BRB No. 09-0426 BLA

JIMMIE HICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROCKET COAL COMPANY	)	DATE ISSUED: 03/18/2010
	)	
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 Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Jimmie Hicks, Manchester, Kentucky, *pro se*.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order – Denial of Subsequent Claim (2006-BLA-5666) rendered by Administrative Law Judge Larry S. Merck on a claim filed pursuant to the provisions of Title IV of the Federal Coal

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] The administrative law judge credited claimant with twelve years of coal mine employment, and found that the x-ray evidence developed since the prior denial of benefits established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and thereby demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Decision and Order at 5-6, 10-12. Reviewing the entire record, he found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 27, 29-32. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, asserting that substantial evidence supports the administrative law judge's denial of benefits.[3] The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[4]

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

[2] Claimant filed the instant subsequent claim on June 8, 2006. Director's Exhibit 5. The procedural history of his earlier claims is as follows: claimant's first claim for benefits, filed on February 1, 1981, was denied on May 20, 1992 for failure to establish total disability, and the denial was affirmed by the Board. *Hicks v. Rocket Coal Company, Inc.*, BRB No. 92-1830 BLA (Sept. 13, 1993)(unpub.). Claimant's next two claims, filed on October 3, 1994, and December 26, 2001, were deemed abandoned and administratively closed on May 15, 1995, and August 19, 2003, respectively. Director's Exhibits 2, 3.

[3] Employer concedes that the evidence establishes the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1). Employer's Brief at 17.

[4] The administrative law judge's findings regarding the length of coal mine employment; his finding that the newly submitted evidence was sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d); and his finding that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), are not adverse to claimant and are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

(1986). We must affirm the Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[5] 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 demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement to benefits. *Anderson v. Valley Camp of Utah, In*c., 12 BLR 1-111, 1-112 (1989).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Turning to the issue of total disability, after correctly finding that the record contained no evidence of complicated pneumoconiosis,[6] the administrative law judge found that the weight of the evidence of record was insufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R §718.204(b)(2)(i)-(iv). At Section 718.204(b)(2)(i), the administrative law judge determined that all of the pulmonary function study evidence of record produced non-qualifying values,[7] including the six newly submitted studies, dated October 28, 1994, March 6, 2002, July 19, 2006, September 18, 2006, May 24, 2007, and February 15, 2008.[8] Decision and Order at 29; Director's Exhibits 2, 3, 11, 13;

[5] Because claimant's most recent coal mine employment occurred 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, 1-202 (1989)(*en banc*); Director's Exhibit 3.

[6] Thus, the administrative law judge properly found that the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 was not applicable. 20 C.F.R. §718.204(b)(1); Decision and Order at 13, 28.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The pulmonary function study of February 15, 2008 shows a qualifying FEV_1 value of 1.83, but the reported FVC value of 2.71 is non-qualifying, and no MVV value was reported. Claimant's Exhibit 3; *see Ross v. Peabody Coal Co.*, BRB No. 05-0596 BLA (Dec. 23, 2005)(unpub); *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

Employer's Exhibit 1; Claimant's Exhibit 3. As substantial evidence supports his conclusion that claimant failed to meet his burden pursuant to Section 718.204(b)(2)(i), it is affirmed. *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

Likewise, substantial evidence supports the administrative law judge's determination that the blood gas study evidence of record failed to establish total disability pursuant to Section 718.204(b)(2)(ii). The administrative law judge found that the four arterial blood gas studies from the prior claims were non-qualifying. Decision and Order at 30. He then reviewed the additional five blood gas studies of record, dated October 28, 1994, February 27, 2002, July 19, 2006, September 18, 2006, and May 10, 2007. *Id*; Director's Exhibits 1, 3, 11, 13; Employer's Exhibit 1. Of these, all produced non-qualifying values, with the exception of the February 27, 2002 study, which produced non-qualifying values at rest and qualifying values after exercise. The administrative law judge permissibly determined that the most recent studies conducted in 2006 and 2007 were entitled to the most weight, and, therefore, rationally concluded that the blood gas study evidence of record did not establish total disability by a preponderance of the evidence under Section 718.204(b)(2)(ii). *See generally Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Fagg v. Amax Coal Co*., 12 BLR 1-77 (1988). Additionally, the administrative law judge found that the record contained no evidence of cor pulmonale with right-sided congestive heart failure, and properly concluded that total disability was not established at Section 718.204(b)(2)(iii). As substantial evidence supports the administrative law judge's findings at Section 718.204(b)(2)(ii), (iii), they are affirmed.

Lastly, in assessing the medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge accurately summarized and compared the conflicting medical opinions of Drs. Alam, Dahhan and Jarboe,[9] and rationally accorded little weight

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Thus, the study is insufficient to support a finding of total disability under 20 C.F.R. §718.204(b)(2)(i).

[9] Dr. Alam evaluated claimant for the Department of Labor in 2002 and 2006, and assessed a mild respiratory impairment. Dr. Alam diagnosed chronic bronchitis and asthmatic bronchitis attributable to both smoking and coal dust exposure, and also diagnosed significant coronary artery disease, severe deconditioning due to arthritis and underlying coronary artery disease, significant back pain, and degenerative joint disease. *See* Director's Exhibit 11 at 5-7; Decision and Order at 16-19, 31. Dr. Alam concluded:

> [T]he impairment is mild in terms of improvement for his reactive disease compliant secondary to treatment. I believe that 17 years of coal mining work has approximately 20% impairment causing the symptoms of

to the medical opinions obtained between 1985 and 1994 in conjunction with claimant's earlier claims. Decision and Order at 15, 31; *see Cooley v. Island Creek Coal Co.*, 845

> bronchitis with cough. I believe the patient is disabled to do any kind of mine related work secondary to other reasons pertaining to his coronary artery disease and arthritis as well as bronchospasm is a component that can still happen if you have another dust exposure so that is also a limiting factor for him to go back to mines. As far as the dyspnea is concerned on the exertion I believe that has more to be blamed on coronary artery disease, arthritis, and deconditioning.

Director's Exhibit 11 at 6-7.

Dr. Dahhan relied on a coal mine employment history of seventeen years, "four years underground loading, and the rest was outside at the machine shop," and diagnosed a mild reversible obstructive ventilatory impairment, from congestive heart failure and obesity, but specified that the mild resting hypoxemia has not resulted from inhalation of coal dust or coal workers' pneumoconiosis. Decision and Order at 20; *see* Director's Exhibit 13 at 5. He opined that claimant "has no findings to indicate any pulmonary impairment or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis**,** hence, he has no evidence of legal pneumoconiosis." Director's Exhibit 13 at 3, 5. He agreed "with Dr. Alam that [claimant] has multiple medical problems that would affect his gainful employment including his coronary artery disease and arthritis. Both are conditions of the general public at large and are not caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis." *Id*.

Dr. Jarboe relied on a coal mine employment history of seventeen years, with four years underground and thirteen on the surface. Dr. Jarboe indicated that claimant loaded coal and built entries underground, and on the surface, he "worked at a coal load-out/prep plant doing maintenance." Employer's Exhibit 1; Decision and Order at 21-22. Dr. Jarboe opined that there was no evidence of a clinically significant restrictive or obstructive disease, and that the miner "has no evidence of a ventilatory or respiratory impairment." Employer's Exhibit 1 at 6; Decision and Order at 22. He stated that the miner "retains the functional respiratory capacity to do his last coal mining job or one of similar physical demand in a dust-free-environment." Employer's Exhibit 1 at 6. He added that the miner "may be disabled as a whole man. He is now eighty years of age and would not likely retain the vigor and stamina to continue to work as a coal miner. Furthermore, he does have coronary artery disease which might prevent returning to his previous employment." *Id*.

F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Noting that Dr. Alam diagnosed multiple respiratory and non-respiratory conditions and assessed a mild respiratory impairment, the administrative law judge determined that it was unclear whether Dr. Alam concluded that claimant should not return to coal mine employment because of a totally disabling respiratory or pulmonary impairment or because of his other medical conditions. Decision and Order at 31. Because an equivocal or vague medical opinion may be discounted, the administrative law judge permissibly assigned it less weight, and, accordingly, determined that Dr. Alam's medical opinion was insufficient to support a finding of total respiratory disability under Section 718.204(b)(2)(iv). *Id*., *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1(1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

By contrast, the administrative law judge accorded full probative weight to the medical opinions of Drs. Dahhan and Jarboe, as he found that they were well-documented and well-reasoned, and that they were supported by the non-qualifying pulmonary function studies and arterial blood gas studies of record. Decision and Order at 31-32. Specifically, he found that Dr. Dahhan's opinion, that claimant had a mild reversible obstructive ventilatory impairment from congestive heart failure and obesity, was supported by his physical examination and medical testing, while Dr. Jarboe's opinion, that claimant had no ventilatory impairment and could return to his usual coal mine employment from a respiratory standpoint, was based on his review of all of the current medical evidence. *Id*.; Director's Exhibit 13; Employer's Exhibit 1; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 186-187, 19 BLR 2-111, 2-113 (6th Cir. 1995). As substantial evidence supports the administrative law judge's findings and inferences, we affirm his findings that the medical opinion evidence of record was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), and that the weight of the evidence of record as a whole was insufficient to meet claimant's burden at Section 718.204(b). *See Shedlock v. Bethlehem Mining Corp*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Claimant's failure to establish total disability pursuant to Section 718.204(b), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-114. Consequently, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge