BRB No. 07-0685 BLA

R.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
S & H MINING, INCORPORATED	)	
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	DATE ISSUED: 05/29/2008
	)	
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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

R.W., Caryville, Tennessee, *pro se*.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order denying benefits (2006-BLA-05175) of Administrative Law Judge Paul H. Teitler (the administrative law judge) 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 twenty-five years of qualifying coal mine employment, and adjudicated this claim, filed on September 3, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer has responded, urging affirmance. The Director, Office of Workers' Compensation Programs, 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 on appeal to be whether the Decision and Order below is supported by substantial evidence. *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 rational, supported by substantial evidence, and in accordance with law.[2] 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 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, filed an appeal on behalf of claimant, but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mine industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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. In finding the evidence of record insufficient to establish total respiratory or pulmonary disability pursuant to Section 718.204(b)(2)(i)-(iv), the administrative law judge accurately summarized the medical evidence of record, and initially determined that the record contained no evidence of complicated pneumoconiosis. Decision and Order at 4-9. Thus, the administrative law judge correctly found that the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 was not applicable. 20 C.F.R. §718.204(b)(1); Decision and Order at 12.

At 20 C.F.R. §718.204(b)(2)(i), the administrative law judge properly resolved the recorded discrepancies in claimant's height and evaluated whether the tests produced qualifying results based on a height of 70.5 inches.[3] Decision and Order at 5; *see Protopappas v. Director, OCWP*, 6 BLR 1-221 (1983). After considering all of the tests[4] and noting that the three qualifying tests were invalidated by reviewing experts and/or administering physicians,[5] the administrative law judge rationally concluded that the

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

[4] The administrative law judge determined that the studies conducted on September 13, 2004 by Dr. Baker, and on October 28, 2004 and January 27, 2005 by Dr. Kelly, produced qualifying values. However, the later studies conducted by Dr. Baker on March 29, 2005 and February 6, 2006; by Dr. Dahhan on February 14, 2006; and by Dr. Hudson on April 24, 2006, were all non-qualifying. Employer's Exhibits 4, 10, 14, 18; Director's Exhibit 12.

[5] Dr. Baker's September 13, 2004 results produced a qualifying FEV1 value and FEV1/FVC ratio. However Dr. Castle found the test to be invalid due to claimant's passive exhalation, hesitation at the onset of exhalation, and lack of maximum effort during the entirety of the FVC maneuver. Decision and Order at 5-6; Employer's Exhibit 7.

Dr. Kelly himself found his own October 28, 2004 pulmonary function study to be invalid, and Dr. Michos provided a consistent invalidation. Director's Exhibit 11.

Dr. Kelly's January 27, 2005 results produced qualifying post-bronchodilator, values. However, Dr. Michos found the results to be invalid due to less than optimal

more recent non-qualifying studies were a better indicator of claimant's true pulmonary ability, and permissibly found that claimant failed to establish total disability at Section 718.204(b)(2)(i). Decision and Order at 12; *see* 20 C.F.R. §718.103; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). The administrative law judge also properly found that total disability was not established at Section 718.204(b)(2)(ii) or (iii), as none of the blood gas studies of record produced qualifying values, and the record contained no evidence of cor pulmonale with right-sided congestive heart failure.

In evaluating the medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge found that the reports of Drs. Dahhan and Hudson, opining that claimant had no respiratory or pulmonary impairment and retained the respiratory capacity to perform his usual coal mine employment, were better reasoned and better documented than the opinions of Drs. Kelly and Baker, that claimant suffered from a totally disabling respiratory impairment. Decision and Order at 12; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). In so finding, the administrative law judge properly determined that Dr. Kelly's report contained no support for the physician's conclusion that claimant suffered from a severe impairment and should not return to coal mine work.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). With respect to Dr. Baker, the administrative law judge acknowledged his status as claimant's treating physician, and considered the factors set forth at 20 C.F.R. §718.104(d), but rationally declined to accord the opinion controlling weight after taking into account the credibility of the opinion, other relevant

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effort, cooperation and comprehension on behalf of claimant. Decision and Order at 5; Director's Exhibit 11. Further, the tracings contained a handwritten notation of "invalid."

Additionally, Dr. Baker himself noted that his non-qualifying March 2005 and February 2006 pulmonary function study results were questionable due to claimant's lack of maximum effort, and a lack of reproducible tracings. Director's Exhibit 12; Employer's Exhibit 14. The administrative law judge also determined that Dr. Long had invalidated Dr. Baker's May 7, 2004 non-qualifying pulmonary function study for lack of tracings and maximum effort. Employer's Exhibit 22; Decision and Order at 5.

[6] The administrative law judge noted that Dr. Kelly found that the qualifying pulmonary function test he conducted on October 28, 2004 was invalid, the blood gas study produced normal values, and did not explain how he reached his conclusion of total disability. Decision and Order at 12.

evidence, and the record as a whole.[7] Decision and Order at 12; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834 (6th Cir. 2002); *Clark*, 12 BLR at 1-155.

Conversely, the administrative law judge found that the reports of Drs. Dahhan and Hudson were better reasoned and documented because both physicians had an opportunity to review all of the medical evidence of record before formulating their opinions. *See generally Stark*, 9 BLR at 1-37; *Hall v. Director, OWCP*, 8 BLR 1-193 (1983). The administrative law judge further found that their reports were better supported by the objective medical evidence of record. *See generally King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Thus, the administrative law judge concluded that the reports of Drs. Dahhan and Hudson were the most probative of claimant's current medical condition, *see generally Cooley*, 845 F.2d 622, 11 BLR 2-147; *Clark*, 12 BLR at 1-155, and permissibly found that claimant failed to establish total disability at Section 718.204(b)(2)(iv). Decision and Order at 13.

Having considered all of the evidence at Section 718.204(b)(2)(i)-(iv), therefore, the administrative law judge properly found that it failed to establish total total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987). Claimant's failure to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112. Consequently, we affirm the administrative law judge's denial of benefits.

[7]The administrative law judge acted within his discretion in finding that Dr. Baker's opinion was unpersuasive because the physician relied upon invalid and/or non-qualifying objective test results, and failed to address or explain how these results demonstrated total respiratory disability. Decision and Order at 12; *see Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge