BRB No. 08-0624 BLA

G.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/29/2009
	)	
FREEMAN UNITED COAL MINING COMPANY	)	
	)	
Employer-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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Gary W. Thomason, Centralia, Illinois, *pro se*.

John A. Washburn (Gould & Ratner LLP), Chicago, Illinois, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (04-BLA-5061) of Administrative Law Judge Thomas M. Burke 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). Claimant filed his claim on August 16, 2002. Director's Exhibit 2. The administrative law judge credited claimant with thirty-one years of coal mine employment,[1] as stipulated, and

[1] The record indicates that the miner's coal mine employment was in Illinois. Decision and Order at 3; Hearing Transcript at 9. Accordingly, this case arises within the

found that claimant established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but did not establish total disability or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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).

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).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the pulmonary function studies did not establish total disability. Decision and Order at 5, 12. The record contains two non-qualifying pulmonary function studies performed on November 20, 2002, and June 9, 2004.[2] Director's Exhibit 13; Employer's Exhibit 6. Because both pulmonary function studies of record are non-qualifying, we affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2)(i).[3]

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jurisdiction of the United States Court of Appeals for the Seventh Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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

[3] Both the November 20, 2002, and June 9, 2004 pulmonary function studies were validated by Dr. Tuteur. Employer's Exhibit 14 at 7-8.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that the blood gas studies did not establish total disability. Decision and Order at 12-13. The administrative law judge considered that the November 20, 2002 resting blood gas study was qualifying, whereas the June 9, 2004 resting and exercise blood gas studies were qualifying and non-qualifying, respectively. Director's Exhibit 11; Employer's Exhibit 6. The administrative law judge noted that Dr. Tuteur interpreted the June 9, 2004 blood gas study as showing no disability because claimant's gas exchange resolved to normal on exercise, and Dr. Repsher interpreted the 2004 exercise blood gas study as not indicative of total disability, since the hypoxemia at rest completely corrected with exercise. Decision and Order at 12-13; Employer's Exhibits 13 at 8-9; 14 at 9-10. Based on the testimony of Drs. Tuteur and Repsher, the administrative law judge reasonably found that "the normal post exercise arterial blood gas test is the test that best reflects [c]laimant's pulmonary condition." Decision and Order at 13; *see Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 507, 15 BLR 2-116, 2-120 (7th Cir. 1990). Consequently, the administrative law judge found that the blood gas studies do not establish total disability. We affirm the administrative law judge's discretionary finding that the non-qualifying exercise blood gas study best reflects claimant's pulmonary condition, and thus that the blood gas studies do not establish total disability pursuant to Section 718.204(b)(2)(ii), as it is rational and supported by substantial evidence.[4] *See Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 671, 22 BLR 2-483, 2-490-91 (7th Cir. 2002); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Mahan v. Kerr-McGee Coal Corp.*, 7 BLR 1-159, 1-161-62 (1984).

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge properly found that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 12. Consequently, we affirm the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Tuteur, Repsher, and Reddy. Drs. Tuteur and Repsher opined that claimant is not totally disabled. Employer's Exhibits 6; 8; 13 at 12-13; 14 at 10. Dr.

[4] Any error in the administrative law judge's failure to weigh the November 24, 1997 qualifying, at-rest blood gas study is harmless, considering that it does not contain a result on exercise, and the administrative law judge specifically relied on the medical opinions crediting the more recent, 2004 non-qualifying exercise blood gas study. *See Freeman v. United Coal Co. v. Benefits Review Board [Wolfe]*, 912 F.2d 164, 171, 14 BLR 2-53, 2-62 (7th Cir. 1990); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-20 (2003); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 5, 12-13; Employer's Exhibit 4.

Reddy opined that claimant is totally disabled. Director's Exhibit 10 at 4. The administrative law judge accurately noted that Dr. Reddy's opinion of total disability was based on the qualifying results of the November 20, 2002 resting blood gas study, while the contrary opinions of Drs. Tuteur and Repsher were based on the non-qualifying pulmonary function studies of November 20, 2002 and June 9, 2004, and the non-qualifying exercise blood gas study of June 9, 2004. The administrative law judge permissibly found that the opinions of Drs. Tuteur and Repsher were "the most reasoned" as they were based on a weighing of the pulmonary function and blood gas studies of record, and were more consistent with the record because the physicians had the advantage of reviewing the non-qualifying exercise blood gas study. Decision and Order at 13; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984). Substantial evidence supports the administrative law judge's finding. As the administrative law judge permissibly credited the opinions of Drs. Tuteur and Repsher over that of Dr. Reddy, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv). *See Shelton*, 933 F.2d at 507, 15 BLR at 2-120; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 13; Director's Exhibit 10; Employer's Exhibits 6, 8, 13, 14.

Pursuant to Section 718.204(b)(2), the administrative law judge weighed the pulmonary function studies, the blood gas studies, and the medical opinions together, and determined that they did not establish total disability. Decision and Order at 13. We affirm the administrative law judge's finding, as it is rational and supported by substantial evidence.[5] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

In light of our affirmance of the administrative law judge's finding that total disability, an essential element of entitlement, was not established, we affirm the administrative law judge's denial of benefits.[6] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[5] We affirm the administrative law judge's finding that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, because the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.204(b)(1); Decision and Order at 10, 12.

[6] Therefore, we need not address the administrative law judge's additional finding that claimant did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge