BRB No. 97-0826 BLA

HERSHEL LAWSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INCOAL, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS AND MERCANTILE COMPANIES	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Hershel Lawson, Viper, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying

[1] Claimant was not represented by counsel at the hearing before the administrative law judge. The administrative law judge, properly notified claimant of his right to representation, and afforded him the opportunity to submit evidence on his own behalf, testify, provide statements and question witnesses. Consequently, we hold that there was a valid waiver of claimant's right to representation and that the hearing before the

Benefits (96-BLA-0816) of Administrative Law Judge Donald W. Mosser 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 ten and one-half (10.5) years of coal mine employment, based on employer's concession, and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's June 1991 filing date. The administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, he found the evidence insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[2]

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v.*

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administrative law judge was properly conducted. 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *see also* Hearing Transcript at 5-6.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with ten and one-half years of coal mine employment. Inasmuch as this finding is not adverse to claimant, it is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director, OWCP, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that claimant has not established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). The administrative law judge correctly found that the record contains eleven pulmonary function studies, of which only the September 25, 1995 study produced qualifying results.[3] Decision and Order at 18; Director's Exhibits 8, 20, 25 at pp. 68, 167, 184, 27 at pp. 137, 141, 154, 266, 267. The administrative law judge reasonably exercised his discretion as trier-of-fact in declining to credit the September 26, 1995 ventilatory study based on his finding that the results of this study were disproportionately lower than the results of the other ventilatory studies of record. Decision and Order at 18; Director's Exhibits 27 at pp. 109, 154; Employer's Exhibit 3; *see Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984). We, therefore, affirm the administrative law judge's finding that the weight of the pulmonary function study evidence is insufficient to demonstrate total disability pursuant to Section 718.204(c)(1). 20 C.F.R. §718.204(c)(1); *see Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

In addition, the administrative law judge properly found that all of the blood gas studies of evidence were non-qualifying and, thus, insufficient to demonstrate total disability pursuant to Section 718.204(c)(2). Decision and Order at 18; Director's Exhibits 10, 20, 25 at pp. 68, 167, 188, 27 at pp. 153, 277; 20 C.F.R. §718.204(c)(2). Moreover, the record contains no evidence of cor pulmonale with right sided congestive heart failure and, therefore, the administrative law judge properly found that total disability was not demonstrated pursuant to Section 718.204(c)(3). Decision and Order at 18; 20 C.F.R. §718.204(c)(3); see *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less that the appropriate values set forth in the tables in Appendices B and C to 20 C.F.R. Part 718. A "nonqualifying" study exceeds those values. 20 C.F.R. §718.204(c)(1), (2).

The administrative law judge also properly found that total disability was not demonstrated at Section 718.204(c)(4). The administrative law judge discussed the nine relevant medical opinions of record, specifically the opinions of Drs. Wicker, Dahhan, Dineen, Sundaram and Baker, each of whom examined claimant, as well as the consultative opinions of Drs. Branscomb, Broudy, Fino and Lane.[4] Decision and Order at 19. Of these opinions, the administrative law judge found that only Dr. Baker and Dr. Sundaram opined that claimant was totally disabled from performing his usual coal mine employment. *Id.* The administrative law judge, within a reasonable exercise of his discretion as trier-of-fact, however, accorded less weight to these opinions as he found that Dr. Baker failed to explain his diagnosis of total disability in light of the underlying documentation that accompanied his opinions. *See* Decision and Order at 19; Director's Exhibit 25 at p. 161; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Likewise, the administrative law judge reasonably accorded less weight to the opinion of Dr. Sundaram, one of claimant's treating physicians, finding that Dr. Sundaram failed to provide the rationale for his opinion that claimant, from a pulmonary standpoint, was not physically capable of performing his usual coal mine employment. Decision and Order at 19; Director's Exhibit 27 at pp. 150, 187, 290; Claimant's Exhibits 2-3; Employer's Exhibit 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett, supra*; *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

Moreover, the administrative law judge reasonably found that the contrary opinions of Drs. Wicker, Dahhan, Dineen, Broudy, Branscomb, Fino and Lane, all of which indicated that claimant was not totally disabled from a pulmonary standpoint and was able to perform his usual coal mine employment, were well-reasoned and consistent with the objective evidence of record. *See* Decision and Order at 19; Director's Exhibits 9, 20, 23, 25 at pp. 60, 92, 111, 119, 201, 229, 243, 27 at pp. 187; Employer's Exhibits 3, 5, 6; *Clark, supra*; *Lucostic, supra*; *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Inasmuch as the administrative law judge has reasonably found the opinions of Drs. Baker and Sundaram, the only opinions supportive of claimant's burden, entitled to little weight, we affirm his finding that the weight of the medical opinion evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(4).[5] *See Fields v. Island Creek*

[4] The record also contains the reports of two of claimant's treating physicians, Drs. Botto and Sandlin. While both physicians provided a respiratory diagnosis, neither physician rendered an opinion phrased in terms of total disability or provided an assessment of physical limitations such that would allow the administrative law judge to infer total respiratory disability, Director's Exhibits 25 at pp. 144, 173, 27 at pp. 135, 148, 295; Claimant's Exhibits 1, 4. Therefore, these medical opinions are not relevant to the inquiry at Section 718.204(c)(4). *See* 20 C.F.R. §718.204(c)(4); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

[5] In light of our affirmance of the administrative law judge's findings under 20 C.F.R. §718.204(c), we need not review the administrative law judge's findings that the evidence is

Coal Co., 10 BLR 1-19 (1987).

Since claimant has failed to establish the existence of a totally disabling respiratory impairment, a necessary element of entitlement pursuant to Part 718, an award of benefits is precluded.[6] *See Trent, supra; Perry, supra.*

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), as any errors therein would be harmless. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] We note that accompanying claimant's *pro se* letter to the Board were copies of various medical reports and copies of treatment notes. Inasmuch as the Board is not empowered to consider new evidence on appeal, we are returning these materials to claimant. *See Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985). If claimant wishes to submit new evidence in connection with his claim for benefits, he must submit this evidence with a request for modification to the district director. 20 C.F.R. §725.310; *see Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge