BRB No. 08-0677 BLA

T.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MINING TECHNOLOGIES, INCORPORATED	)	
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	DATE ISSUED: 04/23/2009
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

T.H., Hardshell, Kentucky, *pro se*.

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (07-BLA-5098) of Administrative Law Judge Joseph E. Kane 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). This case involves a claim filed on March 13, 2003. The administrative law judge credited claimant with "at least" sixteen years of coal mine employment.[1] Decision and Order at 3. The administrative law judge found that the medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). 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, has declined to file a response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised 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 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 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In this case, substantial evidence supports the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See McFall*, 12 BLR at 1-177.

Pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), the administrative law judge correctly found that all four pulmonary function studies and blood gas studies of record[2] are non-

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[1] The record reflects that claimant's coal mine employment was in Kentucky. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] The record contains pulmonary function studies and blood gas studies that were conducted on June 19, 2002, March 16, 2004, May 2, 2006, and June 15, 2006. Director's Exhibit 13 at 1, 11; Director's Exhibit 17 at 5-6; Director's Exhibit 70 at 27, 36, 38, 51.

qualifying.[3] Decision and Order at 12. Consequently, we affirm the administrative law judge's finding that the pulmonary function and blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii).

Because the record contains no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge correctly found that claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 12.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Cornett, Simpao, Dahhan, and Broudy.[4] Director's Exhibits 10, 12, 17, 70; Employer's Exhibits 1, 2. Dr. Cornett opined that claimant "is totally and permanently disabled from . . . a chronic lung disease. He is not able to do any kind of gainful work." Director's Exhibit 10. Dr. Simpao opined that claimant has a mild pulmonary impairment that is totally disabling. Dr. Simpao explained that claimant does not have the respiratory capacity to stand continuously and operate manual levers with both hands and feet while enduring a rough ride on a grader, as was required by his last coal mine job as a coal cleaner. Director's Exhibit 70 at 73. By contrast, Dr. Dahhan opined that claimant did not suffer from any respiratory impairment because the results of his arterial blood gas studies were normal, and, despite suboptimal effort on the pulmonary function studies, his FEV1, lung volume measurement, and total lung capacity were "normal," and his diffusion capacity was normal after being corrected for alveolar ventilation. Director's Exhibit 70 at 25; Employer's Exhibit 2 at 10. Dr. Dahhan additionally indicated that, although claimant's FVC was 77% of predicted and that 80% of predicted or better is considered to be normal, the results of claimant's lung volume measurement, total lung capacity, and diffusion capacity "tend to confirm the observation that if the patient produce[d] better effort, he [would] have produced values above eighty percent for both the FVC and FEV1." Employer's Exhibit 2 at 11. Lastly, Dr. Broudy opined that there was no evidence of total disability because none of claimant's objective studies was qualifying. Director's Exhibit 17 at 3-4.

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

[4] Although the record additionally contains Dr. Alam's medical report, diagnosing a "very mild airflow obstruction," the administrative law judge accurately observed that Dr. Alam did not state an opinion as to whether claimant is totally disabled by the very mild obstruction. Decision and Order at 6; Director's Exhibit 13.

The administrative law judge determined that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In so finding, the administrative law judge permissibly discounted Dr. Cornett's opinion because Dr. Cornett "did not identify the basis for his disability determination or the testing or documentation on which he relied." Decision and Order at 12; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Further, the administrative law judge permissibly found the opinion of Dr. Dahhan, as supported by Dr. Broudy's opinion, to be more persuasive than the opinion of Dr. Simpao. Although the administrative law judge found Dr. Simpao's opinion to be "adequately reasoned and documented, based on his familiarity with [c]laimant's job duties," Decision and Order at 12; Director's Exhibit 70 at 104, 107, the administrative law judge reasonably found the opinions of Drs. Dahhan and Broudy to be well-reasoned and documented, and entitled to greater weight in light of these physicians' superior qualifications.[5] *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); Decision and Order at 13.

Further, as the administrative law judge accurately stated, Dr. Dahhan was familiar with the exertional requirements of claimant's job as a coal cleaner[6] when he opined that claimant is not totally disabled. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); Employer's Exhibit 2 at 6. The administrative law judge reasonably explained that he was persuaded by Dr. Dahhan's opinion because "[w]hile non-qualifying pulmonary function tests do not rule out disability, Dr. Dahhan noted that [c]laimant's [pulmonary function test] values were close to or above 80%, indicating no respiratory impairment." Decision and Order at 13; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Decision and Order at 6, 7; Director's Exhibit 70 at 38-39, 70; Employer's Exhibit 1 at 3-4. As it is supported by substantial evidence, we affirm the administrative law judge's permissible credibility determination. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129. We therefore affirm his finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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[5] The administrative law judge accurately noted that Drs. Dahhan and Broudy are Board-certified in Internal Medicine and Pulmonary Disease. Dr. Simpao's credentials are not contained in the record.

[6] Further, Dr. Dahhan assumed that claimant's job required arduous manual labor. Employer's Exhibit 2 at 11-12.

In light of our determination to affirm the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2),[7] an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order – 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

[7] The record contains no evidence of complicated pneumoconiosis. Therefore, the administrative law judge correctly found that the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304, is inapplicable. Thus, claimant cannot establish total disability by means of the irrebuttable presumption. *See* 20 C.F.R. §718.204(b)(1).