BRB No. 97-0698 BLA

LARRY HARRIS Claimant-Petitioner v. C & S MINING CORPORATION and LINKY B COAL COMPANY Employer-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Larry Harris, Rowe, Virginia, *pro se.*

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

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (94-BLA-1739) of Administrative Law Judge John C. Holmes denying benefits on a claim filed

[1] Claimant is Larry Harris, the miner, who filed this application for benefits on September 15, 1993. Director's Exhibit 1. Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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 medical evidence failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Linky B Coal Company and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.[2]

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 Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under 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. *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).

Pursuant to Section 718.204(c)(1), the administrative law judge correctly found that all three pulmonary function studies of record are non-qualifying.[3] Director's Exhibit 14; Employer's Exhibits 3, 5. We therefore affirm the administrative law judge's finding pursuant to Section 718.204(c)(1).

[2] C & S Mining Corporation has not filed a response to claimant's appeal.

[3] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Pursuant to Section 718.204(c)(2), the administrative law judge considered all three blood gas studies and concluded that they did not establish total respiratory disability. The October 6, 1993 study yielded qualifying values at rest, but its exercise values were non-qualifying. Director's Exhibit 16. Dr. Forehand, the administering physician, interpreted the study as showing "hypoxemia [at] rest improvement with exercise," and, based on his otherwise normal examination findings, diagnosed "no respiratory impairment." Director's Exhibit 15. The June 1 and October 24, 1994 studies were non-qualifying. Employer's Exhibits 1, 5. In weighing the blood gas studies, the administrative law judge rationally considered that the two more recent studies were non-qualifying, *see Cooley v. Island Creek Coal Co*., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982), that the exercise values of the October 6, 1993 study were non-qualifying, and that the administering physician, "despite the qualifying resting blood/gas test, finds that [c]laimant can continue to do his usual coal mine employment and has no pulmonary disability." Decision and Order at 4; *see Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(2).[4]

Pursuant to Section 718.204(c)(4), the administrative law judge correctly found that "[n]one of the physicians . . . finds that [claimant] is disabled by a pulmonary impairment." Decision and Order at 4. All of the physicians opined that claimant retains the respiratory pulmonary capacity to perform his usual coal mine employment. Director's Exhibits 15; Employer's Exhibits 1, 3, 5, 7, 8. Drs. Forehand, Fino, and Tuteur diagnosed no respiratory impairment. Director's Exhibit 15; Employer's Exhibits 1, 8. Dr. Iosif, based on his examination and testing, initially detected a "very mild respiratory impairment" based on the pulmonary function study results. Employer's Exhibit 3. After reviewing most of the medical evidence in the record, Dr. Iosif found no "fixed impairment of oxygenation . . . or pulmonary function abnormalities pointing to the presence of significant respiratory impairment," and concluded that claimant retained "more than sufficient pulmonary reserve to continue performing his previous coal mine job." Employer's Exhibit 7. Dr. Stewart diagnosed a "mild respiratory impairment" based on a "minimal defect" in claimant's pulmonary function FVC score. Employer's Exhibit 5.

The administrative law judge permissibly found the opinions of Drs. Tuteur and Stewart to be "convincing" based on their status as "experts in the field," *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and concluded that "claimant is not disabled by a pulmonary impairment." Decision and Order at 4. Substantial evidence supports the administrative law judge's

[4] The administrative law judge did not address 20 C.F.R. §718.204(c)(3). However, review of the record reveals no evidence of cor pulmonale with right-sided congestive heart failure.

finding pursuant to Section 718.204(c)(4), which we therefore affirm. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-24 (4th Cir. 1997).

Because claimant has failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge