BRB No. 03-0813 BLA

ELMER SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 05/27/2004
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	
	)	
Employer/Carrier Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2002-BLA-5436) of Administrative Law Judge Daniel J. Roketenetz 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).[1] The administrative law judge found the medical evidence insufficient to establish the existence of pneumoconiosis or total disability. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.202(a)(4), and 718.204(b).[2] The employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the arguments on appeal, the evidence of record, and the administrative law judge's Decision and Order, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and in accordance with

---

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We affirm the administrative law judge's finding of fourteen and one-half years of coal mine employment as unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4.

law. The administrative law judge properly determined that claimant failed to establish a totally disabling respiratory or pulmonary impairment. Under Section 718.204(b)(2)(i), the administrative law judge properly found that of the four pulmonary function studies, only one study, obtained by Dr. Hussain on June 13, 2001, was qualifying for total disability. The administrative law judge, however, properly noted that this qualifying study was invalidated by Dr. Burki, a pulmonary specialist, because the tracings from the study showed poor effort and an incomplete flow/volume loop. Director's Exhibit 9; Decision and Order at 9; 20 C.F.R. §718.103; *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Given the invalidation report pertaining to the one qualifying study, and the fact that a subsequent study obtained by Dr. Hussain on August 24, 2001 produced non-qualifying values, the administrative law judge reasonably questioned whether the qualifying study was indicative of claimant's respiratory condition. Director's Exhibit 9. The administrative law judge, therefore, acted within his discretion in crediting the preponderance of the non-qualifying pulmonary function study evidence at Section 718.204(b)(2)(i). *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

The Board further affirms the administrative law judge's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(ii) since there are no qualifying arterial blood gas studies of record. Decision and Order at 10. Similarly, as there is no evidence in the record that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge correctly found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*.

In weighing the medical opinion evidence for total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law permissibly rejected Dr. Hussain's opinion that claimant is unable to work as a coal miner since he found that that physician did not adequately explain how his diagnosis of mild respiratory impairment precluded claimant from performing his usual coal mine employment, *i.e.*, Dr. Hussain did not list any specific physical limitations to compare with the exertional requirements of claimant's last job as a welder. Director's Exhibit 9; Decision and Order at 10; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Further, the administrative law judge permissibly assigned less probative weight to Dr. Hussain's diagnosis of mild respiratory impairment since it was based, in part, on the June 13, 2001 pulmonary function study, which had been invalidated by Dr. Burki. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Siegel*, 8 BLR 1-156; *Street v. Consolidation Coal Corp.*, 7 BLR 1-65 (1984).

With respect to Dr. Baker's opinion, the administrative law judge properly found that that physician's recommendation against further dust exposure did not constitute an opinion that claimant was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 10; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-

254, 2-258 (6th Cir. 1989). Additionally, the administrative law judge permissibly questioned the reliability of Dr. Baker's diagnosis of a Class II respiratory impairment based on the April 4, 2001 non-qualifying pulmonary study. As noted by the administrative law judge, Dr. Broudy obtained a higher FEV_1 value during his pulmonary function testing on March 28, 2002. The administrative law judge, therefore, permissibly relied on Dr. Broudy's review of all of the pulmonary function study evidence,[3] and Dr. Broudy's finding that Dr. Baker's April 4, 2001 study demonstrated less than optimal effort. Decision and Order at 10; Director's Exhibits 10, 11; *Clark*, 12 BLR at 1-155. *Anderson*, 12 BLR at 113.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to determine whether an opinion is documented and reasoned, *see Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, based on the medical opinion evidence of record, the administrative law judge acted within his discretion in crediting Dr. Broudy's opinion that claimant had no pulmonary or respiratory impairment since the administrative law judge found Dr. Broudy's opinion to be better reasoned and better supported by the objective evidence, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youhiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Accordingly, the administrative law judge's finding that claimant failed to establish total disability under Section 718.204(b)(2)(iv) is affirmed.

Because the administrative law judge properly found that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b), we decline to address the administrative law judge's findings relevant to the existence of pneumoconiosis and causation. *See Trent*, 11 BLR 1-26; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986)(*en banc*); *Perry*, 9 BLR 1-1. Because claimant failed to establish total respiratory disability under 20 C.F.R. §718.204(b), a requisite element of entitlement under Part 718, claimant is precluded from benefits. *Id*.

[3] The administrative law judge noted that Dr. Broudy had the benefit of reviewing the pulmonary function study results obtained by Drs. Baker and Hussain. Decision and Order at 11.

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

SO ORDERED

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge