BRB No. 13-0365 BLA

JAMES SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DANIELS BRANCH COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 04/11/2014
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-5510) of Administrative Law Judge Drew A. Swank, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the

Act). This case involves a subsequent claim filed on September 17, 2010.[1] Director's Exhibit 3.

Applying amended Section 411(c)(4),[2] 30 U.S.C. §921(c)(4), the administrative law judge credited claimant with "well over" fifteen years of qualifying coal mine employment,[3] and found that the new medical evidence established the existence of clinical pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b).[4] The administrative law judge further found, however, that the evidence did not establish that claimant is totally disabled by a respiratory or

[1] Claimant's initial claim for benefits, filed on October 4, 2007, was finally denied by the district director because claimant did not establish any element of entitlement. Director's Exhibit 1.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] Claimant's coal mine employment was in West Virginia. Director's Exhibits 4, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] The administrative law judge did not specify whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. No party challenges this aspect of the administrative law judge's decision. Because claimant did not establish any element of entitlement in his previous claim, the administrative law judge's finding that claimant established the existence of pneumoconiosis with new evidence constitutes a determination of a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption, and, in the alternative, could not affirmatively establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the medical opinion evidence in finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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).

To establish entitlement 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).

Claimant challenges the administrative law judge's analysis of the medical opinion evidence, relevant to the issue of total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Rasmussen, Fino and Castle.[6] Dr. Rasmussen opined that claimant has a totally

[5] Claimant does not challenge the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Dr. Rasmussen examined claimant and diagnosed a "minimal ventilatory impairment" and stated that, based on this impairment, claimant did "not retain the pulmonary capacity to perform his regular coal mine employment," which the physician described as involving "heavy and some very heavy manual labor." Director's Exhibit 13. Dr. Fino examined claimant and reviewed his medical records. Dr. Fino noted that claimant's last coal mine employment involved heavy labor, noting that claimant stated that "50% of the work involved very heavy labor and 50% of the work involved heavy labor." Employer's Exhibit 1. Dr. Fino opined that claimant did not have a respiratory impairment, Employer's Exhibit 10 at 15, and stated that "[f]rom a respiratory standpoint, this man is neither partially nor totally disabled from returning to his last mining job or a

disabling respiratory impairment. In contrast, Drs. Fino and Castle opined that claimant is able to perform his usual coal mine employment from a respiratory or pulmonary standpoint.

Having considered the qualifications of the physicians, and the bases for their opinions, the administrative law judge found that as two of the three physicians stated that claimant is not totally disabled from performing his usual coal mine employment, the preponderance of the medical opinion evidence did not establish total respiratory disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 16.

Claimant asserts that the administrative law judge erred in finding that the opinions of Drs. Fino and Castle outweighed the opinion of Dr. Rasmussen. Claimant argues that Drs. Fino and Castle are less qualified than Dr. Rasmussen, and that their opinions are not credible. Therefore, claimant contends that Dr. Rasmussen's opinion should have been given the greatest weight. Claimant's Brief at 10-15. Claimant's contentions lack merit.

We initially reject claimant's assertion that the administrative law judge erred in crediting Dr. Fino's opinion. Specifically, claimant contends that because Dr. Fino opined that all of the pulmonary function studies of record produced invalid results,[7] Dr. Fino's conclusion regarding claimant's respiratory capacity is not supported by

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job requiring similar effort." Employer's Exhibit 1. Dr. Castle examined claimant and reviewed his medical records. Dr. Castle noted that "there was heavy labor involved" in claimant's job duties as a continuous miner and roof bolting machine operator. Employer's Exhibit 5. Dr. Castle diagnosed mild restrictive lung disease, but stated that claimant is not disabled from performing his last coal mine employment from a respiratory perspective. Employer's Exhibit 9 at 23-24.

[7] The administrative law judge found that Dr. Rasmussen's pulmonary function study, performed on June 7, 2011, produced valid results, while Drs. Fino and Castle opined that the studies they administered produced invalid results. Decision and Order at 12. Dr. Castle opined that Dr. Rasmussen's pulmonary function study was valid, and reflected a mild restrictive impairment. Employer's Exhibit 5. Dr. Castle concluded, however, that claimant is not disabled from a respiratory standpoint. Employer's Exhibit 10 at 23-24. While Dr. Fino was the only physician to conclude that Dr. Rasmussen's pulmonary function studies were invalid, he clarified that, even assuming that the results were accurate, the minimal level of impairment that the study results reflected would not be disabling. Employer's Exhibit 10 at 12-13, 16. Thus there is no merit to claimant's contention that Dr. Fino's opinion is not consistent with that of Dr. Castle. Claimant's Brief at 15.

substantial evidence, and should have been accorded no weight. Claimant's Brief at 14-15. Contrary to claimant's argument, in addition to reviewing the pulmonary function study results, Dr. Fino based his opinion on his physical examination of claimant, the results of the blood gas studies he administered, and claimant's employment history, as well as a review of claimant's medical records and the report of Dr. Rasmussen's examination and objective testing. Employer's Exhibits 1, 10. Thus there is no merit to claimant's assertion that Dr. Fino's opinion is not supported by substantial evidence.

Further, we reject claimant's assertion that Dr. Castle did not address the exertional requirements of claimant's coal mine employment, and that therefore his opinion should be accorded diminished weight. Claimant's Brief at 16. Contrary to claimant's argument, Dr. Castle specifically noted that "[f]or the last 15 or 20 years [claimant] ran a remote control continuous miner. . . . There was heavy labor involved as he had to move a very lengthy cable and waterline. He also worked as a roof bolting machine operator." Employer's Exhibit 5 at 2. In addition, Dr. Castle reviewed claimant's employment histories, claimant's description of his coal mine work, and Dr. Rasmussen's report, describing claimant's work as requiring "heavy labor." *Id*. at 5-6. Accordingly, the record does not support claimant's assertion that, in concluding that claimant can perform his usual coal mine work from a respiratory standpoint, Dr. Castle did not consider the exertional requirements of claimant's job.

Finally, in asserting that Dr. Rasmussen's opinion should have been accorded the greatest weight, as the most highly qualified physician of record, claimant is asking for a reweighing of the evidence, which the Board is not empowered to do. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Anderson*, 12 BLR at 1-113. Moreover, in finding that the opinions of Drs. Fino and Castle, that claimant does not have a disabling respiratory impairment, outweighed the contrary opinion of Dr. Rasmussen, the administrative law judge did not rely on the qualifications of the physicians as a determining factor. Decision and Order at 16. Thus, claimant's assertion regarding Dr. Rasmussen's qualifications is misplaced. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the preponderance of the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Compton, v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). We further affirm, as supported by substantial evidence, the administrative law judge's conclusion that the preponderance of the evidence, overall, does not establish the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order at 16.

Because the medical evidence of record does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In light of that affirmance, we also affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 16.

Accordingly, the administrative law judge's Decision and Order Denying 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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BETTY JEAN HALL
Administrative Appeals Judge