

BRB No. 08-0856 BLA

G.S.)
)
 Claimant-Petitioner)
)
 v.)
)
 ARCH ON THE NORTH FORK,) DATE ISSUED: 08/06/2009
 INCORPORATED c/o ARCH COAL,)
 INCORPORATED, UNDERWRITERS)
 SAFETY & CLAIMS)
)
 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 Larry W. Price,
Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., 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 (2004-BLA-6192) of
Administrative Law Judge Larry W. Price (the administrative law judge) 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). Adjudicating the
claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the parties
stipulated to twelve years of coal mine employment, but found that the evidence failed to

establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that pneumoconiosis was not established at Section 718.202(a)(1), (4), and that total respiratory disability was not established at Section 718.204(b). Claimant also asserts that the administrative law judge erred in failing to address the CT scan evidence relevant to establishing pneumoconiosis pursuant to 20 C.F.R. §718.107. Employer responds, urging affirmance of the administrative law judge's Decision and Order Denying Benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

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.¹ 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).

Claimant challenges the administrative law judge's finding that total respiratory disability was not established at Section 718.204(b)(2)(i)-(iv). Specifically, claimant contends that the administrative law judge erred in rejecting Dr. Baker's March 1, 2003 and May 5, 2003 qualifying pulmonary function studies as invalid, since they substantially complied with the quality standards. Claimant also contends that the administrative law judge should not have relied on Dr. Jarboe's non-qualifying post-bronchodilator study results of August 27, 2003 to find that the pulmonary function study was non-qualifying, instead of relying on the qualifying pre-bronchodilator results.

In considering the pulmonary function study evidence, the administrative law judge properly accorded diminished weight to the March 1, 2003 and May 5, 2003 qualifying studies conducted by Dr. Baker, based on Dr. Burki's assessment that both

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in coal mining in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

studies exhibited poor effort due, in part, to claimant's recent open heart surgery. Further, the administrative law judge noted that Dr. Baker testified on deposition that he was not able to get "completely valid" studies because claimant's difficulty with breathing "made it difficult for him to yield exactly reproducible values." Decision and Order at 25; Claimant's Exhibit 3. We, therefore, affirm the administrative law judge's finding that Dr. Baker's qualifying pulmonary function studies were invalid. See *Anderson*, 12 BLR at 1-112; *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141 (1984); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Jeffries v. Director, OWCP*, 6 BLR 1-1013 (1984). Additionally, contrary to claimant's contention, the administrative law judge properly found that the results of Dr. Jarboe's August 27, 2003 pre-and post-bronchodilator studies were non-qualifying. 20 C.F.R. §718.204(b)(2)(i). Accordingly, we affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total disability at Section 718.204(b)(2)(i).

Claimant also challenges the administrative law judge's finding that the blood gas study evidence did not establish total disability at Section 718.204(b)(2)(ii). Claimant argues that the administrative law judge erred in relying on the most recent non-qualifying blood gas study when all of the blood gas studies were taken within a six month period. Additionally, claimant also contends that the administrative law judge failed to address the quality standards at 20 C.F.R. §718.105.

In considering the blood gas study evidence, the administrative law judge acknowledged that all five blood gas studies of record were taken within a period of six months. The administrative law judge noted that the studies conducted on March 1, 2003 and May 6, 2003 were qualifying, while the studies conducted on March 26, 2003, July 8, 2003, and August 27, 2003 were non-qualifying. In finding that the blood gas study evidence did not establish total disability at Section 718.204(b)(2)(ii), the administrative law judge permissibly credited the non-qualifying blood gas studies over the qualifying blood gas studies because the comments of Drs. Baker and Jarboe supported a finding that "the two qualifying blood gas studies merely revealed an impairment that was temporary in nature," and that "[t]he five blood gas studies show[ed] that [claimant's] ventilation perfusion did fluctuate significantly in a short period of time." Decision and Order at 26. Specifically, the administrative law judge noted that Dr. Baker opined that claimant could have had a "mild exacerbation" during the blood gas studies conducted by him, thereby explaining the lowered oxygenation reflected in the PO₂ value. Decision and Order at 26; Claimant's Exhibit 3. Additionally, the administrative law judge noted that both Drs. Baker and Jarboe described a possible "fleeting condition that could have exacerbated [claimant's] impairment at the time of the study." Decision and Order at 26; Claimant's Exhibit 3; Director's Exhibit 11. The administrative law judge, therefore, permissibly concluded, that the blood gas study evidence as a whole did not establish total disability pursuant to Section 718.204(b)(2)(ii). See *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Caldwell v. Circle B Coal Co.*, 6 BLR 1-788 (1984). Further,

claimant's general assertion that the administrative law judge did not address the quality standards at Section 718.105 in considering the blood gas study evidence is rejected. Claimant's assertion lacks any specificity. We cannot, therefore, determine how the administrative law judge's consideration of the blood gas studies was in error pursuant to Section 718.105. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

Claimant additionally challenges the administrative law judge's finding that total disability was not established at Section 718.204(b)(2)(iii) on the ground that there is no evidence of *cor pulmonale* in the record. Claimant argues that the administrative law judge erred in finding that the record contained no evidence of *cor pulmonale* because the treatment records contain a diagnosis of *cor pulmonale*. *See* Director's Exhibit 12. Total disability can be established at Section 718.204(b)(2)(iii) based on a diagnosis of *cor pulmonale with right-sided congestive heart failure*. 20 C.F.R. §718.204(b)(2)(iii). While both *cor pulmonale* and *congestive heart failure* are separately noted in claimant's treatment records, the record does not contain a diagnosis of *cor pulmonale with right-sided congestive heart failure*, as required by Section 718.204(b)(2)(iii) to establish total disability. *Newell v. Director, OWCP*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991). Accordingly, we affirm the administrative law judge's finding that total disability was not established at Section 718.204(b)(2)(iii).

Finally, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability at Section 718.204(b)(2)(iv), as all of the doctors found claimant to be totally disabled from his usual coal mine employment due to a respiratory impairment. In considering the medical opinion evidence, however, the administrative law judge properly accorded diminished weight to the opinion of Dr. Baker, that claimant had a totally disabling respiratory impairment, because it was not supported by reliable clinical testing, *i.e.*, the qualifying pulmonary function studies and blood gas studies relied on were found to be invalid. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also properly accorded diminished weight to Dr. Baker's opinion, that claimant's "chronic bronchitis...can make it difficult...to work in the mines...on an eight to ten hour basis" because it was equivocal and did not sufficiently explain the severity of claimant's respiratory impairment. Decision and Order at 27; Claimant's Exhibit 3. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986). Considering the opinion of Dr. Koura that claimant did not have the respiratory capacity to perform the work of a coal miner, the administrative law judge properly accorded it diminished weight because Dr. Koura based his opinion on pulmonary function studies that were ultimately found to be unreliable. *See* 20 C.F.R. §718.104(d)(5); *Clark*, 12 BLR at 1-155.

Instead, the administrative law judge properly accorded greater weight to the opinion of Dr. Jarboe that claimant had the respiratory capacity to perform his coal mine employment, as it was supported by the non-qualifying objective evidence of record and Dr. Jarboe explained how the qualifying objective evidence of record was unreliable.² *See Clark*, 12 BLR at 1-155. Further, the administrative law judge properly concluded that Dr. Jarboe's finding that claimant's disability was not due to a respiratory impairment, but was instead due to coronary artery disease and back and joint problems, was insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability at Section 718.204(b)(2)(iv).

Further, in weighing the evidence as a whole at Section 718.204(b), the administrative law judge properly concluded that it failed to establish total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc* 9 BLR 1-236 (1987). The administrative law judge's finding that total disability was not established at Section 718.204(b) is, therefore, affirmed.³

² Contrary to claimant's contention, Dr. Jarboe's medical reports did not exceed the evidentiary limitations set forth at 20 C.F.R. §410.414(a)(3)(i), (ii). *See Brasher v. Pleasant View Mining, Co.*, 23 BLR 1-141 (2006).

³ Because we affirm the administrative law judge's finding that claimant has failed to establish total respiratory disability, an essential element of entitlement, we need not consider claimant's arguments concerning the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and at 20 C.F.R. §718.107. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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