BRB No. 99-0180 BLA

FRED C. HARRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	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 on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Fred C. Harris, Charleston, West Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order on Remand (95-BLA-1872) of Administrative Law Judge John C. Holmes 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 instant case involves a duplicate claim filed on December 15, 1993.[1] In the initial decision, the

[1]The relevant procedural history of the instant case is as follows: Claimant

administrative law judge found, *inter alia*, that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. By Decision and Order dated May 27, 1997, the Board affirmed the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). *Harris v. Cannelton Industries, Inc.*, BRB No. 96-1144 BLA (May 27, 1997) (unpublished). The Board also affirmed the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3). *Id.* However, the Board vacated the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). *Id.* The Board specifically instructed the administrative law judge, on remand, to determine the nature of claimant's usual coal mine employment and the exertional requirements of that job. *Id.* The Board further instructed the administrative law judge to reevaluate the medical opinion evidence to determine whether it supported a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). *Id.* The Board also instructed the administrative law judge to address whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R.

---

initially filed a claim for benefits with the Social Security Administration (SSA) on July 3, 1972. Director's Exhibit 29. The SSA denied the claim on April 23, 1973, September 26, 1973 and October 4, 1979. *Id.* The Department of Labor denied the claim on December 15, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1972 claim.

Claimant filed a second claim on December 15, 1993. Director's Exhibit 1.

§725.309.[2] *Id.*

[2]The Board subsequently denied claimant's motion for reconsideration. *Harris v. Cannelton Industries, Inc.*, BRB No. 96-1144 BLA (Sept. 26, 1997) (Order) (unpublished). Although claimant filed an appeal with the United States Court of Appeals for the Fourth Circuit, the Fourth Circuit dismissed the appeal as interlocutory. *Harris v. Cannelton, Industries*, *Inc.*, No. 97-2474 (4th Cir. Feb. 18, 1998).

On remand, the administrative law judge found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Assuming *arguendo* that the evidence was sufficient to establish total disability, the administrative law judge further found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. The administrative law judge subsequently denied claimant's motion for reconsideration. On appeal, claimant generally contends that the administrative law judge erred in denying benefits.[3] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 living 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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Inasmuch as it is supported by substantial evidence, we initially affirm the administrative law judge's finding that claimant's usual coal mine employment as a trackman required some occasional heavy exertion and a significant amount of

[3]By letter dated November 10, 1998, claimant requested the Board's assistance in obtaining a copy of a document that purportedly evidences a "40% black lung" award. The record indicates that the West Virginia Workmen's Compensation Fund awarded claimant a 15% permanent partial disability award for occupational pneumoconiosis on January 11, 1974. Director's Exhibit 22. Claimant was also granted additional state awards, including a total of 40% for back and leg injuries. *Id.* The record does not contain any evidence of a 40% state award for pneumoconiosis (black lung).

walking and crawling.[4] Decision and Order on Remand at 2.

[4]Claimant testified that he worked various jobs during the last seven years of his coal mine employment. Transcript at 14. Claimant testified that his last coal mine work involved running a motor and laying track. *Id.* at 13. Claimant testified that when he was laying track, he had to lift rails weighing 40-60 pounds. *Id.* at 14-15. Claimant testified that he worked with three other men and that the four of them would use tongs to lift the rails. *Id.* at 15. Claimant also indicated that his position required a lot of walking. *Id.*

In determining whether the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge accorded Dr. Gaziano's opinion "less than full weight" because he found that it was "not particularly well analyzed...." Decision and Order on Remand at 2. Inasmuch as Dr. Gaziano failed to provide a basis for his finding of disability,[5] the administrative law judge acted within his discretion in according Dr. Gaziano's opinion less weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge also found that Dr. Fritzhand's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). Under the Medical Assessment portion of his August 23, 1980 report, Dr. Fritzhand indicated that claimant could perform mild activity without associated shortness of breath. Director's Exhibit 29. The administrative law judge, however, noted that Dr. Fritzhand did not list any physical limitations. Decision and Order on Remand at 3. Noting that Dr. Fritzhand basically gave claimant "a clean bill of health,"[6] the administrative law judge found that Dr. Fritzhand's statement, standing alone, was "worth no weight." *Id.* Inasmuch as Dr. Fritzhand failed to

[5]In a report dated February 24, 1994, Dr. Gaziano opined that claimant's coal workers' pneumoconiosis and ASHD "both independently would be disabling for coal mine work." Director's Exhibit 8. Dr. Gaziano provided no explanation for his conclusion.

[6]Under the "History" portion of his report, Dr. Fritzhand noted that claimant could "ambulate on level terrain without difficulty" and could "climb stairs and walk up grades with but minimal dyspnea." Director's Exhibit 29. Dr. Fritzhand also recorded that claimant could "mow a lawn without associated dyspnea." *Id.* On physical examination, Dr. Fritzhand noted that claimant's breath sounds were "clear without rales, rhonchi or wheezes." *Id.*

provide a basis for his assessment, the administrative law judge acted within his discretion in discrediting Dr. Fritzhand's opinion. *See Clark*, *supra*; *Lucostic*, *supra*.

The administrative law judge also found that Dr. Rasmussen's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). In his December 6, 1995 report, Dr. Rasmussen found that claimant's objective studies revealed a "mild impairment in respiratory function." Claimant's Exhibit 3. Dr. Rasmussen also opined that claimant exhibited "poor exercise tolerance which could be the consequence of his cardiovascular disease, deconditioning and his minimal pulmonary impairment." *Id.* Dr. Rasmussen, therefore, concluded that claimant did "not possess the physical capacity to perform his last regular coal mine job with its requirement of very heavy manual labor." *Id.* Dr. Rasmussen attributed claimant's loss of capacity to his cardiovascular disease, deconditioning, and pulmonary impairment. *Id.* The administrative law judge found that Dr. Rasmussen's description of claimant's coal mine employment as involving very heavy manual labor was "somewhat overdone." Decision and Order on Remand at 3. The administrative law judge also found that Dr. Rasmussen was "ambivalent with respect to the cause of his found disability." *Id.* Inasmuch as Dr. Rasmusssen did not clearly indicate that claimant's pulmonary impairment was, in and of itself, totally disabling, the administrative law judge properly found that Dr. Rasmussen's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4).

The administrative law judge further found that Dr. Bellotte's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). In a report dated December 14, 1995, Dr. Bellotte opined that claimant suffered from some mild pulmonary and respiratory impairment. Employer's Exhibit 4. However, considering only his ventilatory impairment, Dr. Bellotte opined that claimant retained the ability to perform his last coal mining duties as an equipment operator. *Id.*

During a deposition on January 2, 1996, Dr. Bellotte, after noting that he understood the exertional rigors of claimant's last coal mining job as a machine operator to be relatively light labor, opined that claimant retained the pulmonary capacity to perform moderate and heavy exertion. Employer's Exhibit 8 at 9-10. While Dr. Bellotte indicated that claimant, from a pulmonary standpoint, "would maybe have difficulty performing heavy sustained labor or maybe heavy work," he opined that claimant would not be disabled from performing his last coal mining duties as they were explained to him. *Id.* at 26.

The administrative law judge found that Dr. Bellotte's opinion was well-

reasoned and supported by objective testing. Decision and Order on Remand at 3. The administrative law judge, however, found that Dr. Bellotte's opinion was entitled to "less than full value" because he provided somewhat inconsistent descriptions of claimant's last coal mine employment and claimant's work capability. *Id.* As previously noted, the administrative law judge found that claimant's usual coal mine employment required occasional heavy exertion. While Dr. Bellotte opined that claimant, from a pulmonary standpoint, might have difficulty performing heavy sustained labor or heavy work, Dr. Bellotte indicated that claimant retained the pulmonary capacity to perform work requiring moderate and heavy exertion. Employer's Exhibit 8 at 9-10. Consequently, the administrative law judge properly found that Dr. Bellotte's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4).

The administrative law judge also properly found that the opinions of Drs. Zaldivar,[7] Crisalli,[8] Fino[9] and Castle[10] were insufficient to establish total disability

[7]In a report dated September 22, 1994, Dr. Zaldivar opined that claimant suffered from congestive failure, pneumoconiosis and "an asthmatic problem." Employer's Exhibit 1. Dr. Zaldivar indicated that claimant's asthmatic problems could be treated with bronchodilators and prednisone. *Id.*

[8]In a report dated November 8, 1994, Dr. Crisalli opined that he could not state whether claimant retained the pulmonary capacity to perform his work in the coal mines because claimant was in congestive heart failure at the time of his pulmonary function testing. Director's Exhibit 21.

Dr. Crisalli subsequently reviewed additional medical evidence. In a report dated December 14. 1995, Dr. Crisalli opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 2. Dr. Crisalli noted that claimant suffered from atherosclerotic heart disease and congestive heart failure. *Id.* Dr. Crisalli also noted that claimant had a history consistent with chronic bronchitis. *Id.*

In a deposition dated December 20, 1995, Dr. Crisalli noted that he had reviewed additional medical evidence. Employer's Exhibit 6 at 23. Dr. Crisalli assessed claimant's coal mine work as involving "medium work" and, at times, "heavy work." *Id.* at 9. Dr. Crisalli opined that claimant had no "pulmonary function impairment." *Id.* at 28.

[9]Dr. Fino reviewed the medical evidence of record. In a report dated December 18, 1995, Dr. Fino opined that there was no respiratory impairment present. Employer's Exhibit 5. Dr. Fino also opined that from a respiratory

pursuant to 20 C.F.R. §718.204(c)(4). Decision and Order on Remand at 2-4. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, *supra; Gee*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

---

standpoint, claimant was neither partially nor totally disabled from returning to his last coal mining job. *Id.*

[10]Dr. Castle reviewed the medical evidence of record. In a report dated December 21, 1995, Dr. Castle opined that claimant suffered from a "mild respiratory abnormality which [was] not impairing him in any way." Employer's Exhibit 5. Dr. Castle further opined that claimant retained the respiratory capacity to perform his usual coal mine employment. *Id.*

In a deposition dated January 3, 1996, Dr. Castle noted that he had reviewed additional medical evidence. Employer's Exhibit 7 at 8. After noting that claimant's last coal mine job would require heavy labor on an intermittent basis, Dr. Castle opined that claimant retained the respiratory capacity to perform his last coal mine work. *Id.* at 22-23. Dr. Castle noted that claimant had only a "mild airways obstruction" due to his asthma. *Id.* at 23, 26.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge