BRB No. 08-0262 BLA

B. H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAUREL CREEK COAL COMPANY	)	DATE ISSUED: 10/30/2008
	)	
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 – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher M. Hunter (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 – Denying Benefits (06-BLA-5113) of Administrative Law Judge Daniel L. Leland (the administrative law judge) 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 at least twenty-eight years of qualifying coal mine employment and found that the evidence of record established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish total respiratory disability at Section 718.204(b)(2)(i) and (iv), based on the most recent pulmonary function study, which resulted in qualifying post-bronchodilator results,[1] and the medical opinion evidence that claimant could not perform the medium to heavy work required by his usual coal mine employment. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order – Denying Benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response 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 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).[2]

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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, 1-112 (1989).

In finding that total respiratory disability was not established at Section 718.204(b), the administrative law judge considered all of the relevant evidence regarding total respiratory disability together. The administrative law judge recognized that one of claimant's pulmonary function studies was qualifying, but noted that because the rest of claimant's pulmonary function studies were non-qualifying, claimant's blood gas studies were non-qualifying, and Drs. Zaldivar and Crisalli provided reasoned opinions that claimant did not have a totally disabling respiratory impairment,[3] the evidence, as a whole, failed to establish total respiratory disability at Section 718.204(b).

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[1] Claimant concedes that the results of his other pulmonary function studies are non-qualifying. Claimant's Brief at 8.

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 5.

[3] Claimant concedes that Dr. Gaziano's opinion cannot establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) because Dr. Gaziano did not diagnose a totally disabling respiratory or pulmonary impairment. Claimant's Motion For Director To Clarify Medical Report of Dr. Gaziano at 2.

Contrary to claimant's argument, an administrative law judge is not required to accord controlling weight to a single qualifying pulmonary function study, even if it is the most recent study of record. *See Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). In this case, there were three pulmonary function studies conducted on January 20, 2005, October 5, 2005, and September 25, 2006. Blood gas studies were also conducted on these dates. All of these pulmonary function studies and blood gas studies were non-qualifying, except for the most recent pulmonary function study that resulted in a qualifying post-bronchodilator study. The administrative law judge acted rationally in finding that the single qualifying post-bronchodilator study was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1980)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986).

In weighing the medical opinion evidence, along with the pulmonary function study and blood gas study evidence, the administrative law judge rationally found that it did not establish total respiratory disability, as it established that claimant did not have a "respiratory" disability. Specifically, the administrative law judge noted that both Drs. Zaldivar and Crisalli provided well documented and reasoned opinions, explaining that claimant's mild restrictive impairment, as evidenced by claimant's pulmonary function studies, was "caused by factors extrinsic to the lungs," specifically, obesity and a damaged left hemidiaphragm due to claimant's heart surgery.[4] The administrative law judge, therefore, properly found that the medical opinion evidence did not establish total respiratory disability at Section 718.204(b)(2)(iv). *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994)(claimant is required to show that he is totally disabled due to a respiratory impairment, as opposed to non-respiratory conditions).[5] In

[4] Dr. Crisalli diagnosed a restrictive defect due to obesity and "potentially" a paralyzed hemidiaphragm. Employer's Exhibit 4. Dr. Zaldivar concluded that claimant did not have any intrinsic pulmonary impairment and that any restriction seen on breathing tests was due to the weakness of his diaphragm, which was damaged during claimant's open heart surgery. Employer's Exhibit 1.

[5] Because we affirm the administrative law judge's finding that the medical opinion evidence failed to establish a totally disabling respiratory impairment, as opposed to a non-respiratory impairment, at 20 C.F.R. §718.204(b)(2)(iv), *see Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994), we need not address claimant's argument concerning the medical opinion evidence and the exertional requirements of his usual coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

sum, the administrative law judge properly concluded that the evidence, as a whole, failed to establish total respiratory disability at Section 718.204(b).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is 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