

BRB No. 06-0757 BLA

LARRY DARLOS COLLINS)
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 Claimant-Petitioner)
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 v.) DATE ISSUED: 04/27/2007
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 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 – Denial of Benefits (05-BLA-5424) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), on a subsequent 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).¹ The

¹ The initial claim was filed on January 22, 1992, and was denied on July 23, 1992. Director's Exhibit 1. On July 21, 1993, claimant submitted a request for modification, which was subsequently denied on October 15, 1993. *Id.* The second claim was filed on February 19, 1999, and was denied on June 10, 1999 for failure to establish any element of entitlement. Director's Exhibit 2. The instant claim was filed on

administrative law judge accepted the parties' stipulation that claimant had eighteen years of coal mine employment as supported by the evidence and initially considered whether claimant had established a change in an applicable condition of entitlement subsequent to the denial of a prior claim.² The administrative law judge found that the newly submitted x-ray evidence was sufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), thereby demonstrating a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); Decision and Order at 14-17. The administrative law judge then considered the merits of entitlement and found that claimant's pneumoconiosis arose from coal mine employment. Decision and Order at 15; *see* 20 C.F.R. §§718.203(b). The administrative law judge then determined that the evidence of record was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 17. Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i). The Director, Office of Workers' Compensation Programs, responds, urging affirmance.³

August 1, 2001. Director's Exhibit 3. After benefits were denied by the district director, claimant timely requested a formal hearing. On June 21, 2004 Administrative Law Judge Rudolph L. Jansen remanded the claim for further development of the evidence. Director's Exhibits, 18, 22, 23. A hearing was conducted by Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), on December 1, 2005, in Hazard, Kentucky.

² The administrative law judge properly found that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLAR 1-200 (1989) (*en banc*); Decision and Order at 3; Director's Exhibit 1.

³ The parties do not challenge the administrative law judge's findings that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d), that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), that the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304 is not available to claimant, and that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). These findings are therefore affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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, 363 (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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In considering the issue of total disability, the administrative law judge accorded little weight to the evidence submitted with the 1992 claim due to the age of the evidence. Decision and Order at 8. In comparison, because it was more recent, the administrative law judge accorded substantially more weight to the evidence submitted with claimant's 1999 claim, and noted that the record contained a qualifying pre-bronchodilator value from the pulmonary function study conducted on June 16, 2000, although the post-bronchodilator value was not qualifying. Decision and Order at 8, 15; Director's Exhibit 2. The administrative law judge accorded the greatest weight to the pulmonary function test results submitted as evidence in the instant claim. Decision and Order at 15. These studies are dated July 16, 2001, September 12, 2001, May 28, 2003, and November 14, 2003. Director's Exhibits 7, 10, 23. The administrative law judge found that "[n]one of the newly submitted pulmonary function test evidence produced values equal to or below those found in Appendix B of Part 718, either pre or post-bronchodilator." Decision and Order at 15. Based on this analysis, the administrative law judge found that claimant did not establish total disability pursuant to Section 718.204(b)(2)(i). *Id.*

Claimant argues that the administrative law judge erred in finding that none of the newly-submitted pulmonary function test results were qualifying pursuant to Section 718.204(b)(2)(i). In support of his argument, claimant points to pulmonary function studies dated May 23, 2003 and November 14, 2003, which produced FEV1 values of 1.97 and 2.03 respectively.⁴ Director's Exhibit 23.

⁴ In the Decision and Order – Denial of Benefits, the administrative law judge refers to results from a pulmonary function test conducted in May 2003. Decision and Order at 5. Although claimant and the administrative law judge alternately indicate that this test was conducted on May 23, 2003 or May 28, 2003, a review of the record reflects that the test in question was actually conducted on May 28, 2003. Decision and Order at 5; Claimant's Brief at 3-4; Director's Exhibit 23.

In considering the May and November 2003 pulmonary function tests, the administrative law judge determined that, at the time these tests were administered, claimant was 68.7 inches tall and sixty years old. Decision and Order at 5 n.8. The qualifying FEV1 value listed in Appendix B for a male of the age and height determined by the administrative law judge is 1.97. 20 C.F.R. §718.204(b)(2)(i). Therefore, claimant's argument that the FEV1 value of 2.03 obtained during the November 14, 2003 test is qualifying is without merit.

We also reject claimant's allegation of error regarding the May 2003 pulmonary function test. For a pulmonary function test to constitute evidence of total disability pursuant to Section 718.204(b)(2)(i), it must produce both a qualifying FEV1 value and either an FVC or MVV equal to or less than those values appearing in the tables set forth in Appendix B, or it must produce an FEV1 to FVC ratio equal to or less than 55%. 20 C.F.R. §718.204(b)(2)(i)(A)-(C).⁵ Although claimant is correct in stating that the administrative law judge misidentified the pre-bronchodilator FEV1 of 1.97 for the May 28, 2003 pulmonary function test as non-qualifying, this value is not accompanied by a qualifying FVC, MVV, or FEV1/FVC ratio. Therefore, the administrative law judge's characterization of the May 28, 2003 FEV1 as non-qualifying does not constitute an error requiring remand, because the administrative law judge's ultimate conclusion, that the pulmonary function studies of record are non-qualifying under the Federal disability guidelines, is supported by substantial evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We affirm, therefore, the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(i) and his determination that claimant failed to meet his burden of establishing total disability under Section 718.204(b)(2), an essential element of entitlement. Thus, the denial of benefits is also affirmed. *Anderson*, 12 BLR at 1-111; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

⁵ According to Appendix B of Part 718, the qualifying FVC value for an individual of claimant's age and height, as determined by the administrative law judge, is 2.51 and the qualifying MVV value is 79. Claimant's pulmonary function test of May 28, 2003 produced an FVC value of 2.76 and an FEV/FVC ratio of 71%, which is well above the required ratio of less than or equal to 55%. Director's Exhibit 23. No MVV value was reported for this test. *Id.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge