BRB No. 12-0141 BLA

JACK W. STEELE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADDINGTON, INCORPORATED (PITTSTON COAL)	)	
	)	
	)	DATE ISSUED: 11/28/2012
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 and Decision on Motion for Reconsideration of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan PSC), South Williamson, Kentucky, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Decision on Motion for Reconsideration (10-BLA-5892) of Administrative Law Judge Richard A. Morgan denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a

subsequent claim filed on September 24, 2009.[1]

After crediting claimant with at least twenty-three years of underground coal mine employment,[2] the administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2009 claim on the merits. Considering this claim, the administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

The administrative law judge found that the evidence did not establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant failed to invoke the Section 411(c)(4) presumption. The administrative law judge also found that claimant was not entitled to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.[3]

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[1] Claimant's previous claim for benefits, filed on November 20, 2003, was denied by an administrative law judge on August 24, 2006, because the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 1. The Board subsequently affirmed the denial of benefits. *J.W.S.* [*Steele*] *v. Addington, Inc.*, BRB No. 06-0971 BLA (Aug. 21, 2007) (unpub.).

[2] Claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law 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).

[3] By Decision on Motion for Reconsideration dated November 25, 2011, the administrative law judge corrected misstatements contained in his Decision and Order dated October 13, 2011.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv) and, therefore, erred in finding that claimant did not invoke the Section 411(c)(4) presumption. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a response brief.[4]

The Board's scope of review is defined by statute. 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. 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 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).

Claimant initially contends that the administrative law judge erred in finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Claimant specifically contends that the administrative law judge erred in not providing a basis for rejecting the qualifying pulmonary function study conducted on September 8, 2010.[5] We disagree. The administrative law judge found that the September 8, 2010 pulmonary function study was invalid, based upon Dr. Rosenberg's review of the study. Decision and Order at 28. Dr. Rosenberg invalidated the study because only "one spirometric attempt was made."[6] Employer's Exhibit 9 at

[4] Because claimant does not challenge the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[6] The standards for the administration and interpretation of pulmonary function tests provide that a "minimum of three flow-volume loops and derived spirometric tracings shall be carried out." 20 C.F.R. Part 718, Appendix B; *see also* 20 C.F.R. §718.103(b). Our review of claimant's September 8, 2010 pulmonary function study

12-14. As the record does not contain any other valid qualifying pulmonary function studies,[7] we affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant next argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant specifically argues that the administrative law judge erred in his consideration of Dr. Lorenzana's opinion. We disagree. The administrative law judge permissibly discounted Dr. Lorenzana's opinion, since it was based, in part, on the September 8, 2010 pulmonary function study, which the administrative law judge had found unreliable.[8] *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 28. Because claimant does not raise any additional error in regard to the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), this finding is affirmed.

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confirms Dr. Rosenberg's observation that the study contains only a single flow-volume loop. Claimant's Exhibit 6.

[7] Although claimant's pre-bronchodilator pulmonary function study conducted on December 29, 2010 produced qualifying values, Dr. Zaldivar, the administering physician, invalidated the results, noting claimant's "extremely poor effort." Employer's Exhibit 3; *see also* Employer's Exhibit 8 at 30-31.

[8] Claimant contends that Dr. Lorenzana's opinion should have been accorded greater weight based upon the doctor's status as claimant's treating physician. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003) (holding that the "case law and applicable regulatory scheme clearly provide that the [administrative law judge] must evaluate treating physicians just as they consider other experts."). In this case, the administrative law judge acknowledged Dr. Lorenzana's status as claimant's treating physician, but permissibly found that the doctor's disability assessment was unreasoned because it was based upon unreliable data. Consequently, the administrative law judge properly found that Dr. Lanazana's opinion was not entitled to controlling weight as claimant's treating physician pursuant to 20 C.F.R. §718.104(d).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718, *see Trent*, 11 BLR at 1-27, as well as his finding that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration are 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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BETTY JEAN HALL
Administrative Appeals Judge