BRB No. 08-0446 BLA

F.T.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROCHESTER & PITTSBURGH COAL	)	DATE ISSUED: 01/26/2009
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

F.T.R., Apollo, Pennsylvania, *pro se*.[1]

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (07-BLA-5339) of Administrative Law Michael P. Lesniak denying benefits 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). This case involves a subsequent

[1] Lynda Glagola, Program Director of Lungs at Work in McMurray, Pennsylvania, requested on behalf of claimant that the Board review the administrative law judge's decision, but Ms. Glagola is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995) (Order).

claim filed on December 16, 2005.[2] After crediting claimant with thirty-eight years of coal mine employment,[3] the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. 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).

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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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[2] Claimant filed a previous claim for benefits on August 28, 1996. Director's Exhibit 1. On November 22, 1996, the district director ordered claimant to show cause within thirty days why his claim should not be denied by reason of abandonment. *Id.* When claimant failed to file any response, his claim was denied by reason of abandonment. The regulations provide that, "[f]or purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). There was no medical evidence submitted in connection with claimant's 1996 claim.

[3] The record reflects that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In considering whether the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three pulmonary function studies conducted on April 10, 2006, November 27, 2006, and January 10, 2007. The April 10, 2006 pulmonary function study produced qualifying values both before and after the administration of bronchodilators.[4] Director's Exhibit 11. The November 27, 2006 pulmonary function study also produced qualifying values. Employer's Exhibit 1. However, the most recent pulmonary function study, conducted on January 10, 2007, produced non-qualifying values both before and after the administration of bronchodilators. Employer's Exhibit 3.

In considering claimant's April 10, 2006 pulmonary function study, the administrative law judge noted that Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, concluded that the test was invalid because of "a premature termination to exhalation and a lack of reproducibility in the expiratory tracings." *See* 20 C.F.R. §718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993); Decision and Order at 16; Employer's Exhibit 1. The administrative law judge considered the report of Dr. Kucera, an equally qualified physician, validating the April 10, 2006 pulmonary function study, but permissibly accorded it less weight because Dr. Kucera merely checked a box indicating that the study was valid without offering any explanation for his opinion.[5] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998) (holding that a physician's check-box validation of an arterial blood gas study "lent little additional persuasive authority" to the study); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997) (noting lack of detail in validation of a qualifying blood gas study and affirming administrative law judge's conclusion that arterial blood gas studies did not establish total disability); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 16; Director's Exhibit 13. Consequently, the administrative law judge permissibly found that the April 10, 2006 pulmonary function study was invalid.

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[4] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values.

[5] The record reflects that Dr. Celko, the physician who administered the April 10, 2006 pulmonary function study, did not directly comment upon its validity. Director's Exhibit 11. Although the pulmonary function study report lists claimant's cooperation as "good," it also notes that claimant was "fatiqued [sic] throughout [the] testing." *Id.*

The administrative law judge also permissibly found that the November 27, 2006 pulmonary function study was invalid because Dr. Fino, the administering physician, opined that the study was invalid due to "a premature termination to exhalation and a lack of reproducibility in the expiratory tracings."[6] Decision and Order at 16; Employer's Exhibit 1.

Because the only valid pulmonary function study of record, the study conducted on January 10, 2007, was non-qualifying, Employer's Exhibit 3, the administrative law judge found that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Because it is supported by substantial evidence, this finding is affirmed.

The record contains the results of three arterial blood gas studies conducted on April 10, 2006, November 27, 2006, and January 10, 2007. Director's Exhibit 11; Employer's Exhibits 1, 3. Of these three arterial blood gas studies, only the study conducted on January 10, 2007 produced qualifying values. Employer's Exhibit 3. However, the administrative law judge noted that Dr. Pickerill, the physician who administered the January 10, 2007 arterial blood gas study, opined that the reduced PCO2 value on that test "was probably due to temporary hyperventilation."[7] Decision and Order at 16. Based on Dr. Pickerill's explanation, the administrative law judge acted within his discretion in determining that the January 10, 2007 arterial blood gas study was an "anamoly" and, therefore, was unreliable as an indicator of claimant's respiratory function. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). The administrative law judge also noted that the other two arterial blood gas studies, taken within a nine month period of claimant's qualifying study, were non-qualifying. Decision and Order at 16. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Because there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that total disability pursuant to 20

[6] The administrative law judge accurately noted that no other physician commented on the validity of claimant's November 27, 2006 pulmonary function study. Decision and Order at 16.

[7] After reviewing the PCO2 values from the April 10, 2006 and November 27, 2006 arterial blood gas studies, Dr. Pickerill opined that the likely explanation for claimant's lower PCO2 value on the January 10, 2007 study was "temporary hyperventilation, which can rapidly change the PCO2 [value] depending on how deep or rapidly someone breaths [sic] temporarily." Employer's Exhibit 9 at 26-27.

C.F.R. §718.204(b)(2)(iii) was not established. Decision and Order at 16.

The administrative law judge finally considered the medical opinion evidence. The medical opinion evidence consists of the opinions rendered by Drs. Celko, Fino, and Pickerill. Dr. Celko opined that claimant was totally disabled from a pulmonary standpoint. Director's Exhibit 11. Conversely, Drs. Fino and Pickerill each opined that claimant did not suffer from a totally disabling pulmonary impairment. Employer's Exhibits 1-3, 9.

Although Dr. Celko opined that claimant was totally disabled from a pulmonary standpoint, the administrative law judge permissibly discredited his opinion because he found that it was not sufficiently reasoned.[8] *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order at 17-18; Director's Exhibit 11. The administrative law judge also permissibly accorded greater weight to Dr. Pickerill's opinion, that claimant was not totally disabled from a pulmonary standpoint, because he found that it was better supported by the objective evidence of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 17; Employer's Exhibits 3, 9. The administrative law judge also correctly noted that Dr. Pickerill's opinion was supported by that of Dr. Fino. Decision and Order at 17; Employer's Exhibits 1, 2. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we need not address the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] Dr. Celko did not provide an explanation for his finding that claimant was totally disabled from a pulmonary standpoint. *See* Director's Exhibit 11. Because the administrative law judge provided a proper basis for discrediting Dr. Celko's opinion, *i.e.*, that his opinion was not sufficiently reasoned, the administrative law judge's error, if any, in discrediting Dr. Celko's opinion for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge