BRB No. 00-0107 BLA

EARL J. TRUSTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
Employer-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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Deborah Mae Trusty on behalf of Earl J. Trusty, Linton, Indiana, *pro se.*

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order - Denying Benefits (97-BLA-1791) of Administrative Law Judge Rudolf L. Jansen on a request for modification in a claim[2] filed pursuant to the provisions of Title IV of the Federal

[1]Claimant's widow, Deborah Mae Trusty, is pursuing the miner's claim. The autopsy indicates that the miner died on August 1, 1997 due to adenocarcinoma of the right lung. Claimant's Exhibit 1.

[2]Claimant filed the instant claim on December 10, 1985. Director's Exhibit 1. Subsequent to a hearing, the administrative law judge denied benefits based on claimant's failure to establish the existence of pneumoconiosis and total respiratory or pulmonary

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge determined that claimant thereby established a change in conditions on modification under 20 C.F.R. §725.310. Considering the record as a whole on the merits of the claim, the administrative law judge further found that the evidence failed to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

In response to the instant appeal, employer urges the Board to affirm the administrative law judge's denial of benefits on the merits of the claim. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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. *Stark v. Director, OWCP,* 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment,

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disability under 20 C.F.R. Part 718. Director's Exhibit 34. In its Decision and Order dated May 11, 1994, the Board affirmed the administrative law judge's denial of benefits based on the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis under Part 718. Director's Exhibit 35. Claimant timely requested modification and submitted additional medical evidence. Director's Exhibit 36. Claimant passed away in 1997 prior to the issuance of the administrative law judge's Decision and Order, the subject of the instant appeal, which is dated August 31, 1999.

and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The administrative law judge's finding, on the merits of the claim, that the evidence of record fails to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(c)(1) through (c)(4), is rational, supported by substantial evidence, and in accordance with applicable law.[3] Pursuant to Section 718.204(c)(1), the administrative law judge correctly noted that the sole pulmonary function study submitted since the prior denial resulted in non-qualifying values.[4] Director's Exhibit 36. The administrative law judge further noted that of the five previously submitted pulmonary function studies, three resulted in qualifying values and these three studies "were invalidated for reasons including

[3]We affirm, as unchallenged on appeal, the administrative law judge's findings of the existence of occupational pneumoconiosis at 20 C.F.R. §§718.202(a)(2) and 718.203(b) and that claimant established a change in conditions on modification under 20 C.F.R. §725.310. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

inadequate effort and invalid MVV values. Even if I did credit the tests which produced qualifying results, the most recent study did not produce qualifying results. This study was found to be valid by Drs. Tuteur and Renn." Decision and Order at 10.[5] The administrative law judge thereby properly resolved the conflicting pulmonary function studies of record and accorded greatest weight to the most recent pulmonary function study of record, which was validated by two physicians. *Wilt v. Wolverine Mining Co.,* 14 BLR 1-70 (1990); *Trent, supra*; *Gambino v. Director, OWCP*, 6 BLR 1-134 (1983).

[5]The administrative law judge continued, "Since pneumoconiosis is a progressive and irreversible disease, it would be illogical for Claimant's results to improve if the cause of his respiratory condition truly was pneumoconiosis." Decision and Order at 10. While employer recognizes that this statement by the administrative law judge is irrelevant to the issue at 20 C.F.R. §718.204(c)(1) and cannot affect the outcome of the case, employer notes its disagreement with the theory that pneumoconiosis is invariably progressive, particularly in the absence of further coal dust exposure. Ultimately, employer notes its objection to this statement by the administrative law judge in the event of further proceedings. Employer's Brief at 12-13 n.2.

Pursuant to Section 718.204(c)(2), the administrative law judge correctly noted that no new blood gas study was submitted since the prior denial. The administrative law judge then noted that the previously submitted blood gas studies were conflicting, and permissibly accorded determinative weight to the most recent of record, which resulted in non-qualifying values. Director's Exhibits 15, 27, 30; *Wilt, supra*; *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984).[6]

Further, the administrative law judge correctly noted that the record contains no evidence that claimant had cor pulmonale with right sided congestive heart failure, and thus, claimant cannot establish total respiratory or pulmonary disability at Section 718.204(c)(3). Decision and Order at 10.

Under Section 718.204(c)(4), the administrative law judge found that of the newly submitted medical opinions, Dr. Combs' opinion supports a finding that claimant was totally disabled. Dr. Combs opined that claimant was significantly disabled from coal workers' pneumoconiosis and indicated his belief that it would not have been possible for claimant to return to his coal mine employment due to his coal workers' pneumoconiosis. Claimant's Exhibit 5. The administrative law judge next properly determined that Dr. Tuteur's finding of a "mild obstructive ventilatory defect that improves to normal following the administration of aerosolized bronchodilator," Director's Exhibit 39, supports a finding that claimant was not totally disabled. *See generally McMath v. Director, OWCP*, 12 BLR 1-6 (1988). The administrative law judge also correctly noted that Dr. Kleinerman's opinion supports a finding that claimant was not totally disabled. Dr. Kleinerman found that claimant's mild reversible airways narrowing "did not cause Mr. Trusty to have impaired respiratory function nor to interfere with his assignments while at work." Employer's Exhibit 1. With regard to the relevant previously submitted medical opinions, the administrative law judge noted that Dr. Combs had opined that claimant's pneumoconiosis prevented him from performing his usual coal mine employment, while Drs. Howard and Dukes had found that claimant had the respiratory capacity to perform his usual coal mine employment. Employer's Exhibits 26, 27, 29.

Weighing the conflicting medical opinions of record, the administrative law judge found,

Although Dr. Combs is a board certified physician, I continue to find that

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[6]The record reveals that the blood gas studies performed in 1985 resulted in both qualifying and nonqualifying values. Director's Exhibits 27, 44. Each of the studies conducted in 1986 and 1987, the most recent of record, resulted in nonqualifying values. Director's Exhibits 15, 27, 30.

> his opinion is entitled to less weight since it is contradicted by his own pulmonary function study and arterial blood gas study evidence. Dr. Kleinerman's opinion is entitled to additional weight since he is a board certified physician who defended and thoroughly explained his opinion at deposition. His opinion is supported by Dr. Tuteur's findings based on the April 17, 1995 pulmonary function study and the well documented and well reasoned opinions of board certified physicians, Drs. Howard and Dukes. Accordingly, I find that the medical opinion evidence does not support a finding of total respiratory disability.

Decision and Order at 11. The administrative law judge properly accorded less weight to Dr. Combs' opinion based on his finding that it was inconsistent with its underlying evidence. *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge, within his discretion, accorded additional weight to Dr. Kleinerman's opinion based on his finding that it was thoroughly explained, and supported by Dr. Tuteur's findings regarding the April 17, 1995 pulmonary function study, the most recent of record, and the opinions of Drs. Howard and Dukes. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see generally Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Based on the foregoing discussion, we affirm the administrative law judge's finding that the evidence of record fails to establish that claimant was totally disabled due to a respiratory or pulmonary impairment under Section 718.204(c)(1) through (c)(4). In light of our affirmance of the administrative law judge's finding that claimant failed to establish total respiratory or pulmonary disability under Section 718.204(c), an essential element of entitlement, we affirm the administrative law judge's denial of benefits in the instant case as a finding of entitlement is precluded. *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

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge