BRB No. 98-0211 BLA

JAMES GROSS)
)
Claimant-Petitioner)
)
v.)
)
DOMINION COAL CORPORATION) 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 of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

James Gross, Swords Creek, Virginia, *pro se*.[1]

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

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

PER CURIAM:

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[1]Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. In an Order issued on November 5, 1997, the Board stated that claimant would be considered to be representing himself on appeal. *Gross v. Dominion Coal Corp.*, BRB No. 98-0211 BLA (Nov. 5, 1997)(Order)(unpub.); *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1813) of Administrative Law Judge Paul A. Mapes denying benefits 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). The administrative law judge credited claimant with thirty-one years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found all of the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found all of the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge found the evidence insufficient to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310,[2] and thus, he denied benefits.[3] On

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[2]Claimant filed his initial claim with the Social Security Administration (SSA) on June 19, 1973. Director's Exhibit 36. After several denials by the SSA, this claim was finally denied by the Department of Labor (DOL) on January 7, 1980. *Id.* The

bases of the DOL's denial were claimant's failure to establish that the pneumoconiosis arose out of coal mine employment and total disability due pneumoconiosis. *Id.* Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed a duplicate claim with the DOL on May 24, 1994. Director's Exhibit 1. On September 9, 1994, the DOL issued a denial of benefits based on claimant's failure to establish total disability due to pneumoconiosis and a material change in conditions. Director's Exhibit 16. Claimant filed a request for modification on August 18, 1995. Director's Exhibit 20.

[3]The administrative law judge stated that "it is clear that there has been a 'material change in conditions' since the denial of the claimant's first claim in 1980 and that therefore a denial of this claim under the provisions of section 725.309 would not be permissible." Decision and Order at 3. The administrative law judge observed that "claimant's uncontradicted testimony that he worked as a coal miner for 31 years is sufficient to warrant invocation of the 20 C.F.R. §718.302 presumption that his pneumoconiosis arose out of his coal mine employment and to thereby establish an element of entitlement that he failed to establish when he made his first claim." *Id.*

appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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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[4]Inasmuch as the administrative law judge's length of coal mine employment finding, which is not adverse to this *pro se* claimant, is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, in finding the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge considered all of the relevant medical evidence of record. The administrative law judge correctly observed that "[a]lthough Dr. Peterkin interpreted the claimant's July 1996 CT scan as showing a large opacity, Dr. Wheeler, Dr. Branscomb and Dr. Castle all failed to detect any evidence of complicated pneumoconiosis on the same CT scan or any subsequent scan."[5] Decision and Order at 10; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 4-6. The administrative law judge also correctly observed that there is no "indication of complicated pneumoconiosis in any of the x-ray interpretations." Decision and Order at 10; Director's Exhibits 13-15, 27, 28, 31, 36; Employer's Exhibits 1, 2, 5. Thus, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

With regard to 20 C.F.R. §718.204(c), the administrative law judge considered all of the pulmonary function studies and arterial blood gas studies of record. Since none of the pulmonary function studies or arterial blood gas studies of record yielded qualifying[6] values, we affirm the administrative law judge's finding that the evidence

[5]The administrative law judge stated that "[t]he first scan was administered on July 17, 1996 by Dr. Ian Peterkin, a radiologist." Decision and Order at 5. The administrative law judge also stated that "[t]he second scan was performed on October 15, 1996 at Clinch Valley Medical Center, but the record does not contain the administering radiologist's report of that scan." *Id.* The administrative law judge observed that "Dr. Peterkin interpreted the [July 17, 1996] scan as indicating 'fine nodular interstitial lung disease, most likely due to pneumoconiosis.'" *Id.* Further, the administrative law judge observed that Dr. Peterkin "noted 'a 1.5-2 cm area of irregular density in the right lateral upper lobe' and commented that while 'this could be an area of conglomerating fibrosis, early neoplastic involvement...cannot be excluded.'" *Id.* In addition, the administrative law judge observed that both the July 17, 1996 and October 15, 1996 CT scans were reviewed by Drs. Branscomb, Castle and Wheeler who concluded that the scans "showed no large opacities compatible with complicated pneumoconiosis." *Id.* The administrative law judge noted that Dr. Branscomb is a B-reader and Dr. Wheeler is a Board-certified radiologist and a B-reader. *Id.*

[6]A "qualifying" pulmonary function study or blood gas study yields values that

is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2).[7] Director's Exhibits 9, 12, 28, 29, 31. In addition, we hold as a matter of law that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since there is no evidence of cor pulmonale with right sided congestive heart failure.

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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).

[7]The record contains three pulmonary function studies dated June 17, 1994, September 11, 1995 and March 12, 1996. Director's Exhibits 9, 28, 29, 31. The administrative law judge found that "[o]f these three tests, only the tests performed by Dr. Robinette [in the September 11, 1995 study] produced results indicative of a total disability under the provisions of Appendix B." Decision and Order at 11. Contrary to the administrative law judge's finding, the September 11, 1995 study produced non-qualifying values. Director's Exhibit 28; 20 C.F.R. §718.204(c)(1). Nonetheless, any error by the administrative law judge in mischaracterizing the September 11, 1995 pulmonary function study is harmless in view of the fact that this study supports the administrative law judge's finding of no total disability at 20 C.F.R. §718.204(c)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Finally, the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). The administrative law judge considered all of the relevant medical opinions of record. The administrative law judge correctly observed that "[o]nly one physician has offered the opinion that the claimant is totally disabled, Dr. Sutherland."[8] Decision and Order at 11; Director's Exhibit 20. Drs. Branscomb, Castle and Forehand opined that claimant does not suffer from a disabling respiratory impairment. Director's Exhibits 11, 31; Employer's Exhibits 2, 4, 5. Drs. Ahmed, Hixson and Robinette did not render opinions with regard to total disability.[9] Director's Exhibits 10, 26, 28. The administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb and Castle than to the contrary opinion of Dr. Sutherland because of their superior qualifications.[10] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24

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[8]Dr. Sutherland opined that claimant is unable to do gainful employment. Director's Exhibit 20.

[9]The administrative law judge correctly found that "Dr. Isosif's opinion that further exposure to coal dust could cause a progression of the claimant's pneumoconiosis is not equivalent to a determination that the claimant has a total disability." Decision and Order at 12 n.5; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

[10]The administrative law judge stated that Dr. Branscomb "is [B]oard-certified

(1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, the administrative law judge permissibly discounted Dr. Sutherland's opinion because he found it to be not well reasoned and documented.[11] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Therefore, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

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in internal medicine, a B-Reader, and a Distinguished Professor Emeritus at the University of Alabama at Birmingham." Decision and Order at 9. The administrative law judge also stated that Dr. Castle "is [B]oard-certified in internal and pulmonary medicine." *Id.* at 8. The credentials of Dr. Sutherland are not contained in the record.

[11]The administrative law judge stated that the opinion of Dr. Sutherland "is not accompanied by an explanation or by any objective medical evidence." Decision and Order at 11.

Since claimant has failed to establish total disability at 20 C.F.R. §718.204(c), an essential element of entitlement under 20 C.F.R. Part 718, or invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, we hold that the administrative law judge properly denied benefits on the merits under 20 C.F.R. Part 718.[12] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

JAMES F. BROWN
Administrative Appeals Judge

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[12]In view of our disposition of the case on the merits, we need not address the administrative law judge's findings at 20 C.F.R. §§725.309 and 725.310. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).