BRB No. 99-1302 BLA

KESTER R. KISER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Kester R. Kiser, Lebanon, Virginia, *pro se.*

Melissa Amos Young (Gentry, Locke, Rakes & Moore), Roanoke, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denial of Benefits (98-BLA-0630) of Administrative Law Judge Daniel J. Roketenetz 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 seventeen and one-half years of coal mine employment and found that employer was the responsible operator. Considering the merits of the claim under 20 C.F.R. Part 718, the

administrative law judge found the existence of pneumoconiosis established under 20 C.F.R. §718.202(a)(1) and (a)(4), and the requisite etiology established at 20 C.F.R. §718.203(b). The administrative law judge further found that while the record contains x-ray evidence of complicated pneumoconiosis, this evidence considered as a whole was insufficient to show the presence of complicated pneumoconiosis sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. The administrative law judge further found that claimant failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant has filed a brief on appeal. Employer responds to claimant's *pro se* appeal, and requests affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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. *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. 33 U.S.C. §932(a); as incorporated by 30 U.S.C.§932(a); *O'Keeffe v. Smith Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 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*).

In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 718.304, the administrative law judge must consider all the evidence relevant to the presence or absence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993), citing *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). Under Section 718.304, claimant may establish the existence of complicated pneumoconiosis by showing that the miner is suffering from a dust disease of the lung which: when diagnosed by chest x-ray shows one or more large opacities (greater than one centimeter) classified as Category A, B, or C, 20 C.F.R. §718.304(a); or when diagnosed by biopsy or autopsy, yields massive lesions in the lung, 20 C.F.R. §718.304(b); or when diagnosed by means other that those specified under subsections (a) and (b), would be a condition which could reasonably be expected to yield the results described in subsections (a) or (b) had diagnosis been made as therein described, provided, however, that any diagnosis made under this subsection shall accord with acceptable medical procedures, 20 C.F.R. §718.304(c).

In the instant case, the administrative law judge found that claimant failed to establish the presence of complicated pneumoconiosis and thus did not invoke the

irrebuttable presumption of total disability due to pneumoconiosis provided at Section 718.304. Specifically, the administrative law judge noted that Dr. Alexander, a B reader and Board-certified radiologist, read the February 3, 1998 and July 28, 1997 x-rays as positive for pneumoconiosis 2/3qr with Category A large opacity. Claimant's Exhibit 4. He also noted that Dr. Forehand, a B reader, read the July 28, 1997 x-ray as positive for pneumoconiosis 2/3 qq with Category A large opacity. Director's Exhibit 20. The administrative law judge determined, however, that these three readings were outweighed by the other eight probative x-ray readings of record, including rereadings of the aforementioned x-rays, which were rendered by either B readers or readers dually qualified as B readers and Board-certified radiologists, and which, although read as positive for pneumoconiosis, did not constitute evidence of complicated pneumoconiosis. *Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984); Director's Exhibits 18, 19; Claimant's Exhibit 1; Employer's Exhibits 2, 4. In this regard, we reject claimant's contention that the preponderance of the x-ray readings by dually qualified physicians establishes the presence of complicated pneumoconiosis. Among the physicians of record who are dually qualified as B readers and Board-certified radiologists, only Dr. Alexander rendered x-ray readings showing Category A opacities. Claimant's Exhibit 4. Drs. Sargent and Navani, also dually qualified, read x-rays as being positive for pneumoconiosis and did not include any findings supportive of the presence of complicated pneumoconiosis. Director's Exhibits 18, 19. Moreover, claimant mistakenly characterizes Dr. Wheeler as dually qualified. Claimant's Brief at 3. The record supports the administrative law judge's finding that Dr. Wheeler is a B reader. Claimant's Exhibit 1; Decision and Order at 6.

Further, the record contains no other evidence supportive of a finding of complicated pneumoconiosis under Section 718.304. Inasmuch as the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304 is supported by substantial evidence and is in accord with law, it is affirmed. *See Lester, supra; Melnick, supra*.

The administrative law judge also found that the evidence is insufficient to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(c)(1) through

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[1]The record contains Dr. Wheeler's interpretation of the June 21, 1996 x-ray which he read as positive for pneumoconiosis 2/2 qq and noted "? 1 cm nodular density RUF," Claimant's Exhibit 1, as well as Dr. Mullens' interpretation of the January 15, 1997 x-ray which he read as showing a one centimeter nodular density in the right upper lobe "probably representing coalescent interstitial disease." *Id.* The administrative law judge correctly did not characterize this evidence as supportive of the presence of complicated pneumoconiosis. In order for x-ray evidence to constitute evidence of complicated pneumoconiosis, there must be a diagnosis of one or more large opacities (greater than one centimeter) classified as Category A, B or C. 20 C.F.R. §718.304(a). To the extent that claimant relies on this evidence, his reliance is misplaced.

(c)(4). Specifically, the administrative law judge correctly noted that the pulmonary function study evidence fails to establish total disability under Section 718.204(c)(1) because it resulted in entirely non-qualifying values. Director's Exhibit 14; Employer's Exhibits 1, 2; Claimant's Exhibit 3.

Claimant relies on the blood gas study evidence to show that he is totally disabled. Claimant argues that pursuant to 20 C.F.R. §718.105(b), because the July 28, 1997 initial "at rest" blood gas test produced qualifying values, the subsequent "exercise" test, which resulted in non-qualifying values, should not have been administered (or considered by the administrative law judge). Claimant's apparent argument is that Section 718.105(b) mandates that if the earlier "at rest" test produces qualifying values under Appendix C of 20 C.F.R. Part 718 (Appendix C), then a subsequent "exercise" test should not be taken. Claimant also contends that the February 3, 1998 "at rest" blood gas test was not administered while claimant was "at rest" as required by Section 718.105. Claimant specifically asserts that his blood for the "at rest" test was drawn while claimant was still undergoing the pulmonary function study.

The administrative law judge acknowledged that claimant contested the validity of the February 3, 1998 "at rest" test, which resulted in non-qualifying values. He found, "..even if this test is not considered there are two tests which produced nonqualifying ratios and only one test that produced a qualifying ratio. Thus, the preponderance of the arterial blood gas evidence does not establish total disability pursuant to 20 C.F.R. §718.204(c)(2)." Decision and Order at 10. The administrative law judge thus properly determined that the sole blood gas test which resulted in qualifying values, namely the "at rest" test taken on July 28, 1997, Director's Exhibit 14, 16, was outweighed by the other two tests of record which each produced non-qualifying values. *Id.*; Employer's Exhibit 1. Further, contrary to claimant's argument, Section 718.105 does not mandate that an "exercise" test shall not be taken where an earlier "at rest" test produces qualifying values. Rather, Section 718.105 provides that where an earlier "at rest" test produces

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[2]Section 718.105(b) provides: A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, blood shall be drawn during exercise. 20 C.F.R §718.105(b).

[3]A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out 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).

[4]The administrative law judge mistakenly indicated the date of this blood gas study as July 2, 1998. Decision and Order at 10.

non-qualifying values, or values which do not meet with the requirements of Appendix C, claimant shall be offered an "exercise" blood gas test unless medically contraindicated. 20 C.F.R. §718.105(b).

The administrative law judge further correctly noted that there is no evidence that claimant suffers from cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(c)(3).

Claimant further relies on the medical opinions of Dr. Craven as his treating physician, and Dr. Forehand who examined claimant, in asserting that he is totally disabled. Considering the medical opinion evidence under Section 718.204(c)(4), the administrative law judge noted that Drs. Craven and Forehand found that claimant is totally disabled while Drs. Hippensteel and Fino concluded that he is not. Dr. Craven, whom the administrative law judge noted to be claimant's treating physician, Decision and Order at 7, diagnosed coal workers' pneumoconiosis and found that claimant has a disabling lung impairment. Claimant's Exhibit 3. Dr. Forehand diagnosed chronic bronchitis and coal workers' pneumoconiosis, which he related to claimant's smoking and coal dust exposure. Dr. Forehand opined that claimant is totally and permanently disabled. Director's Exhibit 15. Dr. Hippensteel diagnosed simple coal workers' pneumoconiosis without evidence of complicated pneumoconiosis. He found that claimant "does not have impairment related to gas exchange, diffusion, or ventilatory function to keep him from going back to his prior job in the mines from a pulmonary standpoint." Employer's Exhibit 1. Dr. Hippensteel also indicated, however, that claimant has a minimal impairment due to smoking and pneumoconiosis which would not prevent his return to coal mine work. *Id.* Dr. Fino diagnosed simple pneumoconiosis, and found a mild respiratory impairment due to smoking. He indicated, "From a respiratory standpoint, this man is neither partially nor totally disabled from returning to his last coal mine job or a job requiring similar effort." Employer's Exhibit 4.

Claimant contends that the opinions of Drs. Craven and Forehand should have been given substantial weight. Claimant also contends that the administrative law judge's crediting of the opinions of Drs. Hippensteel and Fino as being consistent with the objective evidence of record is undermined by the administrative law judge's failure to discredit what claimant asserts is non-conforming blood gas study evidence. Claimant further argues that the opinions of Drs. Hippensteel and Fino are not reasoned.

Claimant's contentions lack merit. It is within the discretion of the administrative law judge, as fact finder, to determine the credibility of the medical opinion evidence and to the extent that claimant seeks a reweighing of this evidence, his request is rejected. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge, within his discretion, properly accorded additional weight to the opinions of Drs. Hippensteel and Fino as he found that they were better supported by the objective evidence of record. *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Further, as discussed *supra*, the

administrative law judge did not err in his consideration of the blood gas study evidence. Moreover, the record reveals that Drs. Hippensteel and Fino discussed claimant's usual coal mine employment as a roof bolter and acknowledged the exertional requirements of this job. Employer's Exhibits 1, 4. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Lastly, the administrative law judge acknowledged that Dr. Craven was claimant's treating physician and that Dr. Forehand examined claimant, Decision and Order at 7; he not obligated to accord determinative weight to either physician based on either rationale. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge, therefore, properly accorded greater weight to the opinions of Drs. Hippensteel and Fino over the contrary opinions of Drs. Craven and Forehand upon whom claimant relies. Inasmuch as the administrative law judge's finding at Section 718.204(c)(4) is supported by substantial evidence and is in accordance with law, we affirm that finding.

Based on the foregoing discussion, we affirm the administrative law judge's finding that claimant failed to establish total respiratory or pulmonary disability at Section 718.204(c). In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability under Part 718, an essential element of entitlement, we further affirm the administrative law judge's denial of benefits in the instant case, as a finding of entitlement is precluded. *Trent; supra; Perry, supra; see also Director, OWCP v. Greenwich Collieries, [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge