BRB No. 06-0869 BLA

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| D. S.<br><br>Claimant-Petitioner<br><br>v.<br><br>TRI DEAN MINING, INCORPORATED<br><br>and<br><br>LIBERTY MUTUAL INSURANCE COMPANY<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 05/31/2007<br><br>DECISION and ORDER |

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

D. S., Wartburg, Tennessee, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (04-BLA-6433) of Administrative Law Judge Alice M. Craft denying benefits 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. §901 *et seq.* (the Act).[2] The administrative law judge found seventeen years of coal mine employment. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2. The administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), one of the elements previously adjudicated against claimant, and thus established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 2-4, 13-14; Director's Exhibits 1, 2. Considering all the evidence of record, the administrative law judge concluded that it was sufficient to establish that the existence of pneumoconiosis, and that pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), but that it was insufficient to establish total disability, 20 C.F.R. §718.204(b)(2). Decision and Order at 14-16. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

In an appeal filed by a claimant 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are

[1] Ron Carson, 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. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant filed his first claim for benefits on March 2, 1994. That claim was finally denied by the district director on August 24, 1994, as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on August 13, 1997. That claim was denied by the district director on June 1, 1998, as claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant took no further action, until he filed the instant claim on June 17, 2002, which was denied by the district director on February 4, 2004. Director's Exhibits 4, 39. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 40.

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 in a living miner's claim filed pursuant to 20 C.F.R. 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish 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 administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is rational, supported by substantial evidence, and in accordance with law.[3] The administrative law judge properly found that the evidence of record was insufficient to establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii) as the preponderance of the valid pulmonary function study evidence and all of the blood gas study evidence was non-qualifying.[4] Decision and Order at 15; Director's Exhibits 1, 2, 12, 14, 15; Employer's Exhibit 2; *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). The administrative law judge also correctly found that total disability could not be established pursuant to Section 718.204(b)(2)(iii) as there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order at 14; *see* 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). The administrative law judge's findings at Section 718.204(b)(2)(i)-(iii) are, accordingly, affirmed.

Considering the medical opinions of Drs. Dahhan, Hudson, Baker, Parrish and Bruton, the administrative law judge rationally credited the opinions of Drs. Dahhan,

[3] The record indicates that claimant was last employed in the coal mine industry in Tennessee. Director's Exhibits 1, 2, 5; Decision and Order at 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] 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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

Hudson, and Baker,[5] that claimant did not have a totally disabling respiratory impairment, as well-reasoned and well-documented.[6] Decision and Order at 15-16; Director's Exhibits 1, 12, 15; Employer's Exhibits 2, 3. The administrative law judge rationally concluded that the opinion of Dr. Bruton, who opined that the miner was totally disabled, was unsupported, as Dr. Bruton relied on the only qualifying pulmonary function study of record, and two more recent pulmonary function studies resulted in non-qualifying results, which greatly exceeded the qualifying values. Decision and Order at 16; Director's Exhibits 1, 12, 15; Employer's Exhibits 2, 3; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director,*

[5] Dr. Dahhan, a Board-certified internist and pulmonologist, reviewed two pulmonary function studies, Dr. Hudson's report, a nurse's notes, and the opinion of Dr. Baker. In a report dated February 21, 2005, Dr. Dahhan opined that claimant's pulmonary function studies and blood gas studies showed no evidence of functional pulmonary impairment and/or disability and that claimant retained the capacity to continue his previous coal mine employment. Employer's Exhibit 2. Dr. Hudson, a Board-certified internist and pulmonologist, examined claimant on November 1, 2004, and found no significant pulmonary impairment. In addition to examination, Dr. Hudson's report was based on symptomatology, history, x-ray, and pulmonary function and blood gas study. Employer's Exhibit 2. Dr. Baker, a Board-certified internist and pulmonologist, examined claimant on August 23, 2002. In addition to a physical examination, Dr. Baker's opinion was based on symptomatology, history, x-ray, pulmonary function study, blood gas study, and electrocardiogram. Dr. Baker opined that claimant suffered from a mild impairment based on a pulmonary function study and blood gas study, but found that claimant retained the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. Director's Exhibit 12. Although the administrative law judge found that Dr. Parrish opined that claimant had no pulmonary or respiratory impairment, the administrative law judge accorded the opinion little weight as it was based on an examination and objective testing that was almost twelve years old, *i.e.*, Dr. Parrish examined claimant and conducted testing in 1994. Director's Exhibit 1; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

[6] The administrative law judge properly noted that the opinions of Dr. Pietrasz, the office notes of Nurse Kellie Brooks, and the treatment records from the Methodist Medical Center, do not offer an opinion with respect to total disability and, therefore, are not probative of that issue. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir 2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); Decision and Order at 15; Director's Exhibit 2; Claimant's Exhibits 1, 4, 5.

*OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv) and his finding that the pulmonary function study, blood gas study, and medical opinion evidence, considered together, failed to establish total disability, as this finding is supported by substantial evidence and in accordance with law. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.[7]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[7] The administrative law judge correctly found that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at 20 C.F.R. §718.304 as the record did not contain any evidence of complicated pneumoconiosis. Decision and Order at 14; *see* 20 C.F.R. §718.304; *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).