BRB No. 98-1291 BLA

FRANKLIN D. SEAGROVES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/26/99
	)	
NATIONWIDE, INCORPORATED	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Franklin D. Seagroves, Tracy City, Tennessee, *pro se.*

David L. Murphy (Clark, Ward & Cave), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1699) of Administrative Law Judge Thomas M. Burke 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).[1] The administrative law judge credited claimant with thirty-five years of coal mine employment and found that claimant failed to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 supported by substantial evidence, are rational, and are consistent 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 (1985).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. *See Perry v. Director, OWCP,* 9 BLR 1-1 (1986) (*en banc*).

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[1]This claim was filed on June 23, 1996. Director's Exhibit 1.

[2]We affirm the administrative law judge's finding of thirty-five years of coal mine employment as unchallenged on appeal and not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(1)-(4). The administrative law judge properly found that none of the pulmonary function studies or the blood gas studies of record yielded qualifying values under Section 718.204(c)(1) and (c)(2).[3] Decision and Order at 8; Director's Exhibits 8, 10, 21; Claimant's Exhibit 1. Under Section 718.204(c)(3), the administrative law judge properly found that the record is devoid of any evidence regarding the existence of cor pulmonale with right sided congestive heart failure. Decision and Order at 8. Finally, under Section 718.204(c)(4), the administrative law judge noted that the medical opinions of record, namely those of Drs. Sotores and Broudy, disagreed as to the presence of a totally disabling respiratory impairment. Decision and Order at 9; Director's Exhibits 9, 21; Employer's Exhibit 4; Claimant's Exhibit 1. Dr. Broudy did not find any respiratory impairment and concluded that claimant retains the respiratory capacity to perform his last coal mine job. Dr. Sotores diagnosed a stage II disability. The administrative law judge, within a proper exercise of his discretion, credited the opinion of Dr. Broudy over that of Dr. Sotores, because it is supported by the objective evidence of record and because of Dr. Broudy's superior qualifications as pulmonary specialist. Decision and Order at 9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Dr. Sotores' credentials are not contained in the record. Therefore, the administrative law judge properly relied on the opinion of Dr. Broudy who is Board-certified in internal medicine and pulmonary disease. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); Employer's Exhibit 4.[4] We, therefore, affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability under Section 718.204(c)(4) as it is supported by substantial evidence.

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[3]A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those in the tables. 20 C.F.R. §718.204(c)(1), (c)(2).

[4]We deem harmless error, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), the administrative law judge's failure to acknowledge Dr. Sotores' status as claimant's treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), inasmuch as the administrative law judge properly accorded Dr. Broudy's opinion determinative weight because it was supported by the objective evidence of record, *see* discussion, *supra*.

Inasmuch as claimant failed to establish total disability under Section 718.204(c), a requisite element of entitlement, an award of benefits under Part 718 is precluded. *See Perry, supra.* In light of the foregoing, we need not review the administrative law judge's findings under Section 718.202(a).

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

REGINA C. McGRANERY
Administrative Appeals Judge