BRB Nos. 08-0751 BLA
and 08-0751 BLA-A

C.P.	)	
	)	
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
ROCKSPRING DEVELOPMENT, INCORPORATED	)	DATE ISSUED: 06/24/2009
	)	
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

Allison Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Denial of Benefits (2007-BLA-5169) of Administrative Law Judge Larry S. Merck rendered 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). Claimant filed this application for benefits on October 17, 2005. Director's Exhibit 1. In a Decision and Order dated July 11, 2008, the administrative law judge credited claimant with thirty-three years of coal mine employment, as stipulated by the parties. Adjudicating this

claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), but that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Since claimant failed to establish total disability, the administrative law judge found that the issue of total disability due to pneumoconiosis was moot. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge failed to properly consider the opinions of Drs. Hussain and Jarboe as to the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer has filed a cross-appeal, asserting that the administrative law judge erred in discrediting the opinion of Dr. Repsher as being inconsistent and inadequately explained. Claimant responds to employer's cross-appeal, asserting that the administrative law judge did not err in discrediting the opinion of Dr. Repsher. The Director, Office of Workers' Compensation Programs, has not filed a response to either appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of

[1] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of thirty-three years of coal mine employment, that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant asserts that the administrative law judge erred in finding the medical opinion evidence to be insufficient to establish total disability. We disagree. Pursuant to 20 C.F.R. §718.202(b)(2)(iv), the administrative law judge considered the opinions of Drs. Hussain, Jarboe, Repsher and Castle. Dr. Hussain examined claimant on November 13, 2005, at the request of the Department of Labor. Director's Exhibit 9. Dr. Hussain indicated that the results of claimant's pulmonary function and arterial blood gas studies were "normal," but he diagnosed a "moderate impairment based on effort intolerance and advanced pneumoconiosis on x-ray." *Id*. Dr. Hussain opined that claimant's pulmonary impairment would prevent him from performing the work of a coal miner or similar employment. *Id*. In his deposition, Dr. Hussain explained that based on claimant's exercise stress test, he suffered from a "severe impairment in the sense that he could not walk briskly for more than three minutes" without symptoms of shortness of breath. Employer's Exhibit 4 at 10-11.

Dr. Jarboe examined claimant on December 28, 2006, and opined that he had a significant impairment of gas exchange on arterial blood gas testing but no evidence of airflow obstruction on pulmonary function testing. Claimant's Exhibit 5. Dr. Jarboe opined that claimant is totally disabled from performing his usual coal mine work because "he has a moderate reduction in diffusion and a significant fall in oxygen tension with minimal exercise." *Id*.

Dr. Repsher examined claimant on January 24, 2007, and opined that claimant's "pulmonary function tests [were] normal, except for a mild to moderate decrease in diffusing capacity." Employer's Exhibit 1. In addition, Dr. Repsher stated that the "arterial blood gases show[ed] only very mild and non-qualifying hypoxemia." *Id*. In his deposition, Dr. Repsher testified that claimant was not "totally disabled from a pulmonary or respiratory standpoint" and that "he would be able to do his last job in the coal mines or any other job with similar work requirements." Employer's Exhibit 5 at 13, 15-16.

Dr. Castle issued a report on June 12, 2007, and opined that claimant "does have a mild restrictive ventilatory impairment which is not disabling" and that "he does retain the respiratory capacity to perform his previous coal mine employment duties." Employer's Exhibit 2. Dr. Castle explained that he reviewed the medical histories and physical examinations by Drs. Hussain, Repsher and Jarboe and "in general, they were relatively consistent in virtually all aspects." Employer's Exhibit 3 at 8; *see* Employer's Exhibit 2. Dr. Castle indicated that his opinion that claimant is not totally disabled is based on "all the information; the historical data, the physical examination, the [x]-ray reports and the objective findings." Employer's Exhibit 3 at 25. He further stated that

"the most important in this is that the objective findings, both from ventilatory studies, lung volume studies, diffusion and arterial blood gas studies do not demonstrate a disabling abnormality of either function or blood gas transfer mechanisms." *Id*.

In weighing the conflicting medical opinion evidence, the administrative law judge determined that the opinions of Drs. Hussain and Jarboe, that claimant is totally disabled, were adequately reasoned, but entitled to less weight because they were "belied by the non-qualifying pulmonary function studies and arterial blood gas study evidence." Decision and Order at 20-21. The administrative law judge accorded little weight to Dr. Respher's opinion that claimant is not totally disabled because he found it was "internally inconsistent and inadequately reasoned." *Id*. Conversely, the administrative law judge found Dr. Castle's opinion, that claimant is not totally disabled, to be well-reasoned and well-documented because it was "based on a review of all the evidence of record, giving him a more comprehensive review of the record than any of the other doctors." *Id*. at 21. The administrative law judge therefore assigned Dr. Castle's opinion the greatest weight and concluded that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), claimant asserts that the administrative law judge erred in finding the medical opinion evidence to be insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), merely because claimant was unable to meet the objective standards for establishing total disability pursuant to 20 C.F.R. 718.204(b)(2)(i)-(iii). Claimant's Brief at 12. Claimant specifically argues that the administrative law judge erred in discounting the opinions of Drs. Hussain and Jarboe because the record contains non-qualifying pulmonary function studies and arterial blood gas studies. *Id*. Claimant's assertion of error is rejected as it is without merit.

Contrary to claimant's contention, the administrative law judge properly weighed all of the physician's opinions, taking into consideration the underlying documentation that supported their conclusions, and found that the opinions of Drs. Hussain and Jarboe diagnosing total disability were less persuasive than the opinion of Dr. Castle. *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); Decision and Order at 21. We conclude that the administrative law judge acted within his discretion in according greater weight to Dr. Castle's opinion, that claimant is not totally disabled from performing his usual coal mine work, because he found that it was "well-reasoned and well-documented" and was "based on a review of all the evidence of record, giving [Dr. Castle] a more comprehensive review of the record than any of the other doctors." Decision and Order at 21; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge also acted within his discretion in finding that Dr. Jarboe's opinion was less persuasive

because Dr. Jarboe did not fully explain how the objective evidence supported his diagnosis of total disability. *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Decision and Order at 20. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

We also affirm, as supported by substantial evidence, the administrative law judge's overall determination that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); Decision and Order at 21. Because claimant has failed to satisfy his burden to establish total disability, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that entitlement to benefits is precluded.[3] *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[3] Because we affirm the administrative law judge's denial of benefits, it is not necessary that we address employer's argument on cross-appeal that the administrative law judge erred in his consideration of Dr. Repsher's opinion.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge