BRB No. 09-0390 BLA

EUGENE ELKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/28/2010
	)	
DICKENSON RUSSELL COAL COMPANY	)	
	)	
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 – Denial of Benefits of Administrative Law Judge Edward Terhune Miller, United States Department of Labor.

Eugene Elkins, Swords Creek, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denial of Benefits (2007-BLA-5535) of Administrative Law Judge Edward Terhune Miller with respect to a claim filed on March 24, 2006, 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). After crediting claimant with at least twenty-five years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge concluded that claimant did not establish the existence of clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), or total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

Claimant generally challenges the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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.[1] 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 20 C.F.R. 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).

In considering whether claimant established total disability at 20 C.F.R. §718.204(b)(2), the administrative law judge considered the results of seven pulmonary function studies,[2] three arterial blood gas studies and the medical opinions of Drs. Forehand, Sheikh, Hippensteel, and Castle.

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

[2] Claimant's recorded height varied from 68 inches to 72 inches. Director's Exhibits 11, 16, 17; Employer's Exhibits 3-5. The administrative law judge stated that, in determining whether the pulmonary function studies were qualifying, he used 70.2 inches, which was the height recorded in conjunction with the most recent pulmonary function study, but did not explain why he selected this figure. Decision and Order at 13, *citing Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Error, if any, in the absence of an explicit rationale for designating 70.2 inches as claimant's height is harmless, however, as the pulmonary function studies are non-qualifying, regardless of which recorded height is used. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We affirm, as supported by substantial evidence, the administrative law judge's determination that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(i), as the results of the pulmonary function studies were non-qualifying.[3] Director's Exhibits 11, 16, 17; Employer's Exhibits 3-5; Decision and Order at 13.

With respect to 20 C.F.R. §718.204(b)(2)(ii), the arterial blood gas study obtained by Dr. Forehand on April 6, 2006, produced qualifying results but the two studies performed on September 28, 2006 and December 19, 2007, by Drs. Hippensteel and Castle, respectively, were non-qualifying. Director's Exhibits 11, 16; Employer's Exhibit 5. We affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(ii), on the ground that a preponderance of the blood gas study evidence was non-qualifying. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); Decision and Order at 13.

With respect to 20 C.F.R. §718.204(b)(2)(iii), we affirm the administrative law judge's determination that claimant did not establish total disability under this subsection, as the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 13.

Regarding 20 C.F.R. §718.204(b)(2)(iv), the physicians rendered conflicting opinions as to whether claimant is totally disabled. Dr. Forehand examined claimant on April 6, 2006, at the request of the Department of Labor, and found that he is totally and permanently disabled due to a significant respiratory impairment, based on his blood gas study results. Director's Exhibit 11.

Dr. Sheikh, claimant's treating physician, recommended that claimant cease all coal dust exposure. Director's Exhibit 17; *see also* Director's Exhibit 15; Claimant's Exhibit 1.

Dr. Hippensteel examined claimant on September 28, 2006, and reviewed additional medical records. Director's Exhibit 16. Dr. Hippensteel determined that, in light of the normal ventilatory function demonstrated on most of the claimant's pulmonary function studies, there was no evidence that claimant has a permanent pulmonary impairment. *Id.* Based on the normal gas exchange results on the blood gas study he performed, Dr. Hippensteel also opined that the blood gas study obtained by Dr.

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

Forehand did not support the diagnosis of a permanent gas exchange impairment. *Id*. Dr. Hippensteel reiterated these findings in his supplemental report and deposition. Employer's Exhibits 1, 6.

Dr. Castle, based on an examination of claimant on December 19, 2007, and a review of medical records, stated that, even if he assumed that claimant had x-ray evidence of simple pneumoconiosis, there was no evidence of a totally disabling respiratory impairment, based on the results of the pulmonary function and arterial blood gas studies. Employer's Exhibit 5. Dr. Castle further noted that claimant had a "marked response" to the administration of bronchodilators and that the results of claimant's pulmonary function studies were more consistent with an asthmatic process. *Id*. At his deposition, Dr. Castle reiterated the findings from his report. Employer's Exhibit 10 at 24.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge permissibly found that Dr. Sheikh's opinion was not sufficient to prove total disability, as he advised claimant to avoid further coal dust exposure, but did not otherwise indicate that claimant is totally disabled. *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Taylor v. Evans & Gambrel Co*., 12 BLR 1-83 (1988); Decision and Order at 13-14. The administrative law judge also rationally determined that Dr. Sheikh's opinion did not outweigh the reasoned opinions of Drs. Hippensteel and Castle, despite his status as claimant's treating physician, because Dr. Sheikh's opinion on the issue of total disability was "not sufficiently reasoned and documented to accord [it] deferential weight." Decision and Order at 14; 20 C.F.R. §718.104(d)(5); *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). The administrative law judge also acted within his discretion in discounting Dr. Forehand's opinion, as compared to the opinions of Drs. Hippensteel and Castle, because they are Board-certified in pulmonary medicine, while Dr. Forehand is Board-eligible in pediatric pulmonary medicine. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984); Decision and Order at 14.

Further, the administrative law judge permissibly determined that the opinions of Drs. Hippensteel and Castle were entitled to more weight because they were better supported by the objective medical data and were also based on a review of the medical evidence of record, while Drs. Forehand and Sheikh based their findings on their examinations of claimant. *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Minnich v. Pagnotti Enterprises, Inc*., 9 BLR 1-89 (1986); Decision and Order at 14. We affirm, therefore, the administrative law judge's

finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv).[4]

Because we have affirmed the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we must affirm the denial of benefits.[5] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[4] Regarding the availability of the irrebuttable presumption of total disability due to pneumoconiosis, set forth in 20 C.F.R. §718.304, the administrative law judge acted within his discretion in finding that Dr. Forehand's diagnosis of complicated pneumoconiosis, based on his reading of the x-ray dated April 6, 2006, was outweighed by the negative readings of the same film by more highly qualified physicians. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 11; Director's Exhibits 11, 14, 16; Claimant's Exhibit 1; Employer's Exhibits 8, 9.

[5] In light of our affirmance of the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we need not review the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge