

BRB No. 05-0425 BLA

BOBBY R. SMITH)
)
 Claimant-Petitioner)
)
 v.)
)
 RALEIGH MINE & INDUSTRIAL)
 SUPPLY, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 11/15/2005
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Bobby R. Smith, Port Richey, Florida, *pro se*.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

BEFORE: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals from the Decision and Order on Remand – Denial of Benefits (02-BLA-5314) of Administrative Law Judge Robert L. Hillyard with respect to 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). When this case was last before the Board, the Board vacated the administrative law judge’s finding that claimant established total disability under 20 C.F.R. §718.204(b)(2)(iv) and remanded the case to the administrative law judge for reconsideration of the opinions of Drs. Fino and Newan. *Smith v. Raleigh Mine & Industrial Supply, Inc.*, BRB No. 03-0731 (May 28, 2004)(unpub.).¹

On remand, the administrative law judge found that these opinions were not adequately reasoned or documented. He further determined, therefore, that claimant failed to satisfy his burden of proving that he is suffering from a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

Claimant argues generally on appeal that the administrative law judge erred in denying his claim. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Worker Compensation Programs, has submitted a letter in which he states that he will not be participating in this 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 in a living miner’s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from 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*).

On remand, the administrative law judge complied with the Board’s instructions and reconsidered the opinions of Drs. Newan and Fino pursuant to Section

¹ The complete procedural history of this case is set forth in the Board’s prior Decision and Order. *Smith v. Raleigh Mine & Industrial Supply, Inc.*, BRB No. 03-0731 (May 28, 2004)(unpub.), slip op. at 2 n.2.

718.204(b)(2)(iv). The administrative law judge determined that Dr. Newan's opinion, that claimant is suffering from a totally disabling pulmonary impairment, was not well reasoned because there is no pulmonary function study (PFS) in the record with the FEV1 values upon which the doctor based his finding of an impairment.² Decision and Order on Remand at 6; Director's Exhibit 13; Claimant's Exhibit 1. We affirm the administrative law judge's decision to discredit Dr. Newan's diagnosis of a totally disabling respiratory impairment, as the administrative law judge provided a valid rationale for questioning the credibility of Dr. Newan's diagnosis of an impairment. See *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991).

We now turn to the administrative law judge's consideration of Dr. Fino's opinion. Dr. Fino reviewed the medical evidence of record and stated:

There is a mild reduction in the FVC and FEV1. However there is no evidence of an impairment in the oxygen transfer. The reduction in FVC and FEV1 is not sufficient to prevent him from returning to his last job or a job requiring similar effort.

Employer's Exhibit 1. The administrative law judge determined that Dr. Fino's opinion does not support a finding of total disability pursuant to Section 718.204(b)(2)(iv). Decision and Order on Remand at 5. The administrative law judge's finding is rational and supported by substantial evidence, as Dr. Fino did not explicitly diagnose a respiratory or pulmonary impairment – he merely noted a reduction in the values on claimant's June 5, 2001 PFS – nor did he describe any exertional limitations relevant to claimant. See *Boyd v. Freeman United Coal Mining Co.*, 6 BLR 1-159, 1-164 (1983). We therefore affirm the administrative law judge's finding that claimant has not established total disability pursuant to Section 718.204(b)(2)(iv).

In light of the administrative law judge's permissible determination that claimant did not demonstrate total disability under Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, we must affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

² Dr. Newan indicated that he based his diagnosis of a totally disabling impairment upon a PFS during which claimant produced an FEV1 that was 48% of the predicted value. Claimant's Exhibit 1. Dr. Newan obtained a PFS from claimant on December 14, 2001. The two FEV1 values on this study were reported to be 69% and 67% of the predicted value respectively. Director's Exhibit 13.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge