

BRB No. 07-0350 BLA

F. H.)
)
 Claimant-Petitioner)
)
 v.)
)
 MARTIN COUNTY COAL)
 CORPORATION, c/o UNDERWRITERS)
 SAFETY & CLAIMS)
)
 and)
)
 A.T. MASSEY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)

DATE ISSUED: 12/20/2007

Party-in-Interest

DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Jeffrey Hinkle (Hinkle & Keenan, P.S.C.), Inez , Kentucky, for claimant.

Natalie D. Brown (Jackson Kelly PLLC.), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (05-BLA-5938) of Administrative Law Judge Larry S. Merck rendered on a claim filed on November 13,

2003,¹ 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 parties stipulated and the administrative law judge found twenty-three years of coal mine employment.² The administrative law judge further found that the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), and the existence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence, relevant to the existence of pneumoconiosis, and that he erred in finding that claimant failed to establish total disability due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.³

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 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

¹ Director's Exhibit 2.

² The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

³ The administrative law judge's findings that claimant established twenty-three years of coal mine employment and that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

After reviewing the administrative law judge's Decision and Order, the briefs of the parties, and the evidence of record, we affirm the administrative law judge's denial of benefits as his finding that claimant is not totally disabled by a respiratory or pulmonary impairment is supported by substantial evidence. On the issue of total disability, we reject claimant's argument that he established total disability based on a qualifying post-bronchodilator pulmonary function study dated December 10, 2003. Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered three pulmonary function studies dated December 10, 2003, March 11, 2004 and April 28, 2005. Decision and Order at 13; Director's Exhibit 8; Claimant's Exhibit 3; Employer's Exhibits 2, 3. Contrary to claimant's assertion, because the administrative law judge properly found that the preponderance of the pulmonary function studies produced non-qualifying values, he permissibly determined that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i). Decision and Order at 13. *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Thus, we affirm his finding under that subsection.

Furthermore, we reject claimant's assertion that Dr. Hussain's opinion, that claimant has a severe impairment, "in combination with the notations of Dr. Ehrie," establish that claimant is totally disabled. Claimant's Brief at 9 (unpaginated). Although the administrative law judge acknowledged that Dr. Hussain diagnosed that claimant suffered from a severe impairment, he rationally found that Dr. Hussain's opinion was neither well-reasoned nor well-documented, as Dr. Hussain failed to cite to any objective data to support his opinion, and he failed to explain the basis for his diagnosis of total disability. *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*)(Boggs, J. concurring); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-249 (1989)(*en banc*); *Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987); Decision and Order at 14; Director's Exhibit 8; Claimant's Exhibit 4. In addition, the administrative law judge reasonably found that the treatment records maintained by Dr. Ehrie, from December 3, 1987 to March 5, 1998, were not probative on the issues of pneumoconiosis or total disability, as they lacked the underlying necessary documentation. *Webber*, 23 BLR 1-123; *Clark*, 12 BLR 1-249; *Fields*, 10 BLR 1-19; Decision and Order at 10; Claimant's Exhibit 5.

The administrative law judge also found that the opinion of Dr. Repsher was insufficient to establish that claimant was suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). Decision and Order at 14. This finding is supported by substantial evidence because Dr. Repsher's report does not contain an explicit diagnosis of a totally disabling respiratory or pulmonary impairment, and the administrative law judge found Dr. Repsher's objective testing included non-qualifying studies.⁴ Decision and Order at 14; Employer's Exhibit 3. The administrative

⁴ Dr. Repsher reported: no evidence of coal workers' pneumoconiosis; no evidence of any other pulmonary or respiratory disease or condition, either caused by or

law judge further found that Dr. Jarboe, in a well-reasoned and well-documented opinion, concluded that claimant did not have a respiratory impairment sufficient to keep him from performing his last coal mining job. Decision and Order at 14. Consequently, the administrative law judge concluded that, based on the well-reasoned and well-documented medical reports of Drs. Jarboe and Repsher, along with the non-qualifying pulmonary function studies and non-qualifying arterial blood gas studies, claimant has not established total disability pursuant to Section 718.204(b)(2). Decision and Order at 15.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); see *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Because the administrative law judge examined all of the relevant medical evidence, and acted within his discretion in finding that the evidence of record failed to establish that claimant was totally disabled due to a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), his findings are hereby affirmed. Because we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2), we need not address claimant's arguments that the administrative law judge erred in weighing the evidence at 20 C.F.R. §718.202(a)(1), (4) and 718.204(c), regarding the issues of pneumoconiosis and disability causation. Because claimant failed to establish total disability, a requisite element of entitlement, benefits are precluded in this case. See *Trent*, 11 BLR at 1-27.

aggravated by his employment as a coal miner with exposure to coal mine dust; chronic interstitial lung disease, advanced, but with surprisingly little effect on pulmonary function and arterial blood gas tests; cor pulmonale by x-ray, secondary to chronic interstitial lung disease unrelated to claimant's coal mine employment; mild chronic renal failure, probably due to arteriolar nephrosclerosis; hypertension, unknown cause, with probable hypertensive cardiovascular disease, with diastolic dysfunction. Employer's Exhibit 3. In his deposition, Dr. Repsher testified that what he originally diagnosed as cor pulmonale by x-ray was in fact enlarged pulmonary arteries on x-ray, which may be consistent with cor pulmonale. Employer's Exhibit 10 at 18-19. Dr. Repsher testified that it was "very unlikely" that claimant had cor pulmonale in "the face of normal to super-normal arterial blood oxygen levels" and since he had "no electrocardiographic evidence of cor pulmonale." *Id.*

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge