BRB No. 97-1483 BLA

AVON WARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
ISLAND CREEK COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Donald E. Earls (Earls & Fleming), Norton, Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0371) of Administrative Law Judge Richard A. Morgan 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). Claimant's application for benefits filed on August 28, 1995 was denied by the district director on October 30, 1995. Director's Exhibit 15. Claimant took no further action until May 16, 1996, when he submitted additional evidence and requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 18. On modification, the administrative law judge noted

that employer did not contest length of coal mine employment or its designation as the responsible operator. Upon consideration of the entire record, the administrative law judge found that the medical evidence failed to establish the existence of total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204. Accordingly, he concluded that neither a mistake in a determination of fact nor a change in conditions was established pursuant to Section 725.310, and denied benefits. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

On appeal, claimant contends that the administrative law judge mischaracterized a physician's radiological credentials in weighing the x-ray evidence pursuant to Section 718.202(a)(1). Claimant further asserts that the administrative law judge's error at Section 718.202(a)(1) affected his weighing of the medical opinions pursuant to Section 718.202(a)(4). In addition, claimant alleges that the administrative law judge failed to consider all of the relevant evidence pursuant to Section 718.204(c)(4), and did not accord proper weight to the medical opinion of claimant's treating physician. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this 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 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).

[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and responsible operator status. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Pursuant to Section 718.204(c)(1)-(3), the administrative law judge correctly found that all of the pulmonary function and blood gas studies were non-qualifying[2] and the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 17-18; Director's Exhibits 8, 18, 24, 27. We therefore affirm these findings.

Pursuant to Section 718.204(c)(4), the administrative law judge considered the reports and treatment records of five different physicians. Decision and Order at 8-11, 17-18. Dr. Smiddy examined and tested claimant and diagnosed pneumoconiosis, cigarette addiction, chronic obstructive pulmonary disease, emphysema, and bronchitis. Director's Exhibit 9 at 2. Dr. Smiddy indicated that claimant's pulmonary function study "show[ed] no obstruction and restriction with normal diffusion." *Id*. He did not discuss any other aspects of claimant's respiratory or pulmonary status.

Dr. Forehand, who is Board-certified in Pediatrics and Allergy and Immunology, also examined claimant and administered objective tests. Director's Exhibit 10. Dr. Forehand identified no abnormalities on examination of the chest, found that claimant's pulmonary function study was "normal," and indicated that his blood gas study revealed "no hypoxemia at rest or with exercise." Director's Exhibit 10 at 3. Dr. Forehand concluded that claimant had "[n]o active cardiopulmonary disease," and "[n]o respiratory impairment." Director's Exhibit 10 at 4. Dr. Castle, who is Board-certified in internal and pulmonary medicine, conducted a pulmonary evaluation and reviewed additional medical records and data. Director's Exhibit 27. He diagnosed mild chronic bronchitis due to tobacco smoke and indicated that claimant's pulmonary function study showed at best a mild, clinically insignificant airways obstruction. Director's Exhibit 27 at 3. Based on his examination and review of additional examination reports and objective study results, Dr. Castle concluded that claimant did "not have any significant respiratory impairment whatsoever." Director's Exhibit 27 at 10. Dr. Fino, who is Board-certified in internal and pulmonary medicine, reviewed the medical evidence of record and diagnosed non-impairing chronic bronchitis due to cigarette smoking. Employer's Exhibit 4 at

[2] 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).

11. Dr. Fino detected no ventilatory impairment and no impairment in oxygen transfer. Director's Exhibit 4 at 10. He concluded that, "[f]rom a functional standpoint, this man's pulmonary system is normal." *Id*.

Dr. Mitchell, claimant's treating physician, submitted copies of treatment notes and hospital records. Director's Exhibit 24. The treatment notes included diagnoses of pneumoconiosis and chronic obstructive pulmonary disease, but did not contain an assessment of the severity of any respiratory or pulmonary impairment, or a statement of physical limitations. *Id*. After the hearing, claimant attempted to submit a one-page form captioned "Examining Physician's Statement of Impairments," in which Dr. Mitchell circled an answer indicating that claimant's pulmonary condition prevented him from engaging in coal mine work. Because the record was not left open for post-hearing submissions, employer objected and the administrative law judge declined to accept the form.[3] Decision and Order at 18 n.15.

The administrative law judge considered the physicians' qualifications and permissibly found the opinions of Drs. Forehand, Castle, and Fino to be supported by the objective tests and by the physicians' "very well reasoned analyses." Decision and Order at 18; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge noted that Dr. Smiddy's report and Dr. Mitchell's treatment notes did not address respiratory disability. Regarding Dr. Mitchell's opinion proffered post-hearing, the administrative law judge found that even if he had considered the form, it would not change his finding pursuant to Section 718.204(c)(4) because the physician merely checked blocks without explaining his conclusion. Decision and Order at 18 n.15.

Claimant contends that the administrative law judge improperly disregarded Dr. Mitchell's report and failed to accord proper weight to his opinion in light of his status as claimant's treating physician. Claimant's Brief at 4. As previously discussed, the record closed at the conclusion of the hearing on April 29, 1997. 29 C.F.R. §18.54(a). Claimant attempted to submit the form on May 23, 1997. Employer timely objected to the admission of the report. Claimant does not argue on appeal that good cause existed for the late submisssion.[4] *See* 20 C.F.R.

[3] The administrative law judge also declined to accept eleven additional pages of treatment notes submitted post-hearing. These treatment notes do not address respiratory disability.

[4] In the cover letter accompanying the May 15, 1997 statement of impairments

§725.456(b)(2). Under these circumstances, the administrative law judge did not abuse his discretion in declining to accept Dr. Mitchell's statement of impairments form into the record. *See* 20 C.F.R. §725.456(b). Moreover, the administrative law judge did not disregard the report. He specifically found it to be insufficiently explained to constitute a reasoned medical opinion under Section 718.204(c)(4). An administrative law judge need not defer to a treating physician's opinion found to be unexplained. *See Hicks, supra*; *Akers, supra*; *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992). Therefore, we reject claimant's allegations of error and we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).

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form, claimant's counsel stated that he requested the report from Dr. Mitchell on April 7. Letter Dated May 23, 1997. Claimant's counsel did not mention this request at the April 29 hearing, or request that the record be left open pending receipt of the report.

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.[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
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[5] In light of our disposition of this case, we need not address claimant's arguments pursuant to Section 718.202(a)(1), (4).