BRB No. 12-0216 BLA

GLENN N. HELTON, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EVANS COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 01/23/2013
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Paul C. Johnson, Jr., Associate Chief Administrative Law Judge, United States Department of Labor.

Glenn N. Helton, Sr., Hulen, Kentucky, *pro se*.

William Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Remand - Denying Benefits (2008-BLA-5995) of Associate Chief Administrative Law Judge Paul C. Johnson, Jr., filed on November 13, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). When this case was first before the administrative law judge, he denied benefits because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Consequently, pursuant to claimant's appeal of the administrative law judge's denial of benefits, the Board vacated the administrative law judge's denial and remanded the case for the administrative law judge to reconsider whether claimant was entitled to benefits pursuant to the amended Section 411(c)(4) presumption of the Act. 30 U.S.C. §921(c)(4). *Helton v. Evans Coal Corp.*, BRB No. 10-0412 BLA (Apr. 21, 2011) (unpub.).

On remand, the administrative law judge reconsidered the evidence and found that, as the parties originally stipulated, claimant established sixteen years of coal mine employment. He found, however, that claimant failed to establish that he had at least fifteen years of underground or comparable coal mine employment. The administrative law judge also found that claimant failed to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge found that claimant was not entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4), and denied benefits on the claim.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Workers' Compensation Programs, has not filed a substantive brief in 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 Corp.*, 12 BLR 1-176, 1-177 (1989). 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.[2] 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 finding that claimant was not entitled to the Section 411(c)(4) presumption, the administrative law judge found that claimant failed to establish that he has a totally disabling respiratory impairment pursuant to Section 718.204(b). Specifically, the administrative law judge properly found that the pulmonary function studies of record did not establish total respiratory disability, as both were non-qualifying. 20 C.F.R. §718.204(b)(2)(i). The administrative law judge also properly found that the blood gas study evidence of record did not establish total respiratory disability, as three of the four blood gas studies conducted were non-qualifying.[3] 20 C.F.R. §718.204(b)(2)(ii).

Turning to the medical opinion evidence, the administrative law judge found that it consisted of the reports of Drs. Moore, Forehand, Rosenberg, and Vuskovich. The administrative law judge found that Drs. Moore and Forehand opined that claimant has a totally disabling respiratory impairment, Director's Exhibit 10; Claimant's Exhibit 4, while Drs. Rosenberg and Vuskovich opined that claimant does not have a totally disabling respiratory impairment, Employer's Exhibits 4, 9, 12, 13, 14, 15.

The administrative law judge, however, found that Dr. Moore's opinion was not well-reasoned or well-documented, because the doctor failed to explain how he arrived at his diagnosis and because, although the doctor referred to an abnormal pulmonary function study, he did not specifically state which test was abnormal, or which test he relied upon to come to his conclusion. Decision and Order at 7. The administrative law

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 3.

[3] The administrative law judge also found that there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 4. A totally disabling respiratory impairment cannot, therefore, be established pursuant to 20 C.F.R. §718.204(b)(2)(iii).

judge, therefore, rejected Dr. Moore's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

Regarding the opinion of Dr. Forehand, the administrative law judge found that, although it was well-reasoned and well-documented, it was outweighed by the opinions of Drs. Rosenberg and Vuskovich, which were also well-reasoned and well-documented. Specifically, the administrative law judge noted that the qualifying blood gas study upon which Dr. Forehand partially relied was outweighed by a subsequent non-qualifying blood gas study conducted by Dr. Rosenberg. Further, the administrative law judge noted that both Drs. Rosenberg and Vuskovich had the benefit of reviewing claimant's past and present medical records. The administrative law judge, therefore, permissibly accorded greater weight to the opinions of Drs. Rosenberg and Vuskovich, who found that claimant does not have a disabling respiratory impairment. *See Clark*, 12 BLR at 1-155; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge, therefore, properly found that the medical opinion evidence did not establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In conclusion, the administrative law judge properly found that claimant was not entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, as claimant failed to establish that he has a totally disabling respiratory impairment pursuant to Section 718.204(b). Because claimant failed to establish this requisite element of entitlement pursuant to Section 411(c)(4), we need not consider the administrative law judge's determination that claimant failed to establish at least fifteen years of underground or comparable coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Further, because claimant has failed to establish a totally disabling respiratory impairment, a necessary element of entitlement, claimant is not entitled to benefits pursuant to 20 C.F.R. Part 718. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986).

Accordingly, the administrative law judge's Decision and Order on Remand - 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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BETTY JEAN HALL
Administrative Appeals Judge