BRB No. 06-0964 BLA

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<tr><td>J. S.<br><br>Claimant-Petitioner<br><br>v.<br><br>F & D COAL COMPANY, INCORPORATED<br><br>and<br><br>KENTUCKY COAL PRODUCERS' SELF INSURANCE FUND<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest</td><td>DATE ISSUED: 09/21/2007<br><br>DECISION and ORDER</td></tr>
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Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices), Harlan, Kentucky, for claimant.

S. Parker Boggs (Buttermore & Boggs, P.S.C.), Harlan, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-5467) of Administrative Law Judge Pamela Lakes Wood 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 noted that the parties stipulated to at least ten years of coal mine employment, and noted that this claim is a subsequent claim.[1] The administrative law judge found that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and therefore demonstrated a change in one of the applicable conditions of entitlement, as required by 20 C.F.R. §725.309(d). On the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 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). Consequently, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the blood gas study evidence insufficient to establish total disability. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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).

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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's findings, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's findings are supported by substantial evidence. Pursuant to Section 718.204(b)(2)(ii), the

[1] Claimant's first claim for benefits, filed on December 6, 1989, was finally denied on August 10, 1990, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed the current claim for benefits on September 23, 2002. Director's Exhibit 3.

[2] The administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), (iv), are not challenged on appeal. They are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge considered four blood gas studies of record.[3] The administrative law judge found that the December 21, 1989 and November 6, 2002 blood gas studies were non-qualifying[4] both at rest and on exercise, that the June 20, 2003, resting blood gas study was "borderline qualifying,"[5] and that the March 18, 2005, resting blood gas study was qualifying. The administrative law judge concluded that the blood gas study evidence was in equipoise, and that claimant therefore failed to establish total disability pursuant to Section 718.204(b)(2)(ii). Decision and Order at 12. We affirm the administrative law judge's finding that the blood gas study evidence did not establish total disability pursuant to Section 718.204(b)(2)(ii), as claimant bears the burden of establishing each element of entitlement by a preponderance of the evidence, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), and this finding is supported by substantial evidence.

In so doing, we reject claimant's assertion that the administrative law judge erred in including the 1989 blood gas study in her consideration of whether claimant established total disability. The administrative law judge had determined that claimant established a change in one of the applicable conditions of entitlement. In considering the merits of entitlement, the administrative law judge had to consider and weigh all of the relevant evidence. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Consequently, we affirm the administrative law judge's finding that the blood gas study evidence did not establish total disability pursuant to Section 718.204(b)(2)(ii). Moreover, the administrative law judge properly considered all of the contrary probative evidence and found that the overall evidence did not establish total disability pursuant to

[3] A fifth blood gas study, dated March 11, 2003 appears in the record, but was not designated as evidence in this claim by any party. *See* 20 C.F.R. §725.414.

[4] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. *See* 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

[5] Claimant suggests that the June 20, 2003 study should have been considered definitely qualifying for disability, by rounding the decimal values of its results. Contrary to claimant's suggestion, the interpretation of the test results using the tables in Appendix C "encompasses neither the 'rounding up' nor 'rounding down' of pCO2 or pO2 values, but, rather, follows the express regulatory requirement that the reported test value be 'equal to or less than' the specified table value." *Tucker v. Director, OWCP,* 10 BLR 1-35, 1-41 (1987).

Section 718.204(b)(2). *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Substantial evidence supports the administrative law judge's finding pursuant to Section 718.204(b)(2), which we therefore affirm.

Because claimant failed to establish total disability, an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent,* 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order 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