

BRB No. 02-0631 BLA

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

Appeal of the Decision and Order on Remand-Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Paul D. Deaton, Paintsville, Kentucky, for claimant.

Jennifer U. Toth (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Benefits (2000-BLA-0361) of Administrative Law Judge Joseph E. Kane 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 has been before the Board previously.¹ On September 29, 2000, the administrative law judge issued a

¹The prior procedural history is set forth in the Board's Decision and Order of November 30, 2001. *Abshire v. Director, OWCP*, BRB No. 01-0223 BLA (Nov. 30,

Decision and Order granting modification and awarding benefits. The administrative law judge credited claimant with fifteen years of coal mine employment and adjudicated this claim, involving a request for modification of a duplicate claim, pursuant to 20 C.F.R. Part 718 (2000).² The administrative law judge found that the newly submitted pulmonary function study and medical opinion evidence were sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c)(1), (4) (2000), and therefore found a change in conditions established pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge then considered all of the evidence of record and found that the existence of pneumoconiosis was established by the x-ray and medical opinion evidence pursuant to Section 718.202(a)(1), (4) (2000). Finally, the administrative law judge found that the medical opinion evidence of record established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge granted modification and awarded benefits.

The Director, Office of Workers' Compensation Programs (the Director), appealed the award of benefits to the Board. In *Abshire v. Director, OWCP*, BRB No. 01-0223 BLA (Nov. 30, 2001)(unpublished), the Board affirmed in part and vacated in part the decision and remanded the case for the administrative law judge to reconsider Dr. Sundaram's medical opinion under 20 C.F.R §718.204(b)(2)(iv) pursuant to the directives set forth in *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), and weigh all the evidence together at 20 C.F.R. §718.204(b)(2)(i)-(iv). The Board instructed the administrative law judge that if, on remand, he found the evidence sufficient to establish a totally disabling respiratory impairment and, thus, a change in conditions, he must consider all the evidence, both old and new, to determine entitlement to benefits.

On remand, the administrative law judge found that Dr. Sundaram's opinion did not support a finding of total disability. He further found that when the pulmonary function studies were considered with Dr. Sundaram's opinion and the previously submitted medical evidence, claimant failed to establish that he is totally disabled by a preponderance of the evidence. Thus, the administrative law judge determined the evidence did not establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310 (2000). Accordingly, the administrative law judge

2001)(unpublished).

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

denied benefits. On appeal, claimant alleges that the administrative law judge erred in finding the medical evidence insufficient to establish that he suffers from a totally disabling respiratory impairment. The Director responds, urging affirmance.

The Board must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 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 prove any one of these requisite elements precludes entitlement.

Claimant argues that the administrative law judge erred in not giving “appropriate weight” to Dr. Sundaram’s opinion, that claimant did not retain the pulmonary capacity to perform his usual coal mine employment. Claimant’s Brief at 3-4. We disagree. The administrative law judge reasonably accorded Dr. Sundaram’s opinion less probative weight, finding it poorly documented, because the physician failed to “explicitly” provide the bases for his opinion and, more particularly, failed to explain his conclusion of total disability “in the face of” the non-qualifying pulmonary function study that he administered. Decision and Order on Remand-Denying Benefits at 9; Director’s Exhibits 64, 70; see *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-106 (6th Cir. 1983); *Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also found that the criteria that Dr. Sundaram used to assess claimant’s level of impairment consisted of claimant’s work history, physical limitations reported by claimant and a non-qualifying pulmonary function study. The administrative law judge correctly determined that although Dr. Sundaram noted that the claimant reported “shortness of breath upon walking one block or climbing one flight of stairs and that he is unable to bend crawl, stoop or work at unprotected heights,” Dr. Sundaram failed to corroborate claimant’s symptoms and functional limitations upon physical examination or compare claimant’s limitations to the exertional requirements of claimant’s job as a rock truck driver.³ Decision and Order on Remand-Denying Benefits at 9; *Cornett, supra*.

³Claimant further argues that the administrative law judge’s observation that claimant “arrived at the formal hearing in a wheel chair and was taking supplemental oxygen” demonstrates that claimant lacks the ability to perform any work, particularly that of a rock truck driver, and supports Dr. Sundaram’s opinion. Claimant’s Brief at 4; Decision and Order on Remand-Denying Benefits at 2. In light of the

Claimant also argues that substantial evidence does not support the administrative law judge's finding that the opinions of Drs. Leslie, El-Amin, Vogelsang, Sutherland and Wright are insufficient to establish total disability. We disagree. The administrative law judge found that Dr. Sutherland opined that claimant retains the pulmonary capacity to perform his job as a rock truck driver or a comparable job in a dust free environment. Decision and Order on Remand-Denying Benefits at 11; Director's Exhibit 2. The record indicates that Dr. Sutherland diagnosed a mild impairment, but he further concluded that claimant has the "respiratory physiological capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment." *Id.* Consequently, Dr. Sutherland's opinion is insufficient to establish total disability. Decision and Order on Remand-Denying Benefits at 12; *Cornett, supra*.

The administrative law judge also reasonably found Dr. Leslie's recommendation that claimant "should not return to his coal mine employment because of pneumoconiosis," and his statement that "claimant is disabled to perform any other strenuous heavy, manual labor," is insufficient to establish total disability. Decision and Order on Remand-Denying Benefits at 10; Director's Exhibit 2; *Cornett, supra*; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). The administrative law judge acknowledged that claimant's job as a rock truck driver involved fueling, greasing and driving the truck to the various dump sites, requiring sitting for eight hours and climbing up and down a ladder to enter and exit the cab of the truck. Decision and Order on Remand-Denying Benefits at 10. The administrative law judge permissibly found, and we affirm as unchallenged on appeal, that because claimant failed to establish how high he had to climb or the frequency with which he had to enter and exit the rock truck, claimant's job primarily involved sitting, and thus a mild pulmonary impairment would not prevent claimant from performing such a job or a comparable job in a dust-free environment. Decision and Order on Remand-Denying Benefits at 10; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Contrary to claimant's argument, Dr. Leslie's conclusions

administrative law judge's rational determination that Dr. Sundaram's opinion was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment, claimant's lay testimony, standing alone, cannot establish this element of entitlement. See *Pekala v. Director, OWCP*, 13 BLR 1-1 (1989).

regarding “strenuous, heavy manual labor” do not indicate that claimant would be unable to perform his usual coal mine employment because the administrative law judge did not find that claimant’s usual coal mine employment involved heavy manual labor. *Cornett, supra*.

Further, the administrative law judge rationally found that the opinions of Drs. El-Amin and Vogelsang were neither documented nor reasoned. Decision and Order on Remand-Denying Benefits at 10; Claimant’s Exhibit 2; Director’s Exhibits 2, 28; *Clark, supra*. The administrative law judge correctly found that Dr. El-Amin did not explain his conclusion or discuss the evidence upon which he relied to determine that claimant was totally disabled. Decision and Order on Remand-Denying Benefits at 10; Claimant’s Exhibit 1; Director’s Exhibit 2. Dr. Vogelsang, in his 1991 response to three questions posed by claimant’s counsel, stated that claimant’s pulmonary disease “is contributing to prevent him from performing his usual or comparable coal mine work” without further discussion. Director’s Exhibit 26. Contrary to claimant’s contentions, the administrative law judge considered Dr. Vogelsang’s responses, but reasonably found that Dr. Vogelsang’s 1991 conclusions were not supported by the documentation provided or adequately explained. Decision and Order on Remand-Denying Benefits at 11; *Clark, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Furthermore, the administrative law judge reasonably found that the mild pulmonary impairment diagnosed by Dr. Vogelsang in 1989 was insufficient to establish total disability because claimant’s job primarily involved sitting, and thus a mild pulmonary impairment would not prevent claimant from performing such a job or a comparable job in a dust-free environment. Decision and Order on Remand-Denying Benefits at 11; *Cornett, supra*.

Finally, although the administrative law judge did not specifically weigh Dr. Wright’s opinion that claimant was totally disabled to “work in the coal mining industry, or in any dusty environment due to his Coal Workers’ Pneumoconiosis,” Dr. Wright did not explain his conclusion or discuss the evidence which he relied upon to determine that claimant was totally disabled. Claimant’s Exhibit 2. Any error that the administrative law judge may have committed regarding Dr. Wright’s opinion is harmless, however, in view of the administrative law judge’s weighing of the evidence and his reliance upon a preponderance of the reasoned medical opinion evidence, which failed to establish a totally disabling pulmonary impairment. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, ___ U.S. ___, 2003 WL 102516 (Jan. 13, 2003); *Clark, supra*. Therefore, we affirm the administrative law judge’s finding that the preponderance of the medical opinion evidence of record, including the opinions of Drs. Sundaram, Leslie, El-Amin, Vogelsang, Sutherland and Wright, did not support a finding of total disability pursuant to Section 718.204(b)(2)(iv).

Because we affirm the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish total disability under Section 718.204(b)(2)(iv), and claimant makes no other specific challenge to the administrative law judge's finding that the weight of all the evidence together, like and unlike, under Section 718.204(b)(2)(i)-(iv) fails to support a finding of total disability, we affirm the administrative law judge's finding that claimant failed to establish, by a preponderance of the evidence, a totally disabling pulmonary impairment pursuant to Section 718.204(b)(2), as it is supported by substantial evidence and is in accordance with law. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, as claimant has failed to establish total disability at Section 718.204(b)(2), an essential element of entitlement under Part 718, we must also affirm the denial of benefits. *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge