BRB No. 09-0558 BLA

JERRY HODGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY	)	
	)	DATE ISSUED: 05/28/2010
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Jerry Hodge, St. Charles, Virginia, *pro se.*

Paul E. Jones and James W. Herald III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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 BOGGS, Administrative Appeals Judges

PER CURIAM:

Claimant appeals,[1] without the assistance of counsel, the Decision and Order – Denial of Benefits (2007-BLA-05457) of Administrative Law Judge Joseph E. Kane rendered on a claim filed on April 3, 2006, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). In his Decision and Order dated March 26, 2009, the administrative law judge credited claimant with thirty-seven years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, but that claimant failed to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the denial of his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has also filed a brief but takes no position on the merits of claimant's entitlement to benefits.[2]

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v.*

[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).

[2] By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Hodge v. Manalapan Mining Co.*, BRB No. 09-0558 BLA (Mar. 31, 2010) (unpub. Order). Employer and the Director, Office of Workers' Compensation Programs (the Director), have responded and assert that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's finding that the evidence is insufficient to establish total disability.

Director, OWCP, 9 BLR 1-36 (1986). The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).[4]

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 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*).

If the irrebuttable presumption described at 20 C.F.R. §718.304 does not apply,[5] a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function tests showing qualifying values equal to, or less than, those in Appendix B, blood gas studies showing qualifying values set forth in Appendix C, by evidence establishing cor pulmonale with right-sided congestive heart failure, or if a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).

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[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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, 1-202 (1989) (*en banc*).

[4] We affirm the administrative law judge's determinations that claimant established thirty-seven years of coal mine employment and the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as those determinations are unchallenged on appeal and favorable to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The administrative law judge properly determined that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304, as the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304; Decision and Order at 12.

In considering the issue of whether claimant was totally disabled by a respiratory or pulmonary impairment, the administrative law judge noted that the record contains three pulmonary function studies. Dr. Baker performed a pulmonary function study on April 20, 2006; Dr. Dahhan performed a pulmonary function test on June 28, 2006; and Dr. Jarboe performed a pulmonary function test on September 28, 2006. Director's Exhibits 12, 14, 20. Because none of the pulmonary function tests was qualifying for total disability under the regulatory criteria,[6] the administrative law judge properly found that claimant was unable to establish that he is totally disabled under 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered five arterial blood gas studies. He found that Dr. Smiddy obtained a resting arterial blood gas study on May 31, 2007, which was non-qualifying;[7] Dr. Baker obtained a resting arterial blood gas study on April 20, 2006, which was qualifying; Dr. Jarboe obtained a resting arterial blood gas study on September 28, 2006, which was non-qualifying; Dr. Dye obtained a resting arterial blood gas study on September 29, 2006, which was qualifying; and Dr. Dahhan obtained a resting arterial blood gas study on June 28, 2006, which was qualifying, but the exercise portion of the test was non-qualifying for total disability under the regulatory criteria. Decision and Order at 18; Director's Exhibits 12, 14, 20, 44; Claimant's Exhibit 3. The administrative law judge found the arterial blood gas study evidence to be equally balanced as "three of the tests yielded qualifying values, while three did not." Decision and Order at 19. Because the administrative law judge considered the arterial blood gas study evidence to be "inconclusive on the issue of total disability," we affirm, as a matter of discretion, the administrative law judge's finding that claimant did not satisfy his burden to establish total disability under 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 19; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

[6] A "qualifying" pulmonary function test yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. Specifically, the FEV1 and either the MVV, FVC or the FEV1/FVC values must qualify. A "non-qualifying" test yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] A "qualifying" arterial blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(ii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge correctly found that the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure, and, therefore, claimant is unable to establish total disability pursuant to that subsection. Decision and Order at 18.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Baker, Dahhan, Jarboe, and Dye. Dr. Baker examined claimant on April 20, 2006, at the request of the Department of Labor. Director's Exhibit 12. He diagnosed coal workers' pneumoconiosis, chronic bronchitis, chronic obstructive pulmonary disease with a mild obstructive defect, and moderate hypoxemia based on the results of the resting arterial blood gas study. Dr. Baker diagnosed a Class II respiratory impairment and opined that claimant retained the respiratory capacity to perform coal mine work. *Id*. However, in a subsequent letter dated August 30, 2006, Dr. Baker indicated that he had overlooked that claimant's arterial blood gas study was qualifying for total disability based on the pCO2 value he obtained. Director's Exhibit 40. Dr. Baker indicated that claimant was totally disabled based on this arterial blood gas study. *Id*.

Dr. Baker also wrote a letter on March 15, 2007, indicating that he had reviewed a resting arterial blood gas study obtained by Dr. Jarboe, which was non-qualifying for total disability. Employer's Exhibit 1. Dr. Baker opined that his own study was valid and that Dr. Jarboe's study was "probably accurate as well." *Id*. He further stated:

> I note Dr. Jarboe's blood gases are much better than those obtained by myself. . . . This can only be explained [by] the fluctuation of the patient's respiratory status from time to time[,] as there was a time difference of [four and one-half] months between the blood gas study obtained in my office and the study by Dr. Jarboe. . . . The blood gas values obtained by Dr. Jarboe [would] certainly indicate [that claimant] would have the respiratory capacity to do the work as a miner. If my results were likewise accurate, this would indicate he does have some degree of fluctuating blood gas values and at times he might be more able to work than others.

Id.

Dr. Dahhan examined claimant on June 28, 2006. Director's Exhibit 14. He indicated that claimant's pulmonary function study showed a mild, partially reversible obstructive ventilatory impairment, while the resting arterial blood gas study showed moderate hypoxemia and the exercise portion of the test showed "minimum" hypoxemia. *Id*. Dr. Dahhan stated that, "[b]ased on my overall evaluation of [claimant], within a reasonable degree of medical certainty, he does not retain the respiratory capacity to continue his previous coal mine work or job of comparable physical demand." *Id*.

Dr. Jarboe examined claimant on September 28, 2006. Director's Exhibit 20. He reported that claimant's pulmonary function study showed no restriction, but did show mild air flow obstruction with no bronchodilator response. *Id*. He also noted that claimant's arterial blood gas study was "normal for a man of [sixty] years of age." *Id*. He concluded that "[t]here is no evidence that [claimant] is totally and permanently disabled from a respiratory standpoint." *Id*. He further stated:

> [Claimant's] FVC is well within normal limits and exceeds the federal limits for disability in coal workers. Also, his FEV1 exceeds the federal limits. His diffusion capacity is mildly reduced, and his resting arterial oxygen tension is normal. Thus, there is no evidence of a gas exchange abnormality.

Id.

In an October 13, 2006 letter addressed to "Whom It May Concern," Dr. Dye stated that claimant has multiple medical problems, including worsening "Black Lung." Director's Exhibit 44. He noted that claimant requires oxygen, nebulizers, and multiple inhalers to remain somewhat functional. *Id*. He described claimant's "most recent [arterial blood gas study] on room air" as showing "a chronic compensated respiratory condition." *Id*. He opined that claimant has "clinical [b]lack [l]ung" and is totally disabled from all employment. *Id*.

Dr. Jarboe submitted a supplemental report on April 23, 2007, after reviewing Dr. Dye's October 13, 2006 letter and the arterial blood gas test results obtained by Dr. Dye on September 29, 2006. Employer's Exhibit 6. Dr. Jarboe indicated that he could not validate the study because there was no information regarding its calibration. Assuming the test was valid, Dr. Jarboe opined that the results could be due to respiratory symptoms, such as wheezing, which can reduce ventilation, and a productive cough, which can clog airways with mucous and affect oxygen tension. He also opined that claimant's heart disease was a potential cause of the fluctuating results. *Id*.

In a letter dated February 28, 2008, Dr. Dye wrote that claimant has black lung, chronic obstructive pulmonary disease, coronary artery disease and "is continuing to deteriorate despite appropriate medication and oxygen." Claimant's Exhibit 4. He noted that "[o]verall, [claimant] feels tired and frustrated with his deteriorating health" and "is still disabled from the above reasons and with significant contribution from the black lung." *Id*.

In an April 23, 2008 supplemental report, Dr. Jarboe summarized Dr. Dye's February 28, 2008 letter and indicated that he disagreed with Dr. Dye's opinion, that claimant has a disabling pulmonary impairment caused by Black Lung or chronic

obstructive pulmonary disease. Employer's Exhibit 6. Dr. Jarboe reiterated his opinion that claimant "may well be disabled as a whole man due to his heart disease," unrelated to his coal mine employment. *Id*.

Additionally, in a May 14, 2008 supplement report, Dr. Jarboe reviewed the arterial blood gas study results of May 31, 2007. He indicated that he was unable to validate the study because there was no information as to the calibration of the machine or the integrity of the sample. Employer's Exhibit 7. He indicated that while the values for the study "fall below the federal limits for disability," it was his opinion that claimant has "a number of medical problems which will affect gas exchange and cause variation in the oxygen tension from day to day," including daily productive cough and wheezing, and heart disease. *Id*.

Based on our review of the administrative law judge's findings, we conclude that he acted within his discretion in finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). The administrative law judge summarized the three reports Dr. Baker provided, and permissibly found that Dr. Baker "did not definitely state whether or not [c]laimant is disabled." Decision and Order at 19. The administrative law judge reasonably assigned "little probative value on the issue of total disability" to Dr. Baker's opinion because he found it to be equivocal. *Id*.; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

The administrative law judge also acted within his discretion in concluding that the disability opinions of Drs. Dahhan and Dye were "less persuasive" because Drs. Dahhan and Dye, unlike Dr. Jarboe, failed to "consider additional evidence" or fully explain the basis for their conclusions:

> [Dr. Jarboe] . . . reviewed Dr. Dye's report and qualifying arterial blood gas test, which was administered one day after Dr. Jarboe's test. Based on the fluctuation in one day, Dr. Jarboe opined that the results of Dr. Dye's test were likely caused by respiratory symptoms, which may have been more severe that day. Dr. Jarboe also reviewed the May 31, 2007 [arterial blood gas test] . . . again attributing the results to worsening respiratory symptoms, rather than a permanent impairment. Although his disability assessment was also brief, Dr. Jarboe reviewed more objective evidence than any other physician.

Decision and Order at 19; *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Rowe v. Director, OWCP*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-

52 (1988). Because the administrative law judge considered Dr. Jarboe's opinion, that claimant was not totally disabled by a respiratory or pulmonary impairment, to be reasoned and documented, we affirm his finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19; *Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9.

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). The administrative law judge, as trier-of-fact, has discretion to make credibility determinations, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Rowe*, 710 F.2d at 251, 5 BLR at 2-99. We therefore affirm, as supported by substantial evidence, the administrative law judge's overall conclusion that claimant failed to satisfy his burden to establish that he is totally disabled. *See Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 19. Because claimant failed to establish total disability, a requisite element of entitlement, benefits are precluded.[8] *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[8] Based on our review of the record, and the briefs filed by employer and the Director, and because we affirm the administrative law judge's finding that total disability was not established at 20 C.F.R. §718.204(b), we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge