BRB No. 09-0343 BLA

A.P. Claimant-Petitioner v. STERLING GARRETT COAL OF KENTUCKY and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/27/2009 DECISION and ORDER

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

A.P., English, Kentucky, *pro se*.

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

Before DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2008-BLA-5095) of Administrative Law Judge Alice M. Craft 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 8.4 years of coal mine employment and considered the claim, filed on January 3, 2007, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that claimant failed to meet his burden to establish that he has pneumoconiosis, under 20 C.F.R. §718.202(a)(1)-(4), and that he is totally disabled due to a pulmonary or respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[1] 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 20 C.F.R. Part 718 in a living miner's claim, a 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. 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*).

We will first address the administrative law judge's finding of 8.4 years of coal mine employment. The length of claimant's coal mine employment is a pertinent issue in this case, as it impacted the weight the administrative law judge gave to certain medical evidence. On claimant's application for benefits, he alleged 19.5 years of coal mine employment, while he listed on his employment history form coal mine employment totaling 17 years, from 1973 until 1990. Director's Exhibits 2-1, 4-1. Claimant's Social Security records indicate periods of coal mine employment from 1974 to 1983. Director's Exhibits 6-2, 7-4, 18-9. In addition, the district director found that claimant

[1] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 2-2, 4-1; Hearing Transcript at 12. 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*).

had 8 years of coal mine employment and employer stipulated to this amount. Hearing Transcript at 5; Director's Exhibit 30-4. At the hearing, claimant testified that he had a "hard time" remembering the dates of his coal mine employment. Decision and Order at 4; Hearing Transcript at 24, 27, 29.

The administrative law judge considered this evidence and concluded that claimant established 8.4 years of coal mine employment, based on claimant's earnings as found in his Social Security records, analyzed in light of the average earnings of employees in coal mining. Decision and Order at 4; Administrative Law Judge's Exhibit 1. We affirm the administrative law judge's finding, as it is rational and supported by substantial evidence. Claimant has the burden of establishing length of coal mine employment regardless of the kind of evidence available. *Green v. Director, OWCP*, 7 BLR 1-276 (1984). An administrative law judge may credit Social Security records over the claimant's testimony, where the testimony is unreliable. *Tackett v. Director, OWCP* , 6 BLR 1-839 (1984). In this case, because claimant acknowledged that he "has a hard time remembering dates" and failed to produce any evidence proving additional years of employment, the administrative law judge properly resolved the conflict in the evidence by concluding that claimant established 8.4 years based on claimant's earnings, found in his Social Security records, considered together with the average earnings of employees in coal mining. Decision and Order at 4; Hearing Transcript at 24, 29, 30; Administrative Law Judge's Exhibit 1; *see Tackett*, 6 BLR at 1-841. Further, the administrative law judge specifically and logically explained how she calculated claimant's coal mine employment. Decision and Order at 4 n. 2. Consequently, we affirm the administrative law judge's finding that claimant had 8.4 years of coal mine employment. *Tackett*, 6 BLR at 1-841.

We will now address the administrative law judge's findings on the merits of entitlement. Pursuant to Section 718.202(a)(1), the administrative law judge considered four interpretations of three chest x-rays, dated February 8, 2007, March 14, 2007, and March 27, 2007. The x-ray dated February 8, 2007, was read as positive for pneumoconiosis by Dr. Baker and negative for pneumoconiosis by Dr. Kendall.[2] Director's Exhibits 13-1, 13-14, 17-3, 17-4. Two subsequent x-rays, dated March 14, 2007, and March 27, 2007, were read as negative by Drs. Broudy and Dahhan, respectively. Director's Exhibits 15-5, 15-6, 16-4, 16-16, 16-17.

To resolve the discrepancy between the readings of the February 8, 2007, x-ray, the administrative law judge properly examined the qualifications of the two doctors. Decision and Order at 12; *see* 20 C.F.R. §718.202(a)(1); *Dixon v. North Camp Coal Co.*,

[2] The February 8, 2007, x-ray was also reviewed by Dr. Barrett. However, his reading was for quality purposes only. Director's Exhibit 14-1.

8 BLR 1-344 (1985). Dr. Baker is a B reader, while Dr. Kendall is a Board-certified radiologist and B reader. Director's Exhibits 13-1, 17-5, 17-7. In *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 n. 5 (1985), the Board held that the qualifications of a Board-certified radiologist are at least comparable, if not superior, to a physician certified as a B reader. *See also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); 20 C.F.R. §718.202(a)(1)(ii)(C), (E). Thus, the administrative law judge properly accorded greater weight to Dr. Kendall's reading and found the x-ray to be negative for pneumoconiosis. *Id*. Based on this finding, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Further, we affirm the administrative law judge's accurate finding that the record does not contain biopsy or autopsy evidence and, therefore, Section 718.202(a)(2) is not applicable. Decision and Order at 11. Likewise, we affirm the administrative law judge's correct determination that the existence of pneumoconiosis was not established at Section 718.202(a)(3), because there is no evidence of complicated pneumoconiosis and none of the other presumptions set forth at that section is applicable since the present claim was filed by a living miner after January 1, 1982. Decision and Order at 11; 20 C.F.R. §§718.304, 718.305, 718.306.

The administrative law judge next considered the medical opinion evidence under 20 C.F.R. §718.202(a)(4). Three medical opinions were submitted: one by Dr. Baker,[3] who recorded a coal mine employment history of 17 years and diagnosed pneumoconiosis, and two by Drs. Broudy and Dahhan, who indicated that claimant does not have pneumoconiosis. Director's Exhibits 13-14, 15-3 – 15-5, 15-7, 16-3 – 16-5.

The administrative law judge found that claimant failed to prove that he has pneumoconiosis pursuant to Section 718.202(a)(4), because Dr. Baker, the only physician who diagnosed pneumoconiosis, was vague in setting forth his conclusions and relied upon an inaccurate history of coal mine employment. Decision and Order at 14. We affirm the administrative law judge's finding at Section 718.202(a)(4), as it is rational and supported by substantial evidence. When evaluating Dr. Baker's opinion, the administrative law judge acted within her discretion in finding that his diagnosis of pneumoconiosis was undermined by his reliance upon an x-ray that the administrative

[3] When summarizing the medical opinion of Dr. Baker, the administrative law judge inadvertently stated that Dr. Baker examined claimant on February 7, 2007, instead of February 8, 2008. *See* Decision and Order at 8.

law judge determined was negative and upon a length of coal mine employment that exceeded the 8.4 years of coal mine employment found by the administrative law judge. Decision and Order at 14; *see Scott v. Mason Coal Co*., 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002).

Further, Dr. Baker found that smoking was the predominant cause of claimant's obstructive disease, but estimated that coal dust exposure "*may* represent 10-15% of the etiology of [claimant's] bronchitis." Director's Exhibit 13-14 (emphasis added). Given that Dr. Baker's opinion, regarding the presence of legal pneumoconiosis was equivocal, the administrative law judge properly accorded it less weight on the ground that it was "tentative." Decision and Order at 14; *see Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988). In addition, the administrative law judge rationally found that she was unable to determine from the evidence whether Dr. Baker's opinion would have changed if he had known that claimant's exposure to coal dust was only half as much as he believed. Decision and Order at 14; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Based on this evidence, therefore, the administrative law judge rationally concluded that Dr. Baker's opinion did not support a finding that claimant has pneumoconiosis, and that Drs. Broudy and Dahhan found that claimant's mild obstructive lung disease did not result from the inhalation of coal dust or coal workers' pneumoconiosis. Decision and Order at 14; Director's Exhibits 15-5, 16-4. Accordingly, the administrative law judge's finding that claimant did not establish that he has pneumoconiosis on the basis of medical opinion evidence is affirmed. Because we have affirmed the administrative law judge's findings under Section 718.202(a)(1)-(4), we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis.

Regarding total disability under Section 718.204(b)(2), the record contains three pulmonary function studies, three blood gas studies, and medical opinions from Drs. Baker, Broudy, and Dahhan. Director's Exhibits 13, 15, 16. The pulmonary function studies performed by Drs. Broudy and Dahhan were nonqualifying and were described as showing a mild or very mild obstructive ventilatory impairment, while the study performed by Dr. Baker was nonqualifying and produced values that Dr. Baker described as within normal limits.[4] Director's Exhibits 13-4 – 13-6, 13-12, 15-4, 15-8, 15-10 – 15-15, 16-4, 16-6 – 16-13. The results of the blood gas studies by Drs. Broudy and Dahhan

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

were nonqualifying and were described as showing mild or minimal hypoxemia at rest. Director's Exhibits 15-5, 15-9, 16-4, 16-14 – 16-15. The results of the study by Dr. Baker were nonqualifying, and he again described them as within normal limits. Director's Exhibits 13-12. All of the physicians reported that claimant was only able to perform the blood gas study at rest due to heart and breathing problems. The doctors agreed that, based on an analysis of his respiratory health, claimant can perform his previous coal mine employment or comparable work. Director's Exhibits 13-14, 15-5, 15-7, 16-4.

The administrative law judge correctly determined that total disability was not established under Section 718.204(b)(2)(i), (ii), as none of the pulmonary function studies or the arterial blood gas studies resulted in qualifying values. Decision and Order at 15; Director's Exhibits 13, 15, 16; 20 C.F.R. §718.204(b)(2)(i), (ii). With respect to Section 718.204(b)(2)(iii), the administrative law judge properly found that the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 15.

Regarding Section 718.204(b)(2)(iv), the administrative law judge properly found that none of the doctors who examined claimant found him to be totally disabled. Decision and Order at 15; Director's Exhibits 13-14, 15-5, 15-7, 16-4. Claimant provided testimony at the hearing that he is unable to return to work. Hearing Transcript at 29. However, in a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish total disability." 20 C.F.R. §718.204(d)(5); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Accordingly, the administrative law judge rationally found the evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 15; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Therefore, we affirm the administrative law judge's finding that there is no competent medical evidence to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2).

Because we have affirmed the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at Section 718.202(a) or total disability at Section 718.204(b)(2), both of which are essential elements of entitlement, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order Denying Benefits 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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REGINA C. McGRANERY
Administrative Appeals Judge