BRB No. 94-0380 BLA

THOMAS L. VITITOE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
R. A. EBERTS 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 of Bernard J. Gilday, Jr., Administrative Law Judge, United States Department of Labor.

Rita S. Fuchsman, Chillicothe, Ohio, for claimant.

Marshall B. Douthett, Jackson, Ohio, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-BLA-1110) of Administrative Law Judge Bernard J. Gilday, Jr., 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). The administrative law judge credited claimant with ten years of coal mine employment, and based on the filing date, June 8, 1991, considered the claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge found that employer was the responsible operator, and found the evidence of record sufficient to establish the existence of pneumoconiosis arising from claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203. The administrative law judge also found the evidence

sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), but insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that his total disability was unrelated to pneumoconiosis. Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), has responded to this appeal.

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 by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.[1] Claimant contends that the opinion of Dr. Foglesong that claimant's chronic obstructive pulmonary disease is possibly due to pneumoconiosis, is sufficient to establish that claimant's total disability is due to pneumoconiosis. Thus, claimant asserts that the administrative law judge erred by failing to rely on this opinion. We disagree. There are two medical opinions of record. Dr. Foglesong diagnosed chronic obstructive pulmonary disease, with which a component of pneumoconiosis may be present, and gave as an etiology "[s]moking--possibly pneumoconiosis and exposure to coal dust." Director's Exhibit 15. Dr. Grodner diagnosed chronic obstructive pulmonary disease, opining that it was probably due to smoking, as claimant had not had sufficient coal dust exposure to develop pneumoconiosis. Director's Exhibit 31. In reviewing these two medical opinions in his analysis at Section 718.203, the administrative law judge permissibly accorded less weight to the opinion of Dr. Foglesong as equivocal compared to that of Dr. Grodner. *See* Decision and Order at 9; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In his later analysis of the same two reports at Section 718.204(b), the administrative law judge found them insufficient to establish that claimant's total disability was due to pneumoconiosis, citing his earlier discussion of the two reports. As the administrative law judge had permissibly found Dr. Foglesong's opinion to be equivocal, it was within his discretion to accord it less weight pursuant to Section 718.204(b). *See Justice, supra*; *Snorton v. Zeigler Coal Co*., 9 BLR 1-106 (1986). Thus, we affirm as supported by substantial evidence the administrative law judge's finding that the evidence of record is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

Further, as claimant has failed to establish that his total disability is due to

[1] The administrative law judge's findings of ten years of coal mine employment, that employer is the responsible operator, that the evidence establishes the existence of pneumoconiosis arising from coal mine employment pursuant to 20 C.F.R. §§718.201(a)(1) and 718.203, and total disability pursuant to 20 C.F.R. §718.204(c) are affirmed as they are unchallenged on appeal and supported by substantial evidence. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

pneumoconiosis under 20 C.F.R. §718.204(b), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *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.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge