BRB No. 96-1653 BLA

SCOTT WOODS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CLINCHFIELD COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Scott Woods, Dante, Virginia, *pro se.*

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order on Remand (94-BLA-0408) of Administrative Law Judge Joan Huddy Rosenzweig 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 third time. Administrative Law Judge T. Eugene Burts initially denied benefits in a Decision and Order issued on July 1, 1988. Director's Exhibit 55. Judge Burts found that the evidence established the existence of pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and

[1] Claimant is Scott Woods, the miner, who filed this application for benefits on October 26, 1983. Director's Exhibit 1.

718.203(b), but concluded that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). On appeal, the Board affirmed Judge Burts' finding that the evidence failed to establish total disability under Section 718.204(c). *Woods v. Clinchfield Coal Co*., BRB No. 88-2677 BLA (Sep. 27, 1990)(unpub.).

Claimant submitted additional evidence and timely requested modification pursuant to 20 C.F.R. §725.310, which was denied by Administrative Law Judge Joan Huddy Rosenzweig in a Decision and Order issued on March 23, 1994. She found that the recently submitted medical evidence established a change in conditions pursuant to Section 725.310, but concluded that the evidence failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(c) and (b). On appeal, the Board affirmed the administrative law judge's finding that a change in conditions was established, but remanded the case for her to weigh all of the relevant evidence at Section 718.204(c), with additional instructions to consider all of the evidence regarding the exertional requirements of claimant's coal mine employment and to compare the opinions of Drs. Fino and Branscomb with those requirements. *Woods v. Clinchfield Coal Co*., BRB No. 94-2311 BLA (Feb. 16, 1995)(unpub.). The Board also instructed the administrative law judge to consider all of the relevant evidence under 20 C.F.R. §718.204(b), if reached. *Id*. On remand, the administrative law judge weighed the evidence under Section 718.204(c), found that it failed to establish total respiratory disability, and accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). 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 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 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); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.204(c)(1), the administrative law judge found that the pulmonary function studies “as a whole,” did not establish total disability. Decision and Order on Remand at 3. Substantial evidence supports the administrative law judge's finding. The record contains eleven pulmonary function studies, one of which was

qualifying.[2] Director's Exhibits 12, 16, 27, 31, 47, 48, 62, 78, 82; Employer's Exhibits 15, 20. The administrative law judge noted that the qualifying study was the most recent one, Employer's Exhibit 20, but rationally declined to mechanically apply the rule allowing an administrative law judge to accord greater weight to more recent studies, *see Cooley v. Island Creek Coal Co*., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982), because a study performed only eight months prior to the latest study was non-qualifying.[3] Director's Exhibit 78. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(1).

Pursuant to Section 718.204(c)(2), the administrative law judge considered all of the blood gas studies and found that, "considered as a whole," they did not establish total respiratory disability. Decision and Order on Remand at 3. The record contains eight blood gas studies, two of which are qualifying.[4] Director's Exhibits 12, 31, 47, 48, 62, 78, 82; Employer's Exhibit 16. Substantial evidence supports the administrative law judge's finding that the blood gas studies as a whole are not indicative of total disability. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(2).

---

[2] A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

[3] The administrative law judge overlooked two non-qualifying pulmonary function studies that could only have supported her finding. Director's Exhibit 32; Employer's Exhibit 15.

[4] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(2). Of the two qualifying studies, one is the oldest study in the record, dating from 1983. Director's Exhibit 12. The other was performed in 1990, Director's Exhibit 62, and was followed by two non-qualifying studies in 1992. Director's Exhibits 78, 82.

Pursuant to Section 718.204(c)(3), the administrative law judge correctly found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order on Remand at 3. We therefore affirm her finding pursuant to Section 718.204(c)(3).

Pursuant to Section 718.204(c)(4), the administrative law judge considered all of the evidence regarding the exertional requirements of claimant's employment as a shuttle car operator. Decision and Order on Remand at 2; Decision and Order on Modification at 5, 11. Claimant's "Description of Coal Mine Work" form indicated that his shuttle car operator job required him to sit for eight hours, required no standing, crawling, or carrying, but did require him to lift 160 pounds once per day. Director's Exhibit 6. Claimant testified that the 160 pounds of lifting once daily referred to a sixteen-gallon barrel of oil that he lifted to waist level and pushed onto the shuttle car.[5] [1993] Hearing Transcript at 12, 28-29. Based on this description, the administrative law judge reasonably concluded that "claimant's job as a shuttle car operator entailed predominantly light, to sedentary, work with only very limited somewhat heavy exertion." Decision and Order on Remand at 2. Substantial evidence supports her finding regarding the exertional requirements of claimant's coal mine employment, which we therefore affirm.

[5] The administrative law judge also considered claimant's testimony that his job required more lifting than was indicated on the Department of Labor form, but acted within her discretion as fact-finder in finding the description on the form, which she noted was signed by claimant in 1983, only nineteen months after leaving the mines, to be more credible than his 1988 or 1993 testimony. Decision and Order on Remand at 2; Decision and Order on Modification at 5, 11; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Pursuant to the Board's instructions, the administrative law judge then compared the physical requirements of claimant's job with Dr. Fino's opinion that claimant's moderate obstructive impairment permitted him to perform sustained moderate labor on a daily basis. Employer's Exhibit 22. Substantial evidence supports her finding that, "[i]n view of my determination regarding the nature of claimant's last usual coal mine job, I conclude that Dr. Fino's report opines that the claimant was able to perform his shuttle car operator job."[6] Decision and Order on Remand at 3. The administrative law judge then considered the old and the new medical opinions, and permissibly credited Dr. Sargent's[7] opinion that claimant was not totally disabled because she found it to be "most consistent with the credible objective medical evidence." Decision and Order on Remand at 3; *see Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). The administrative law judge also acted within her discretion in finding the opinions of Drs. Sargent and Fino[8] to be "persuasive" for the same reasons given in her previous decision, specifically, the opinions were rendered by "pulmonary specialists" who wrote "extremely thorough and well reasoned [reports] consist[ing] of in-depth analyses of the available evidence." Decision and Order on Remand at 3; Decision and Order on Modification at 11; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Inasmuch as the administrative law judge considered the relevant evidence as instructed and substantial evidence supports her weighing of the medical opinions, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).

Because claimant has failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

---

[6] The administrative law judge also considered, pursuant to the Board's instructions, Dr. Branscomb's opinion that claimant "probably" had sufficient pulmonary function to operate a shuttle car, Employer's Exhibit 21, but permissibly found his conclusion to be too equivocal to credit on this issue. Decision and Order on Remand at 3; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

[7] The record indicates that Dr. Sargent, who is Board-certified in internal and pulmonary medicine, examined claimant three times and performed objective testing four times over the course of this claim. Director's Exhibits 31, 48, 78; Employer's Exhibit 20.

[8] The record indicates that Dr. Fino is Board-certified in internal and pulmonary medicine. Employer's Exhibit 23. Both Drs. Sargent and Fino indicated that they were familiar with claimant's job duties. Director's Exhibit 78; Employer's Exhibit 22.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge