b)(2)(ii)-(iv) are supported by substantial evidence and are affirmed.

We find merit, however, in the Director's contention that the administrative law judge's weighing of the pulmonary function studies of record at Section 718.204(b)(2)(i) cannot be affirmed. In his consideration of the seven pulmonary function studies of record, the administrative law judge accurately determined that the studies obtained on March 23, 2001, Claimant's Exhibit A, and November 18, 2003, Director's Exhibit 10, the values of which were recorded in the medical reports of Drs. Thompson and Garretson, respectively, were not in compliance with the regulations because they were unaccompanied by laboratory reports to verify the accuracy of the reporting or the validity of the testing. Thus, the administrative law judge properly accorded no weight to these studies. Decision and Order at 8; *see* 20 C.F.R. §718.103; *Budash*, 16 BLR 1-27.

In reviewing the remaining five studies, the administrative law judge correctly determined that the tests obtained on March 23, 2004, Director's Exhibit 10, and on September 2, 2005, Claimant's Exhibit H, produced qualifying values, while the test obtained on May 10, 2002, Claimant's Exhibit E, produced qualifying values pre-brochodilator, but non-qualifying values post-bronchodilator, and the tests obtained on September 22, 2000, Director's Exhibit 9, and December 4, 2003, Director's Exhibit 10, produced nonqualifying values. Decision and Order at 3, 9. The administrative law judge then compared the FEV_1 and FVC values of the five tests and stated:

> In looking at the FEV_1 values from 2000 to 2005 respectively . . . there does not appear to be any permanent decline in the FEV_1. In fact, the FEV_1 in 2000 . . . is nearly identical to that in 2005. . . . In looking at the FVC values for this same time frame . . . it seems as though the FVC may be on the decline which would account for the qualifying values on the most recent studies. However in 2002, the FVC had dropped to 2.04 but in the 2003 vent study it was 2.77. Based on the variability in the test results it is difficult to determine whether Claimant's FVC is truly declining or whether the differences noted are due instead to some acute illness.

Decision and Order at 9. The administrative concluded that this evidence was "at best equivocal," and thus insufficient to establish total disability. *Id.* However, as the administrative law judge did not reference any medical evidence to support his conclusion that the variability in the test results could be due to acute illness, we agree with the Director's argument that the administrative law judge appears to have conducted a medical, rather than legal, analysis of the pulmonary function studies, which is improper. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(i), and remand this case for a reevaluation and weighing of the evidence thereunder, including an assessment of the validity of the tests.[6] If, on remand, the administrative law judge finds that the pulmonary function study evidence of record is sufficient to establish total disability, he must determine whether the weight of the relevant evidence, like and unlike, is sufficient to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), *see Fields*, 10 BLR 1-19, and if reached, whether the evidence establishes that

[6] The Director notes that the three tests that produced qualifying values are contained in claimant's treatment records and are not signed or attested to by any physician. Although treatment records are not required to conform to the regulatory quality standards, the Director correctly maintains that the administrative law judge must nevertheless determine whether they are reliable. Director's Brief at 2-3; *see* 20 C.F.R. §718.101(b); 65 Fed. Reg. 79928 (Dec. 20, 2000).

pneumoconiosis is a substantially contributing cause of disability pursuant to Section 718.204(c).[7]

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[7] The Director further maintains that if, on remand, the administrative law judge again finds that the evidence of record is insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2), this case must be remanded to the district director in order for him to obtain a supplemental opinion from Dr. Porterfield that will cure any defect in his opinion on the issues of total disability and disability causation. Dr. Porterfield conducted the pulmonary evaluation required under Section 413(b) of the Act for the Department of Labor (DOL). In these circumstances, where the administrative law judge has found that Dr. Porterfield's opinion is unreasoned because the physician failed to provide sufficient information or relied upon erroneous information in addressing an essential element of entitlement, the Director contends that the Department of Labor's obligation to provide claimant with a complete and credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim, as required by the Act and regulations, has not been satisfied. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.406; *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*).