

BRB No. 08-0826 BLA

C.C.)
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 Claimant-Petitioner)
)
 v.)
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 MANALAPAN MINING COMPANY)
)
 and)
)
 AMERICAN MINING INSURANCE) DATE ISSUED: 09/02/2009
 COMPANY)
)
 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 – Denying Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

C.C., Coldiron, Kentucky, *pro se*.

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (06-BLA-0524) of Administrative Law Judge Joseph E. Kane rendered 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 seventeen years of qualifying coal mine employment, and adjudicated this claim, filed on November 1, 2004, pursuant

to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, asserting that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.¹ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to establish a requisite element of entitlement will preclude a finding of entitlement to benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Turning to the issue of total respiratory disability, after correctly finding that the record contained no evidence of complicated pneumoconiosis, the administrative law judge accurately reviewed the four pulmonary function studies of record at Section 718.204(b)(2)(i), and acted within his discretion in finding that they all produced invalid results due to claimant's lack of effort,

¹ Because claimant's most recent coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 6, 9.

based on the opinions of the reviewing pulmonary specialists, Drs. Vuskovich, Rosenberg and Dahhan.² Decision and Order at 6, 12. Specifically, the administrative law judge determined that the December 30, 2004 study conducted by Dr. Forehand noted that claimant's effort was "variable,"³ Director's Exhibit 9, and that Dr. Vuskovich invalidated this study on the ground that the tracings showed a lack of maximum effort. Employer's Exhibit 1; Decision and Order at 5. Dr. Rosenberg agreed that the December 30, 2004 test results indicated incomplete effort. Employer's Exhibit 2. Dr. Dahhan invalidated the pulmonary function study that he conducted on May 9, 2005, reporting "poor" effort,⁴ Director's Exhibit 11 at 5, 7, and Dr. Rosenberg agreed that these test results showed "totally incomplete efforts," Employer's Exhibit 7. Dr. Rosenberg also reported "very poor effort" on the February 12, 2007 pulmonary function study that he conducted. Employer's Exhibits 2, 4. Although Dr. Alam reported that claimant was very short of breath but provided good effort on the pulmonary function study that he conducted on November 8, 2007, Claimant's Exhibit 2, the administrative law judge noted that "[o]n review of this study, however, Dr. Vuskovich reported that there were no tracings reported for the FVC maneuver, but the flow volume loops and MVV tracing suggest that claimant demonstrated less than maximal effort,"⁵ producing results that were "not credible." Decision and Order at 5; Employer's Exhibit 8 at 2-3. The administrative law judge considered claimant's statement that he gave his best effort on these tests, Claimant's Exhibit 3, but noted the variability of all of the pulmonary function study results of record, and noted in particular that the February 2007 test values showed improvement from the earlier tests. Decision and Order at 5, 12. Accordingly,

² The record contains four pulmonary function studies, conducted on December 30, 2004 by Dr. Forehand; on May 9, 2005 by Dr. Dahhan, Director's Exhibits 9, 11; on February 12, 2007 by Dr. Rosenberg, Employer's Exhibit 4; and on November 8, 2007, by Dr. Alam, Claimant's Exhibit 2.

³ The evidentiary quality standards for pulmonary function studies require a notation of the miner's understanding and cooperation. 20 C.F.R. §718.103.

⁴ Dr. Dahhan noted "inconsistent effort" on initial testing, "no improvement" in effort after administration of bronchodilator, "resulting in another invalid study," adding that "Lung Volumes were attempted but were invalid due to poor cooperation. Overall, the patient's cooperation did not allow him to obtain a valid pulmonary function study." Director's Exhibit 11.

⁵ Dr. Rosenberg additionally observed that the "invalid" pulmonary function study from November 8, 2007 "cannot be used to accurately assess [the miner's] functional status" or impairment, and does not establish any pulmonary disability. Employer's Exhibit 7 at 1-2.

the administrative law judge rationally concluded that “this indicates the earlier lower values were either due to acute problems or due to poor effort,” and he characterized the results from the February 2007 study as “questionable.” Decision and Order at 12.

It is within the administrative law judge’s discretion as trier-of-fact to question the validity of pulmonary function studies that have been invalidated by better qualified physicians. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). In the present case, the administrative law judge permissibly accorded greatest weight to the opinions of Drs. Vuskovich, Rosenberg, and Dahhan, based on their credentials as highly qualified pulmonary specialists, *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), and found that all of the test results were unreliable or invalid due to claimant’s inadequate or poor effort. Decision and Order at 12; *see Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). As substantial evidence supports the administrative law judge’s conclusion that claimant failed to carry his burden pursuant to Section 718.204(b)(2)(i), it is affirmed.

Likewise, substantial evidence supports the administrative law judge’s determination that the blood gas studies failed to establish total disability pursuant to Section 718.204(b)(2)(ii). Decision and Order at 5-6, 12-13. Of the four arterial blood gas studies of record, that of December 30, 2004 produced qualifying studies “at rest,” but non-qualifying “after exercise” values.⁶ Decision and Order at 12-13; Director’s Exhibit 9 at 10-11; Employer’s Exhibit 5. Noting that Dr. Dahhan stated that the “at rest” test results were due to the changes in barometric pressure on the day the test was conducted, the administrative law judge rationally found that the single qualifying value was outweighed by the “after exercise” values obtained on the same day and the three other blood gas studies of record, all of which produced non-qualifying results. Decision and Order at 13; Director’s Exhibit 11 at 6; Claimant’s Exhibit 1; Employer’s Exhibit 5; *see Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984). Consequently, the administrative law judge properly found that claimant failed to meet his burden at Section 718.204(b)(2)(ii). Decision and Order at 13.

The administrative law judge also properly found that Section 718.204(b)(2)(iii) was inapplicable, as the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 13.

⁶ 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. A “non-qualifying” study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

Lastly, the administrative law judge accurately summarized and compared the medical opinions of Drs. Echeverria,⁷ Forehand,⁸ Dahhan,⁹ and Rosenberg¹⁰ pursuant to Section 718.204(b)(2)(iv), and found that the evidence failed to support a finding of total respiratory disability. Decision and Order at 13-14. The administrative law judge acknowledged that Dr. Echeverria is claimant's treating physician, and evaluated the treatment relationship pursuant to 20 C.F.R. §718.104(d). However, he rationally found that Dr. Echeverria's opinion, that claimant is "in stage II black lung," Claimant's Exhibit 2, was insufficient to establish total disability because it was based, in part, on the pulmonary function study of November 8, 2007, which was invalidated by a better qualified pulmonary specialist, Dr. Vuskovich.¹¹ Decision and Order at 7, 10-11, 13-14;

⁷ Dr. Echeverria, the miner's treating physician, reported in November 2007 that the miner had dry rales at the lung bases, no wheezing or rhonchi, and good air movement bilaterally. Dr. Echeverria also reviewed Dr. Alam's pulmonary function study of November 8, 2002, and diagnosed "stage II black lung." Decision and Order at 7; Claimant's Exhibits 1, 2. Dr. Echeverria is a physician at the Appalachian Regional Healthcare Clinic; no further credentials are of record. Claimant's Exhibits 1, 2.

⁸ Dr. Forehand performed a pulmonary evaluation on December 30, 2004, and concluded that the miner's blood gas study results showed arterial hypoxemia. Dr. Forehand opined that claimant's respiratory impairment would prevent him from performing his usual coal mine employment. Decision and Order at 6; Director's Exhibit 9.

⁹ Dr. Dahhan examined the miner on May 9, 2005, and concluded that the miner's spirometry was invalid due to inconsistent effort, noting "normal spirometry when [the miner] produced valid studies." Dr. Dahhan reported normal blood gas study results with no hypoxemia with exercise, and no findings indicating a significant pulmonary impairment. Director's Exhibit 11 at 5-6. He concluded that claimant retains the capacity to perform his usual coal mine work. Decision and Order at 6; Director's Exhibit 11.

¹⁰ Dr. Rosenberg examined the miner on February 12, 2007, and concluded that he has normal oxygenation and normal response to exercise, and is not disabled from a pulmonary standpoint. Decision and Order at 6-7; Employer's Exhibit 2, 6, 7.

¹¹ Dr. Echeverria's medical report included the pulmonary function study of November 8, 2007, with a notation of "good effort;" however, Dr. Vuskovich stated that the miner did not give maximal effort, and the results were not credible. Claimant's Exhibit 2; Employer's Exhibit 8. Dr. Vuskovich concluded: "it is not possible to offer a reasoned opinion as to whether claimant had the pulmonary capacity to work in coal mine employment," from the results of the November 8, 2007 pulmonary function study. *Id.*

see Tedesco v. Director, OWCP, 18 BLR 1-103 (1994). The administrative law judge properly exercised his discretion to assess the credibility of the treating physician's opinion on its merits, and identified deficiencies that detracted from its credibility. 20 C.F.R. 718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Consequently, the administrative law judge was not required to accord greater weight to Dr. Echeverria, based on his status as claimant's treating physician.

Similarly, the administrative law judge acted within his discretion in according little weight to the opinion of Dr. Forehand, that claimant's respiratory impairment prevented him from performing his usual coal mine employment, as he found that it was based, in part, on qualifying "at rest" blood gas study results that were challenged by a pulmonary specialist, and that were outweighed by the "after exercise" results and the more recent studies, all of which produced non-qualifying values. Decision and Order at 13; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge rationally found that the contrary medical opinions of Drs. Dahhan and Rosenberg, that claimant had no significant respiratory impairment and was capable of performing his usual coal mine employment or similar work, were the most persuasive and were entitled to greater weight, as they were better supported by the objective evidence of record, discussed *supra*, and the physicians' findings on physical examination. Decision and Order at 6-7, 13-14; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

The administrative law judge's finding, that claimant did not meet his burden of establishing total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), is supported by substantial evidence, and is therefore affirmed. Because claimant has failed to establish total disability, an essential element of entitlement, we affirm the administrative law judge's denial of benefits. Thus, we need not reach the issue of the existence of pneumoconiosis. *See Anderson*, 12 BLR at 1-114.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge