BRB No. 02-0406 BLA

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| CHARLES RAY FOSTER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| PEABODY COAL COMPANY | ) | DATE ISSUED: _____ |
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| Employer-Respondent | ) | |
| | ) | |
| and | ) | |
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| 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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Charles Ray Foster, Nortonville, Kentucky, *pro se*.

Mark E. Solomons and Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denial of Benefits (01-BLA-0502) of Administrative Law Judge Robert L. Hillyard (the administrative law judge) 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 credited claimant with thirty-four years of coal mine employment. The administrative law judge, considering all the evidence of record on the merits of the claim, found that the evidence fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that even if claimant had established the existence of pneumoconiosis, the record evidence fails to establish that claimant is totally disabled due to a respiratory or pulmonary impairment under 20 C.F.R. §718.204(b).[2] Accordingly, benefits were denied. Employer, in response to claimant's appeal, urges the Board to affirm the administrative law judge's denial of benefits on the merits of the claim. Employer contends that the administrative law judge properly found that the evidence of record fails to establish the existence of pneumoconiosis and total respiratory or pulmonary disability. 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).

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[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]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 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*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

We affirm the administrative law judge's denial of benefits on the merits of the claim as substantial evidence supports his finding that, even if claimant had established the existence of pneumoconiosis, the evidence fails to establish a totally disabling respiratory or pulmonary impairment. *See* Decision and Order at 12. The administrative law judge, considering the relevant evidence pursuant to the regulation at 20 C.F.R. §718.204(b), correctly found that none of the four pulmonary function studies of record resulted in qualifying values.[3] 20 C.F.R. §718.204(b)(2)(i); Director's Exhibits 10, 11, Claimant's Exhibit 1, Employer's Exhibit 2. Likewise, he correctly determined that neither of the two blood gas studies of record produced qualifying values. 20 C.F.R. §718.204(b)(2)(ii); Director's Exhibit 10, Employer's Exhibit 2. The administrative law judge also correctly found that the record contains no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

[3]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(b)(2)(i), (ii).

The administrative law judge, addressing the relevant medical opinions under 20 C.F.R. §718.204(b)(2)(iv), initially determined, pursuant to *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), that claimant's usual coal mine employment was that of a beltman in an underground coal mine, which work required him to clean headers, shovel, clean and change belt rollers, and maintain and splice belts. Decision and Order at 13. The administrative law judge noted that Dr. O'Bryan opined that claimant has no respiratory impairment. *See* Employer's Exhibit 3. He further discussed the fact that Dr. Myers, who indicated that claimant was "still working"[4] as a beltman in an underground coal mine, opined that claimant was physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work in a dust-free environment. *See* Claimant's Exhibit 1. The administrative law judge next addressed Dr. Anderson's opinion dated April 4, 1994. Director's Exhibit 11. Dr. Anderson noted claimant's coal mine work on the beltline and that he was still working at the time of his physical examination. Dr. Anderson diagnosed Category 2/1 pneumoconiosis, normal pulmonary function studies, and history compatible with coronary artery disease treated with angioplasty. Dr. Anderson indicated that claimant was physically able, from a pulmonary standpoint, to perform his usual coal mine employment or comparable and gainful employment in a dust-free environment. Dr. Anderson explained, "Does retain sufficient pulmonary functional capacity to do so, however, with Category 2 an irrebuttable presumption of disability." *Id.* The administrative law judge noted Dr. Anderson's opinion that claimant was able to perform his usual coal mine employment or comparable and gainful work, and found:

> However, referring to his 2/1 interpretation of the Claimant's x-ray, [Dr. Anderson] wrote that "with Category 2 an irrebuttable presumption of disability." (DX 11). I find that Dr. Anderson's opinion is not sufficient to establish total disability pursuant to [20 C.F.R.] §718.204(b)(2)(iv).

Decision and Order at 13. We hold that the administrative law judge properly determined that Dr. Anderson's opinion is insufficient to establish that claimant is totally disabled due to a respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(iv). Specifically, contrary to Dr. Anderson's suggestion, an x-ray reading of "Category 2/1 pneumoconiosis"

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[4]Dr. Myers' opinion is dated December 14, 1993. Claimant's Exhibit 1. The record indicates that the miner last worked in the coal mines on May 17, 1994, receiving "sickness and accident pay" for a year until he retired in 1995. Director's Exhibits 1, 2, 12; Hearing Transcript at 26-30.

does not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.304.

The administrative law judge next addressed Dr. Westerfield's medical opinion. Dr. Westerfield conducted a cardiopulmonary exercise test, a pulmonary function study and an EKG on January 5, 1995. He opined that claimant has a mild cardiovascular limitation consistent with a history of coronary artery disease and coronary artery bypass graft, and a mild to moderate respiratory impairment that he categorized as "AMA Class 2" and related to claimant's exposure to coal dust. Director's Exhibit 11. The administrative law judge noted that Dr. Westerfield did not render an opinion as to whether or not claimant's respiratory or pulmonary condition prevented him from engaging in his usual coal mine employment or comparable and gainful work. *See* Director's Exhibit 11. The administrative law judge then found, within his discretion, that Dr. Westerfield's diagnosis of a mild to moderate respiratory impairment, when compared with the exertional requirements of claimant's usual coal mine employment, is not sufficient to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(b)(2)(iv).[5] *Cornett, supra*; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996).

The administrative law judge next weighed Dr. Simpao's opinion. Dr. Simpao examined the claimant on June 6, 2000 and diagnosed a mild impairment due to pneumoconiosis which arose from claimant's coal mine employment. Dr. Simpao opined that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. In this regard, Dr. Simpao explained that his opinion was based on "[o]bjective findings on the chest x-ray and EKG along with symptomatology and physical findings as noted in the report." Director's Exhibit 10. The

[5]In addition, the administrative law judge, considering Dr. Westerfield's medical opinion pursuant to 20 C.F.R. §718.202(a)(4), correctly found that the record lacks specific test results, tracings or test data from any objective test conducted by Dr. Westerfield. Director's Exhibit 11; Decision and Order at 9-10. The administrative law judge thus properly found that Dr. Westerfield's opinion, that claimant has a ventilatory limitation due to his exposure to coal dust, is not well reasoned because the physician failed to include the specific test data to support his conclusion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987). The administrative law judge thus properly accorded less weight to Dr. Westerfield's opinion and found it outweighed by Dr. O'Bryan's contrary opinion, that claimant has no respiratory impairment, which he determined to be better reasoned, documented, and supported by the medical evidence of record. *See* Employer's Exhibit 3; Decision and Order at 9-10.

administrative law judge found that Dr. Simpao was the only physician of record to find that claimant was totally disabled. Decision and Order at 13. The administrative law judge thereby permissibly determined that Dr. Simpao's opinion was outweighed by the contrary medical opinions of record.[6] *See Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984); *see generally King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). The administrative law judge thus properly determined that the medical opinion evidence fails to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(b)(2)(iv).

Based on the foregoing, we hold that the administrative law judge's finding that the record evidence fails to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(b) is rational, supported by substantial evidence and in accordance with law, and must be affirmed. Because the evidence fails to meet claimant's burden to establish that he is totally disabled due to a respiratory or pulmonary impairment under 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits as a finding of entitlement is precluded in the instant case. *See Trent, supra*; *Perry, supra*. We, therefore, need not reach the administrative law judge's additional findings.

Accordingly, we affirm the administrative law judge's Decision and Order - Denial of Benefits.

[6]The administrative law judge also considered Dr. Simpao's opinion under 20 C.F.R. §718.202(a)(4). Therein, he properly accorded less weight to Dr. Simpao's opinion, that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable and gainful work in a dust-free environment, because, *inter alia*, he found that Dr. Simpao "gave no reasoning for his findings in light of the normal pulmonary function study and arterial blood gas study." Decision and Order at 10; *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge