BRB No. 98-0987 BLA

DONALD W. CROUSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLACKWATCH DIVISION, BLACK DIAMOND COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
U.S. STEEL MINING COMPANY	)	
	)	
Employers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order - Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Donald W. Crouse, Cedar Bluff, Virginia, *pro se*.

Michael J. Pollack (Arter & Hadden, LLP), Washington, D.C., for Blackwatch Division, Black Diamond Coal Company.

Howard G. Salisbury, Jr. (Kay, Casto, Chaney, Love & Wise), Charleston, West Virginia, for U.S. Steel Mining Company.

BEFORE: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals from the Decision and Order - Rejection of Claim (97-BLA-1062) of Administrative Law Judge Edward Terhune Miller with respect to 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on May 20, 1970. Director's Exhibit 72. This claim was finally denied by the Department of Labor on August 7, 1981, on the grounds that claimant did not prove that he is totally disabled due to pneumoconiosis. *Id.*. Claimant filed a second claim on January 31, 1995. Director's Exhibit 1. The district director denied this application for benefits on July 26, 1995, as claimant did not establish any of the elements of entitlement and failed to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309. Director's Exhibit 36. Claimant submitted additional evidence under a cover letter dated December 5, 1995. Director's Exhibit 37. The district director treated the submission as a request for modification under 20 C.F.R. §725.310 and denied it. Director's Exhibit 38. After the issuance of a Proposed Decision and Order denying modification and an informal conference, claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges (OALJ). Director's Exhibits 40, 67. The hearing was held before Administrative Law Judge Edward Terhune Miller (the administrative law judge) on October 8, 1997.

In his Decision and Order, the administrative law judge credited claimant with sixteen years of coal mine employment and considered whether, pursuant to Section 725.310, claimant had established a change in conditions or mistake in a determination of fact regarding the district director's July 1996 denial of claimant's second claim for benefits.[1] The administrative law judge weighed all of the evidence of record and determined that it was insufficient to demonstrate either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that claimant is totally disabled pursuant to 20 C.F.R. §718.204(c). The administrative law judge concluded, therefore, that claimant failed to establish a change in conditions or a mistake in a determination of fact. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge erred in finding that the author of one of the medical opinions of record is not a doctor. Counsel for U.S. Steel Mining Company and Blackwatch Division, Black Diamond Coal Company, have responded to claimant's appeal and urge affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

[1]The administrative law judge also indicated that the parties had agreed to postpone consideration of the responsible operator issue until claimant's entitlement to benefits on the merits was determined. Decision and Order at 4.

In an appeal by a claimant filed 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 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 under 20 C.F.R. Part 718, claimant must prove that he suffers from 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. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In light of the fact that the administrative law judge based his determination upon a review of the evidence of record in its entirety, we will treat the administrative law judge's finding that the evidence of record as a whole is insufficient to establish total disability under Section 718.204(c) as a finding on the merits of entitlement pursuant to the regulations set forth in Part 718. With respect to Section 718.204(c)(1), the administrative law judge determined correctly that none of the pulmonary function studies of record produced qualifying values.[2] Decision and Order at 11; Director's Exhibits 28, 37, 59, 72. Under Section 718.204(c)(2), the administrative law judge acted within his discretion in finding that the blood gas studies of record do not support a finding of total disability, inasmuch as the preponderance of the studies is nonqualifying.[3] Decision and Order at 11; Director's Exhibits 32, 37, 57, 59, 72;

[2]A "qualifying" pulmonary function study under 20 C.F.R. §718.204(c)(1) is one that produces values equal to or less than the values set forth in the tables appearing in Appendix B to 20 C.F.R. Part 718. A "nonqualifying" study is one that produces values in excess of the table values. A "qualifying" blood gas study under 20 C.F.R. §718.204(c)(2) is one that produces values equal to or less than the values set forth in the tables appearing in Appendix C to 20 C.F.R. Part 718. A "nonqualifying" study is one that produces values in excess of the table values.

[3]The administrative law judge did not include a qualifying resting blood gas study dated October 10, 1992 in his consideration of the evidence relevant to 20 C.F.R. §718.204(c)(2). Director's Exhibit 57. This error is harmless, however, inasmuch as inclusion of this study would merely shift the balance between qualifying and nonqualifying studies from one out of six to two out of six. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The accuracy of the administrative law judge's conclusion that the preponderance of the blood gas study evidence is nonqualifying would remain,

Claimant's Exhibit 1; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Section 718.204(c)(3) is not applicable in the present case, as the record is devoid of evidence of cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(c)(3).

Regarding Section 718.204(c)(4), the administrative law judge considered the medical opinions of Drs. Forehand, Rinehart, Boutros, J.P. Sutherland, Rasmussen, and Hippensteel. Decision and Order at 11. The administrative law judge noted that the record also contained an opinion in which Frank Sutherland stated that claimant is totally disabled. *Id.*. The administrative law judge determined correctly that the opinions of Drs. Rinehart and Boutros were of no probative value under Section 718.204(c)(4), as neither physician indicated whether claimant was disabled. Decision and Order at 11; Director's Exhibits 37, 57; *see Trent*, *supra*. The administrative law judge also rationally found that Dr. J.P. Sutherland's statement that claimant's lung condition had deteriorated did not constitute a diagnosis of a totally disabling respiratory or pulmonary impairment. Decision and Order at 11; Director's Exhibit 61; *see Trent*, *supra*.

---

therefore, unaltered.

In addition, the administrative law judge acted within his discretion in determining that the opinions in which Drs. Hippensteel and Rasmussen indicated that claimant is capable of performing his usual coal mine work outweighed the contrary opinions of record based upon the superior qualifications of Drs. Hippensteel and Rasmussen. Decision and Order at 6 n.6, 7, 11; Director's Exhibit 59; *see Clark*, *supra*. The administrative law judge also acted within his discretion in finding that Dr. Hippensteel's opinion is entitled to additional weight, as Dr. Hippensteel both examined claimant and reviewed a substantial amount of the medical evidence of record. Decision and Order at 11; Director's Exhibit 59; *see Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). In contrast, the administrative law judge permissibly accorded little weight to the opinion in which Dr. Forehand termed claimant totally disabled on the ground that Dr. Forehand based his opinion solely upon a single qualifying blood gas study. Decision and Order at 11; Claimant's Exhibit 1; *see Clark*, *supra*; *Peskie*, *supra*; *Lucostic*, *supra*. Finally, although the administrative law judge erred in stating that Frank Sutherland is not a medical doctor, he provided a valid alternative rationale for rejecting this opinion inasmuch as he rationally determined that Dr. Sutherland did not identify the basis for his finding of total disability.[4] Decision and Order at 11; Claimant's Exhibit 2; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(en banc), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161,164 n.5 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Thus, the administrative law judge rationally concluded that claimant did not prove that he is totally disabled under Section 718.204(c)(4) by a preponderance of the evidence. *See Trent*, *supra*. Because the administrative law judge's findings pursuant to Section 718.204(c)(1)-(4) are rational and supported by substantial evidence, they are affirmed.

In light of the administrative law judge's appropriate determination, based upon a review of all of the evidence of record, that claimant did not prove that he is totally disabled pursuant to Section 718.204(c)(1)-(4), an essential element of entitlement, we must affirm the denial of benefits. *See Trent*, *supra*; *Perry*, *supra*; *Gee*, *supra*.

Accordingly, the Decision and Order - Rejection of Claim of the administrative law judge is affirmed.

SO ORDERED.

---

[4]Frank Sutherland is a medical doctor, as he is a Doctor of Osteopathy. Claimant's Exhibit 2. In a letter dated February 6, 1997, Dr. Sutherland indicated that claimant is totally disabled due to, *inter alia*, pneumoconiosis, but did not identify the objective data supporting this conclusion. *Id.*.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge