BRB No. 99-0808 BLA

KENNETH BISHOP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Kenneth Bishop, Duffield, Virginia, *pro se*.

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (98-BLA-1084) of Administrative Law Judge Mollie W. Neal 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 properly considered the instant claim, a duplicate claim which was filed on April 11, 1997, pursuant to the permanent regulations at 20 C.F.R. Part 718.[1] After crediting claimant with eight

[1]Claimant filed an initial claim for benefits with the Social Security Administration (SSA) on January 28, 1971, which the SSA finally denied on May 9, 1975. Director's Exhibit 22. Claimant filed a second claim on February 22, 1977 with the Department of Labor. *Id.* Administrative Law Judge Giles J. McCarthy denied this claim in a Decision and Order dated May 19, 1989, after having found that the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability. *Id.* Claimant appealed, and the Board affirmed Judge McCarthy's Decision and Order. *Bishop v. Director, OWCP*, BRB No. 90-0447 BLA (Jan. 26, 1993)(unpublished). Claimant

years of coal mine employment, the administrative law judge found the x-ray evidence associated with the instant duplicate claim sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). The administrative law judge found that claimant thus established a material change in conditions pursuant to 20 C.F.R. §725.309 and, consequently, the administrative law judge considered the claim on the merits. The administrative law judge determined that claimant met his burden of establishing the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(c). The administrative law judge further found, however, that the evidence of record was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's decision denying benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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subsequently filed an appeal with the United States Court of Appeals for the Fourth Circuit, which summarily affirmed the Board's Decision and Order. *Bishop v. Director, OWCP*, No. 93-1235 (4th Cir. Nov. 9, 1994)(unpublished). Claimant did not take any further action in pursuit of benefits until filing the instant duplicate claim on April 11, 1997. Director's Exhibit 1.

In considering the evidence of record with regard to total disability under Section 718.204(c), the administrative law judge first correctly determined that seven of the eight pulmonary function studies and all five of the arterial blood gas studies of record are non-qualifying for total disability.[2] Decision and Order at 10-12; Director's Exhibits 7, 9, 17, 22, 25, 26. The administrative law judge properly discounted the only qualifying pulmonary function study, which was administered on March 18, 1974, because the study was not signed by a physician and because the valid pulmonary function studies administered subsequently, in 1977, 1988 and 1997 produced higher, non-qualifying values. *See Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). Decision and Order at 10-11; Director's Exhibits 7, 17, 22. We affirm the administrative law judge's findings that claimant failed to establish total disability under 20 C.F.R. §718.204(c)(1) and (c)(2). The administrative law judge also properly found that the record does not contain any evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 9. We, therefore, also affirm the administrative law judge's finding that claimant is precluded from establishing total disability pursuant to Section 718.204(c)(3).

[2]A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" test yields values which exceed the requisite table values.

In finding that the medical opinion evidence of record was insufficient to establish total disability under Section 718.204(c)(4), the administrative law judge credited Dr. Paranthaman's opinion, that claimant has a mild impairment and retains the respiratory capacity for his usual coal mine work loading coal,[3] over the opinions of Drs. Strong and Kanwal, which indicate that claimant has a moderate to severe pulmonary impairment. Decision and Order at 16; Director's Exhibits 8, 22, 24. The administrative law judge properly credited Dr. Paranthaman's opinion over Dr. Kanwal's opinion because Dr. Paranthaman possesses superior qualifications as a physician who is Board-certified in pulmonary medicine.[4] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 16; Director's Exhibits 8, 22. The administrative law judge also properly accorded determinative weight to Dr. Paranthaman's opinion on the basis that it was well-reasoned and documented.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 16; Director's Exhibits 8, 22. The administrative law judge discounted Dr. Strong's opinion on the basis that Dr. Strong did not provide any bases for his conclusion that claimant has a moderate to severe pulmonary impairment. Decision and Order at 16. Contrary to the administrative law judge's finding, however, Dr. Strong appears to have provided one basis, at least, for this conclusion.[6] Specifically, Dr. Strong indicated that claimant has a "moderate to severe pulmonary dysfunction according to the pulmonary function test, although the cooperation was only fair." Director's Exhibit 22. To the extent that the administrative law judge erred, however,

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[3]Claimant testified at the hearing on November 6, 1998 that he worked as a coal loader, loading coal underground with a shovel and periodically repairing mining cars during his entire period of coal mine employment. Hearing Tr. at 8, 10-11. Consistent with this testimony, Dr. Paranthaman noted that claimant worked as a coal loader and repaired mining cars. Director's Exhibit 8.

[4]The record does not reflect that Dr. Kanwal is Board-certified in pulmonary medicine.

[5]The administrative law judge noted that while Dr. Paranthaman indicated that he was unable to assess claimant's functional capacity on August 27, 1998 because of invalid pulmonary function testing and normal arterial blood gasses, Dr. Paranthaman definitively concluded after examining claimant on June 19, 1997 that claimant retains the respiratory capacity for his usual coal mine employment and suffers from only a mild impairment in light of a mildly reduced FVC value in pulmonary function testing and normal arterial blood gasses. Decision and Order at 16; Director's Exhibits 8, 22.

[6]Dr. Strong examined claimant on March 18, 1974, and stated in a very brief letter dated March 20, 1974 that there was no evidence of pneumoconiosis, but that claimant has a "moderate to severe pulmonary dysfunction according to the pulmonary function test, although the cooperation was only fair." Director's Exhibit 22. Dr. Strong did not elaborate, and indicated nothing further in his letter, other than to diagnose claimant with arteriosclerotic heart disease and hypertension, with a blood pressure of 160/120. *Id*.

in failing to articulate her reasons for discounting Dr. Strong's opinion, such error was harmless because the administrative law judge properly accorded greatest weight to Dr. Paranthaman's opinion, for the reasons discussed *supra*. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

With regard to the remaining medical opinions of record, the administrative law judge properly found that Drs. Cox, Sutherland and Wallace did not address the degree of claimant's impairment or indicate whether claimant has physical limitations related to a pulmonary or respiratory condition. Decision and Order at 15-16; Director's Exhibit 22. The administrative law judge further found that Dr. Miller indicated that claimant has a mild impairment. Decision and Order at 15. To the extent that the administrative law judge erred by not comparing the exertional requirements of claimant's usual coal mine employment to Dr. Miller's opinion, such error was harmless since, contrary to the administrative law judge's finding, Dr. Miller did not opine that claimant has a mild impairment, but rather stated only that claimant has mild bronchitis, without indicating whether the bronchitis was due to coal dust exposure. Director's Exhibit 22. Thus, Dr. Miller's opinion need not have been considered in relation to the exertional requirements of claimant's job. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Boyd v. Freeman United Coal Mining Co.*, 6 BLR 1-159 (1983). Finally, the administrative law judge properly found that Dr. Fleenor's statement in his June 28, 1977 opinion that claimant cannot mow his lawn did not constitute an assessment of claimant's physical limitations which must be compared to the exertional requirements of claimant's job, but merely indicated claimant's subjective complaint that he could not perform that activity. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 15; Director's Exhibit 22. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

Inasmuch as claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits. *Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge