BRB No. 99-1145 BLA

MYRLE J. JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEBRA LYNN COALS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
APPOLO FUELS, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
and	)	
	)	
CUMBERLAND MOUNTAIN SERVICE CORPORATION (previously known as Mountain Drive Coal Company)	)	
	)	
Employer	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Myrle J. Jones, Middlesboro, Kentucky, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen Chartered), Washington D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (97-BLA-606) of Administrative Law Judge Rudolf L. Jansen 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 twenty-one and one-half years of coal mine employment based on the parties' stipulation at the hearing; determined that claimant smokes one pack of cigarettes a day and has for about 40 years; and found that claimant's last coal mine employment was as a truck driver, a job which involved sitting ten hours a day with no heavy exertion. The administrative law judge found that Debra Lynn Coals, Incorporated (employer) was the properly named responsible operator and dismissed Cumberland Mountain Service Corporation as the responsible operator.[2] Based on the filing date of February 26, 1996, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis or the presence of a totally disabling respiratory impairment at 20 C.F.R. §§718.202(a)(1)-(4), 718.204(c)(1)-(4). Accordingly, benefits were denied. On appeal, claimant generally challenges the findings of the administrative law judge on entitlement. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, filed an appeal on behalf of claimant, but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Employer has not challenged this finding. *See Skrack v. Island Creek Coal Company*, 6 BLR 1-710 (1983).

law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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*).[3]

Initially, the administrative law judge properly credited claimant with twenty-one and one-half years of coal mine employment since the parties stipulated to the length of claimant's coal mine employment at the hearing. *See* Hearing Transcript at p.10; *Pendleton v. Director, OWCP*, 8 BLR 1-242 (1984)(Ramsey, J., dissenting). In addition, in light of claimant's hearing testimony, the administrative law judge appropriately determined that claimant's usual coal mine employment was as a truck driver, that his job required him to sit ten hours a day, and that his job did not involve heavy exertion. *See* Hearing Transcript at 13-15; Director's Exhibit 7; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge also correctly found that claimant smokes one pack of cigarettes a day and has for about forty years based on his hearing testimony. *See* Hearing Transcript at 22; *see generally Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Stark v. Director, OWCP*, 9 BLR 1-36(1986). We, therefore, affirm these findings of the administrative law judge as supported by substantial evidence.

With respect to the merits, claimant bears the burden of establishing each and every element of entitlement. *Perry*, *supra*; *Trent*, *supra*. At 20 C.F.R. §718.202(a)(1), the administrative law judge concluded that the record contained seven x-rays which were interpreted eighteen times. *See* Director's Exhibits 19-25, 39-42; Employer's Exhibits 3-5, 7, 9; Claimant's Exhibit 2; Decision and Order at 9-10. In reviewing the x-ray evidence, the administrative law judge permissibly accorded greater weight to the interpretations of physicians who are Board-certified Radiologists and B-readers, and thus, properly concluded that the preponderance of the x-ray evidence by the most qualified readers was negative for the existence of pneumoconiosis. *See* Director's Exhibits 19-25, 39-42; Employer's Exhibits 3-5, 7, 9; Claimant's Exhibit 2. Thus, the administrative law judge properly concluded that

[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko],* 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); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

The administrative law judge also correctly determined that since the record contained no biopsy or autopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), and that claimant, a living miner, was not entitled to the presumptions at Section 718.202 (a)(3) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306. We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.202(a)(1)-(3) as supported by substantial evidence.

At Section 718.202(a)(4), the administrative law judge acted within his discretion when he found that all the medical opinions of record were reasoned and documented as the reports are based on clinical evaluations, x-rays, objective tests, and claimant's medical, work and smoking histories. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We, therefore, affirm this finding. We, however, must vacate the findings of the administrative law judge at Section 718.202(a)(4) and remand this case for further consideration as the administrative law judge incorrectly concluded that the credentials of Drs. Westerfield and Baker were not in the record.[4] *See* Director's Exhibits 12, 24. Thus, the administrative law judge erred when he concluded that Drs. Dahhan, Fino and Branscomb were more qualified that Drs. Westerfield and Baker.[5] When considering, on remand, which medical opinions are sufficient to meet claimant's burden of proof, the administrative law judge needs to take into consideration a physician's status as a treating physician. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19

[4] The record reflects that Dr. Westerfield is Board-certified as a medical examiner and chest physician as well as in internal medicine and pulmonary diseases and that Dr. Baker is Board-certified in pulmonary diseases. *See* Director's Exhibits 12, 24. In fact, at page 7 of his Decision and Order, the administrative law judge stated that Dr. Westerfield was Board-certified in internal medicine and pulmonary disease, but later at page 10 when discussing the weight accorded the physicians' opinions, the administrative law judge stated that Dr. Westerfield's qualifications were not in the record. Decision and Order at 7, 10.

[5] The administrative law judge may accord greater weight to the medical opinions of the physicians who are better qualified, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Onderko, supra*. Likewise, the administrative law judge should review each medical opinion to determine whether the physician diagnosed the existence of pneumoconiosis as defined at 20 C.F.R. §718.201. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997). If the administrative law judge finds the medical opinion evidence sufficient to establish the existence of pneumoconiosis as defined at Section 718.201, he must render findings at 20 C.F.R. §718.203.

At Section 718.204(c)(1), the record contains nine pulmonary function tests performed between July 25, 1997 and August 12, 1998. *See* Director's Exhibits 9-11, 14; Claimant's Exhibits 1, 3. Based on the disability standards set forth at Appendix B, the administrative law judge incorrectly found that the weight of the pulmonary function study evidence was nonqualifying,[6] as the record reflects that the pulmonary function studies performed on July 27, 1995, December 13, 1995, March 12, 1996, October 13, 1997, and August 18, 1998 meet the disability standards set forth in the regulations. *See* 20 C.F.R. §718.204(c)(1), Appendix B. We, therefore, vacate the finding of the administrative law judge at Section718.204(c)(1) and remand this case for further consideration.

The administrative law judge properly found that the two blood gas studies of record were nonqualifying under the regulatory standards at Section 718.204(c)(2), and were therefore, insufficient to demonstrate the presence of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(c)(2), Appendix C. We, therefore, affirm this finding of the administrative law judge as it is supported by substantial evidence. The administrative law judge did not make any findings at Section 718.204(c)(3), as the record does not contain any evidence of cor pulmonale. *See* 20 C.F.R. §718.204(c)(3).

[6] To establish total disability at 20 C.F.R. §718.204(c)(1), claimant must have a qualifying FEV1 value and either a qualifying value at FVC, or MVV or a FEV1/ FVC ratio of 55% or less based on his height and age at the time the test was administered. *See* 20 C.F.R. §718.204(c)(1), Appendix B. If the record reflects a disparity in claimant's height, the administrative law judge must make a factual finding as to claimant's height. *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

As we have vacated the findings of the administrative law judge at Section 718.204(c)(1), we also vacate his findings at Section 718.204(c)(4) and remand this case for further consideration of the medical opinion evidence on the issue of the presence of a totally disabling respiratory impairment. On remand, the administrative law judge should review the medical opinion evidence in light of the underlying documentation to determine the basis for each physician's conclusion concerning claimant's ability to perform his usual coal mine employment. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997); *Lucostic v. United States Steel Corp.*, 8 BLR 1-43 (1985). Furthermore, although the administrative law judge correctly noted in his Decision and Order that Drs. Branscomb and Fino reviewed claimant's medical records up until the date of their reports, these physicians did not review subsequent records. If the administrative law judge finds that total disability is established, on remand, he must render findings at 20 C.F.R. §718.204(b).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge