BRB No. 94-0772 BLA

CLYDE PAYNE Claimant-Petitioner v. GABRIEL MINING COMPANY INCORPORATED and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND Employer/Carrier-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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Clyde Payne, Lejunior, Kentucky, *pro se*.

Edmond A. Siemon (Buttermore, Turner, Lawson & Boggs), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (91-BLA-2259) of Administrative Law Judge Jeffrey Tureck denying benefits on a duplicate 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). Noting that almost all the evidence was produced in the duplicate claim, the administrative law judge assumed *arguendo* that claimant established a material change in conditions and the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge then considered the claim pursuant to 20 C.F.R. Part 718 and found the evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and,

accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer has not responded and the Director, Office of Workers' Compensation Programs, (the Director) has declined to participate in this 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 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 by 30 U.S.C. §932(a); *O'Keefe 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, 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 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 noted that two pulmonary function studies done in October of 1986 yielded qualifying values,[1] while one 1985 study and three 1987 studies were non-qualifying. Dr. Penman, a board-certified internist and pulmonologist, testified that, when evaluating pulmonary function studies, "the highest result would be the most correct," because a low result could be faked while a high result could not. Director's Exhibit 2 at 24-25. Based on this testimony, the administrative law judge accorded the qualifying results of Dr. Penman's and Dr. Clarke's studies less weight than the four studies which produced much higher non-qualifying results. Decision and Order at 3. The administrative law judge noted that Dr. Penman was highly qualified, and concluded that claimant failed to establish total disability through ventilatory studies. *Id*.

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

The administrative law judge permissibly credited Dr. Penman's testimony based on his superior qualifications, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and properly accorded less weight to the two qualifying pulmonary function studies as disparately low in comparison with the other studies. *See Burich v. Jones and Laughlin Steel Corp*., 6 BLR 1-1189 (1984); *Baker v. North American Coal Corp*., 7 BLR 1-79 (1984). Therefore, we affirm the administrative law judge's finding that the pulmonary function study evidence fails to establish total respiratory disability at Section 718.204(c)(1).

At Section 718.204(c)(2) and (c)(3), the administrative law judge correctly noted that none of the blood gas studies yielded qualifying values[2] and that there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 2, 3.

Pursuant to Section 718.204(c)(4), the administrative law judge permissibly accorded less weight to the opinions of Drs. Clarke and Penman finding total respiratory disability because both were based, in part, on pulmonary function studies that the administrative law judge found to be less probative than the non-qualifying studies. Decision and Order at 3-4; *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Williams, Dahhan, Wright, and Broudy finding no respiratory disability as more consistent with the results of their examinations and objective studies.[3] Decision

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

[3] The administrative law judge also found that Dr. Penman's opinion did not establish total respiratory disability because while he opined that claimant was unable to perform sustained hard manual labor, there was no evidence that claimant's coal mine employment required **sustained** hard manual labor. Decision and Order at 4. We note claimant's uncontradicted testimony that as a "jack setter," a job he described as "hard," he moved a forty-to- fifty-pound jack and cable fifteen to twenty feet in twenty-five to thirty inches of coal every five minutes. Hearing Transcript at 15. Because the administrative law judge permissibly credited four other medical reports finding no respiratory disability, thus providing a valid alternative basis for his findings, *see Kozele v. Rochester and Pittsburgh Coal Co*., 6 BLR 1-379 (1983), we decline to address the issue of the exertional requirements of claimant's usual coal mine employment. *See Moseley v. Peabody Coal Co*., 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *Rinkes v. Consolidation Coal Co*., 6 BLR 1-826 (1984); *see also Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon* 9 BLR 1-104 (1986)(*en banc*).

and Order at 4; *see Wetzel, supra*; *Fagg v. Amax Coal Co*., 12 BLR 1-77 (1988). The administrative law judge also permissibly accorded little weight to claimant's state disability award because it does not state the medical basis for the finding of fifty percent impairment due to pneumoconiosis. Director's Exhibit 14; *see Clark, supra*; *Miles v. Central Appalachian Coal Co*., 7 BLR 1-744 (1985). Therefore, we affirm the administrative law judge's finding that the medical opinion evidence fails to establish total respiratory disability at Section 718.204(c)(4).[4]

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, we affirm the denial of benefits.[5] *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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

[4] We note that the record contains no medical opinion from any doctor described as claimant's treating physician. *See Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 17 BLR 2-16 (1993).

[5] Because we affirm the denial of benefits based on the administrative law judge's consideration of the merits of this duplicate claim, we need not address his material change in conditions analysis. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). We note that the administrative law judge's reliance on the true doubt rule pursuant to Section 718.202(a)(1) is no longer permitted. *See Director, OWCP v. Greenwich Collieries [Ondecko],* U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Administrative Appeals Judge

_____REGINA C. McGRANERY
Administrative Appeals Judge