BRB No. 05-0756 BLA

TEDDY RATLIFF, JUNIOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOPKINS CREEK COAL COMPANY	)	DATE ISSUED: 03/23/2006
	)	
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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Teddy Ratliff, Junior, Belcher, Kentucky, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denial of Benefits (2002-BLA-0406) of Administrative Law Judge Robert L. Hillyard (the administrative law judge) on a subsequent 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.

[1] Susie Davis, a benefits counselor with the Kentucky Black Lung Coalminers & Widows Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

§901 *et seq.* (the Act).[2] The administrative law judge found that employer conceded a coal mine employment history of sixteen years and that the newly submitted biopsy evidence established the existence of pneumoconiosis, an element previously adjudicated against claimant. The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment based on his sixteen years of coal mine employment. The administrative law judge therefore found that claimant established a material change in conditions, and turned to the merits of the case. After considering all the evidence of record, the administrative law judge found that claimant failed to establish a totally disabling respiratory impairment, or that total disability was due to pneumoconiosis. 20 C.F.R. §§718.202(a)(2), 718.203(b), 718.204(b), (c); 725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer, in response, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *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 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 the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law

[2] The lengthy history of this case is set forth in the administrative law judge's Decision and Order at 2-3.

judge is supported by substantial evidence and contains no reversible error.[3] In considering whether claimant established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(b)(2), the administrative law judge found that all of the pulmonary function studies of record, Director's Exhibits 3, 13, 19, 24, 58, 75, 78, 80, 94, 114, 116; Employer's Exhibit 22, produced non-qualifying values, including some of the more recent studies which had demonstrated a "mild drop" in claimant's pulmonary function following a 2000 lobectomy. Accordingly, we affirm the administrative law judge's determination that the pulmonary function study evidence does not support a finding of total disability pursuant to Section 718.204(b)(2)(i). The administrative law judge further found that of the twenty-one blood gas studies of record, only one study, Director's Exhibit 116, produced qualifying values. The administrative law judge, however, permissibly questioned the validity of this qualifying study because it was performed during claimant's hospitalization. *See Hess v Director, OWCP*, 21 BLR 1-141, 1-144 (1998). Moreover, the administrative law judge permissibly accorded greatest weight to the two most recent studies both of which produced non-qualifying values. Director's Exhibit 114; Employer's Exhibit 22; *see* 20 C.F.R. §718.204(b)(2)(ii); *Schretroma v. Director, OWCP*, 18 BLR 1-17, 1-22 (1993); *see also Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987). In addition, the administrative law judge correctly determined that the record contained no evidence of cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii). Accordingly, we affirm the administrative law judge's determination that the evidence of record did not support a finding of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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).

In considering the medical opinion evidence of record, the administrative law judge acknowledged that Dr. Mettu was claimant's treating physician, but accorded little weight to Dr. Mettu's opinions because Dr. Mettu's discussion of disability was vague and equivocal and the doctor had failed to make a decision as to whether claimant was disabled. Specifically, the administrative law judge characterized Dr. Mettu's opinion as finding claimant's impairment to be very mild, yet the doctor also observed that at times claimant may be severely lung impaired. Claimant's Exhibit 1; Employer's Exhibit 39; Decision and Order at 19. Moreover, the administrative law judge found that Dr. Mettu acknowledged normal arterial blood gas studies and mild pulmonary function abnormalities but failed to explain how they affected his consideration of disability.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

Thus, in light of the vague and equivocal nature of Dr. Mettu's opinion, his failure to make a decision on disability, and the lack of supporting documentation, the administrative law judge accorded little weight to Dr. Mettu's opinion. Decision and Order at 19. This was reasonable. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003);[4] *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *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); *Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). We, therefore, hold that the administrative law judge properly accorded little weight to the opinion of Dr. Mettu, notwithstanding the physician's status as treating physician. *See* 20 C.F.R. §718.104(d)(5).

Likewise, the administrative law judge considered the newly submitted reports of another treating physician, Dr. Rogers, who opined that claimant was unable to engage in the activities of a coal miner and did not, therefore, retain the ability to work as an underground miner, Claimant's Exhibits 2, 3; Employer's Exhibit 34. The administrative law judge concluded that even though Dr. Rogers was board-certified in general surgery, vascular surgery and thoracic surgery, the doctor did not possess the kind of superior pulmonary credentials which the Sixth Circuit suggested in *Eastover* would warrant according special consideration to a doctor's opinion. Decision and Order at 19. In *Eastover*, the court indicated that board certification in pulmonary medicine lends credence to a doctor's opinion on whether pneumoconiosis hastened death, but board certification in anesthesiology and pain management does not. The administrative law judge correctly determined Dr. Rogers's credentials do not support the credibility of his opinion. Rogers Deposition at 4-5.

Further, in this case, there is no evidence that Dr. Rogers's status as claimant's treating physician gave him any special insight into the miner's respiratory condition.

[4] The revised regulations provide additional guidance: the officer adjudicating the claim is directed to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record," 20 C.F.R. §718.104(d); including certain specific factors, which are the nature and duration of the relationship, the frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give a physician's opinion controlling weight in appropriate cases, the weight accorded the opinion must also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

The record reflects that Dr. Rogers had limited interaction with claimant: he performed claimant's lobectomy; submitted a letter in which he stated that he was one of claimant's treating physicians, Claimant's Exhibit 2; saw claimant regarding his surgery, Deposition at 8, and never identified claimant's specific jobs or duties while coal mining. Thus, Dr. Rogers's disability opinion did not warrant special consideration based upon the doctor's status as treating physician. *See* 20 C.F.R. §718.104(d)(1)-(5). Furthermore, the administrative law judge found that the physician failed to provide objective support for his conclusion that the claimant had a totally disabling respiratory impairment, *i.e.*, Dr. Rogers did not perform a pulmonary function or blood gas study, and did not list the basis of his diagnosis. Decision and Order at 19-20. The administrative law judge also discredited Dr. Rogers's opinion because he was inconsistent: having opined in written reports in 2001 and 2003 that claimant was totally disabled by his respiratory condition, the doctor testified at a deposition in 2004 that the miner could return to his previous coal mine employment, but that was not recommended. Decision and Order at 20. Accordingly, we hold that the administrative law judge properly accorded little weight to the opinions of Dr. Rogers, notwithstanding the physician's status as one of claimant's treating physicians. *Id*.

Considering the newly submitted reports of Drs. Repsher, Dahhan, Iosif, Castle, Broudy, and Ghio and Branscomb, Director's Exhibits 113; Employer's Exhibits 2, 4-10, 11-14, 17-19, 21, 24-29, 31, 32, 35, 36, 38, all of whom opined that claimant did not suffer from a totally disabling respiratory impairment, the administrative law judge concluded that these physicians were highly qualified, they identified objective evidence to support their opinions, and they fully accounted for claimant's lobectomy and the reduction in his lung function after the procedure. Decision and Order at 20. Accordingly, the administrative law judge, in a permissible exercise of his discretion, accorded greater weight to the opinions of these physicians and concluded that the medical opinion evidence of record was not supportive of a finding of total disability pursuant to Section 718.204(b)(2)(iv). *See Jericol Mining Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolfe Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge further reviewed the evidence previously submitted in conjunction with the prior claims in this case, *i.e.*, the medical opinions of Drs. Mettu, Broudy, Wells, Lafferty, Puram Valera, Dahhan, Iosif, and Fino, and found that the conclusions reached by prior administrative law judges, which were affirmed by the Board, were sound and that the prior medical narrative evidence did not support a finding of total disability.[5] Decision

[5] When this case was most recently before the Board, the Board held that the administrative law judge permissibly accorded greater weight to the opinion of Dr. Dahhan, that claimant had no disabling impairment, as the physician was highly

and Order at 18. Thus, because the administrative law judge reviewed the entirety of the medical opinion evidence of record and provided affirmable bases for crediting the evidence that does not support a finding of a totally disabling respiratory impairment, we affirm the administrative law judge's determination that the evidence of record fails to support a finding of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1. We, therefore, affirm the administrative law judge's determination that the evidence of record does not support a finding of a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(i)-(iv). *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp*., 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *see also 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). Because claimant has failed to demonstrate total respiratory disability, a requisite element of entitlement pursuant to Part 718, entitlement is precluded and we need not address the administrative law judge's finding that claimant failed to establish disability causation. *See* 20 C.F.R. §§718.204(b), (c); *see Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; *see also Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

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qualified, the physician's opinion was better supported by the objective evidence of record, and the opinion was supported by the opinions of Drs. Fino, Broudy and Iosif. Board's Decision and Order dated October 23, 1998. The Board further held that the administrative law judge properly concluded that the opinions of Drs. Wells and Lafferty, which cautioned against further coal dust exposure, were insufficient to establish total disability. *Id*.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge