

BRB No. 06-0239 BLA

RUSSELL R. GRAHAM)
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 Claimant-Petitioner)
)
 v.)
)
 SLAB FORK COAL COMPANY)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 09/28/2006
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6008) 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). In accordance with the parties' stipulation, the administrative law

judge found that claimant had nine years of qualifying coal mine employment and that employer was the proper responsible operator.¹ Decision and Order at 2-3; Hearing Transcript at 8-9. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision and Order at 5. The administrative law judge concluded that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§ 718.202 and 718.203, but failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 6-9. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability. Employer responds, asserting that substantial evidence supports the administrative law judge's denial of benefits and that the administrative law judge erred in finding that the existence of pneumoconiosis was established. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.³

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'Keefe 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 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

¹ Claimant was last employed in the coal mine industry in West Virginia. Director's Exhibits 4-6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² Claimant filed his claim for benefits on August 22, 2001. The district director issued a Proposed Decision and Order awarding awarded benefits on October 8, 2002. Director's Exhibits 2, 30. Employer subsequently requested a hearing, and the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 31.

³ The administrative law judge's findings that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The record contains the medical opinions of Drs. Porterfield and Zaldivar. After an examination of claimant on October 21, 2001, Dr. Porterfield diagnosed coal workers' pneumoconiosis by x-ray and reported it resulted in a 30% impairment due to coal dust exposure. Director's Exhibit 11. Dr. Zaldivar examined claimant on January 30, 2002 and concluded that there is no evidence of coal workers' pneumoconiosis and that there "is no demonstrable pulmonary impairment." Dr. Zaldivar stated that from a pulmonary standpoint, claimant "is fully capable of performing his usual coal mining work or work requiring similar exertion." Director's Exhibit 28.

Claimant asserts that the administrative law judge erred by failing to find total disability established based upon the medical opinion evidence. Claimant specifically contends that the administrative law judge erred in finding that Dr. Zaldivar's report was adequately documented and was entitled to consideration. Claimant's Brief at 7. We disagree.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Dr. Porterfield did not provide any further explanation of his statement that claimant has a "30% or Class 3 impairment." Decision and Order at 9. The administrative law judge determined that because Dr. Porterfield did not offer an opinion on whether claimant would be able to perform his last coal mine employment from a respiratory standpoint, his opinion was insufficient to meet claimant's burden.⁴ Decision and Order at 9. The administrative law judge further found that Dr. Zaldivar's opinion was entitled to consideration, as the report was adequately documented and explained, although the pulmonary function study that Dr. Zaldivar had performed was invalid due to intermittent effort. Decision and Order at 9. The administrative law judge concluded that because the record does not contain a physician's report which provides a determination that the miner is totally disabled from a respiratory standpoint and is unable to perform his last coal mine employment, claimant has not established total disability by medical opinion. Decision and Order at 9.

Contrary to claimant's assertion, the administrative law judge permissibly found that Dr. Zaldivar's opinion was adequately documented and explained. The administrative law judge properly noted both that Dr. Zaldivar had invalidated the pulmonary function study that he performed and that he had commented that the values

⁴ Claimant does not challenge the administrative law judge's credibility determination with respect to the opinion of Dr. Porterfield on appeal and therefore it is affirmed. *Skrack*, 6 BLR 1-711.

showed mild air trapping and mild diffusion impairment which did not prevent the miner from performing his previous coal mine employment or similar work. Decision and Order at 9; Director's Exhibit 28. We reject claimant's assertion that the MVV values of Dr. Zaldivar's pulmonary function study indicate that claimant has a "moderate to severe impairment which would obviously keep him from performing his last coal mine work," Claimant's brief at 7, because claimant is asking, in essence, that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1988). Consequently, the administrative law judge properly considered the quality of the evidence in determining whether the opinion was supported by the underlying documentation and adequately explained and thus rationally found that it was insufficient to establish the existence of total disability. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 9; Director's Exhibit 28.

Because claimant makes no other specific challenges to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(b)(2), we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Since claimant has failed to establish the existence of a totally disabling respiratory impairment, an essential element of entitlement under Part 718, entitlement thereunder is precluded and we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge