

BRB No. 07-0221 BLA

R.O.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PANTHER BRANCH)	DATE ISSUED: 10/18/2007
d/b/a LONG BRANCH ENERGY)	
)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Anthony J. Cicconi (Shaffer & Shaffer, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (03-BLA-6560) of Administrative Law Judge Michael P. Lesniak 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). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with twenty-seven years of coal mine employment and found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant was entitled to the presumption that

his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits. By Decision and Order dated March 30, 2006, the Board affirmed 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)-(iii). [*R.O.*] v. *Panther Branch*, BRB No. 05-0640 BLA (Mar. 30, 2006) (unpub.) (Dolder, J., dissenting). However, the Board vacated 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), and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Claimant contends 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). On remand, in his consideration of whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Rasmussen, Zaldivar, and Crisalli.

Dr. Rasmussen opined that claimant suffered from a minimal restrictive ventilatory impairment that would prevent claimant from performing very heavy manual

labor. Director's Exhibit 15. Dr. Rasmussen opined that the only risk factor for claimant's impairment was his coal dust exposure. *Id.*

Dr. Zaldivar opined that claimant suffered from a mild restrictive ventilatory impairment, but that this impairment was "strictly due to obesity accompanied by a sedentary lifestyle." Employer's Exhibit 1. Dr. Zaldivar explained that claimant's restriction is "not due to any lung dysfunction but rather is due to entrapment of the lungs by his heavy weight." *Id.* Dr. Zaldivar opined that "[s]trictly from a pulmonary standpoint, [claimant] is fully capable of performing his usual coal mining work." *Id.* Dr. Zaldivar explained that claimant's inability to return to work is attributable to his "obesity and general deconditioning, unrelated to his lungs." *Id.*

Dr. Crisalli opined that claimant suffered from a minimal impairment in oxygen transfer that was not attributable to his coal dust exposure. Employer's Exhibit 2. Instead, Dr. Crisalli attributed claimant's impairment to obesity and obstructive sleep apnea. Employer's Exhibit 2. Dr. Crisalli opined that claimant retained the pulmonary functional capacity to perform his previous coal mine work. *Id.*

Claimant contends that the administrative law judge erred in not providing a basis for crediting the opinions of Drs. Zaldivar and Crisalli over that of Dr. Rasmussen. We disagree. The administrative law judge noted that "Dr. Zaldivar opined that [c]laimant's minimal impairment in oxygen transfer was due to obesity because [c]laimant's blood gases after exercise were normal." Decision and Order on Remand at 3. The administrative law judge then explained that "[Dr. Zaldivar] noted that this demonstrated that [c]laimant did not have a pulmonary impairment." *Id.* The administrative law judge permissibly accorded greater weight to Dr. Zaldivar's opinion because he found that it was better reasoned since the doctor explained how the objective evidence supported his finding that claimant's impairment was attributable to obesity. *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); Decision and Order on Remand at 3. In addition, the administrative law judge noted that Dr. Zaldivar's opinion was supported by Dr. Crisalli's opinion.¹ Decision and Order on Remand at 3.

Because it is based on substantial evidence, we affirm 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).

¹ Because total disability at 20 C.F.R. §718.204 is limited to pulmonary and respiratory impairments, the administrative law judge permissibly found that the opinions of Drs. Zaldivar and Crisalli, attributing claimant's impairment solely to non-pulmonary conditions, did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See* 20 C.F.R. §718.204(a).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *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 on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge