

BRB No. 11-0577 BLA

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| CHARLES E. CANTERBURY |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
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| DIRECTOR, OFFICE OF WORKERS' |) | DATE ISSUED: 04/24/2012 |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Charles E. Canterbury, Mount Hope, West Virginia, *pro se*.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, without the assistance of counsel, appeals the Decision and Order Denying Benefits on Remand (2010-BLA-5536) of Administrative Law Judge Richard A. Morgan rendered on a claim filed on October 30, 2003, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act).¹ This case is before the Board for the second time. Initially, Administrative Law

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the claim was filed prior to January 1, 2005. See Pub. L. No. 111-148, §1556(c); Director's Exhibit 3.

Judge Stephen L. Purcell found that claimant established 2.68 years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(c). However, Judge Purcell found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Purcell denied benefits. Pursuant to an appeal by claimant, the Board affirmed Judge Purcell's length of coal mine employment finding, and his finding that claimant established the existence of pneumoconiosis arising out of coal mine employment. The Board also affirmed Judge Purcell's finding that total respiratory disability was not established by the blood gas study evidence or the medical opinion evidence pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iv). Further, the Board affirmed Judge Purcell's finding that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii), because there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. The Board, however, vacated Judge Purcell's finding that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i) based on the pulmonary function studies, and his denial of benefits. The Board remanded the case to Judge Purcell to reconsider whether the pulmonary function studies established total respiratory disability pursuant to Section 718.204(b)(2)(i) and, if they did, to weigh all of the relevant evidence together to determine whether total respiratory disability was established pursuant to 20 C.F.R. §718.204(b). The Board also instructed Judge Purcell to determine, if reached, whether the evidence established disability causation pursuant to 20 C.F.R. §718.204(c). *Canterbury v. Director, OWCP*, BRB No. 08-0411 BLA (Jan. 30, 2009)(unpub.).

On remand, the case was assigned to Judge Morgan (the administrative law judge), who found that the pulmonary function study evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i), because the qualifying pulmonary function studies were unreliable. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that he worked in coal mine employment, sporadically, over twenty-two years, and that he is entitled to benefits as he is totally disabled due to coal workers' pneumoconiosis.² The Director, Office of Workers' Compensation Programs, has not responded to this appeal.

² We will not address claimant's general allegation that he had over twenty-two years of coal mine employment, as the Board previously addressed this contention and affirmed Administrative Law Judge Stephen L. Purcell's length of coal mine employment finding. *See Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Moreover, the Board specifically noted that, "even if claimant were able to establish twenty-two years of coal mine employment, as alleged, it would not affect claimant's entitlement to benefits, as [Judge Purcell] found that claimant's pneumoconiosis arose in part out of coal mine employment pursuant to Section 718.203(c) without benefit of the ten year presumption."

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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 law.³ 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is rational, supported by substantial evidence, and consistent with applicable law. The administrative law judge considered the pulmonary function study evidence, addressing the reliability of the pulmonary function study results, as directed by the Board. The administrative law judge found that two pulmonary function studies were qualifying: the March 23, 2004 study and the September 2, 2005 study. In addition, the administrative law judge found that the May 10, 2002 pulmonary function study, contained in claimant's treatment record, had qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values.

In evaluating these studies, however, the administrative law judge found that, because the March 23, 2004 pulmonary function study did not reflect claimant's cooperation or comprehension, it was entitled to "little, if any, weight, as its validity cannot be ascertained." Decision and Order at 6. Further, the administrative law judge stated that the September 2, 2005 pulmonary function study "lacks a record of comprehension or cooperation and lacks a physician's signature or interpretation. Thus, I give it little to no weight." *Id.* Finally, the administrative law judge found that the May

Canterbury v. Director, OWCP, BRB No. 08-0411 BLA, slip op. at 3 (Jan. 30, 2009) (unpub.).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

10, 2002 pulmonary function study “lacks tracings or a flow loop volume and is neither signed or [sic] attested to by a physician. Thus I give it no weight.” *Id.* The administrative law judge, therefore, found that the pulmonary function study evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i).

As the administrative law judge reconsidered the pulmonary function study evidence, and permissibly rejected the qualifying pulmonary function studies as unreliable, his finding that the pulmonary function study evidence does not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) is, therefore, affirmed. *See* 20 C.F.R. §§718.103; 718.204(b)(2)(i); *Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986). Further, as the administrative law judge found that the evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge’s denial of benefits.⁴ *Gee*, 9 BLR at 1-5. As the administrative law judge properly found that total respiratory disability, an essential element of entitlement, was not established pursuant to Section 718.204(b), we need not address the administrative law judge’s finding regarding disability causation pursuant to Section 718.204(c). *See Gee*, 9 BLR at 1-5.

⁴ In its prior Decision and Order, the Board noted that the Director, Office of Workers’ Compensation Programs argued that if, on remand, the administrative law judge found that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2), the case must be remanded to the district director in order to obtain a supplemental report from Dr. Porterfield to cure any defect in his opinion on the issues of disability and disability causation. Prior to the case being considered by the administrative law judge on remand, and pursuant to the Board’s Decision and Order, the case was remanded to the district director for a supplemental report from Dr. Porterfield. On remand, the administrative law judge considered Dr. Porterfield’s supplemental report and found that it failed to establish total respiratory disability and disability causation, as the doctor failed to sufficiently explain the basis for his opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge