

BRB Nos. 06-0516 BLA
and 06-0516 BLA-A

WAYNE LEE WILLIAMS)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 ESSENTIAL FUELS, INCORPORATED) DATE ISSUED: 02/27/2007
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Natalie A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (04-BLA-5633) of Administrative Law Judge Pamela Lakes Wood denying benefits on a claim filed on July 22, 2002 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 administrative law judge credited claimant with twenty-three years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found the blood gas study evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(ii). However, the administrative law judge found other evidence of record insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii) and (iv), and subsequently concluded the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) overall. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, however, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Claimant responds to employer's cross-appeal, urging the Board to reject employer's assertion that the administrative law judge erred in weighing the evidence at Section 718.202(a). The Director, Office of Workers' Compensation Programs, has declined to participate 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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe 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. *See* 20 C.F.R. §§718.3, 718.201, 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b). Specifically, claimant argues that "[his] total respiratory disability is based upon the presumptions set forth in

[Section] 718.204(b)(2)(ii).” Claimant’s Brief at 8. Claimant further maintains that “[t]here is nothing in the record that would refute this presumption.” *Id.* Claimant therefore asserts that the administrative law judge erred in finding the evidence, as a whole, insufficient to establish total disability at 20 C.F.R. §718.204(b). Contrary to claimant’s assertion, Section 718.204(b)(2)(ii) does not provide a presumption of total disability. *See* 20 C.F.R. §718.204(b)(2)(ii). Rather, the pertinent regulation provides that, in the absence of contrary probative evidence, the arterial blood gas study evidence offered by a party may establish total disability. *Id.* Further, although an administrative law judge may find that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), based upon his weighing of the arterial blood gas study evidence, he must also weigh together all of the contrary probative evidence of record, like and unlike, in determining whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b) overall, *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987)(*en banc*).

In the instant case, the relevant evidence of record consists of three pulmonary function studies, one arterial blood gas study and two medical opinions. With regard to the pulmonary function study evidence, the September 12, 2002 study produced qualifying¹ pre-bronchodilator results and nonqualifying post-bronchodilator results. Director’s Exhibit 11. The June 8, 2000 study produced nonqualifying pre-bronchodilator results. *Id.* Similarly, the August 5, 2003 study produced nonqualifying pre-bronchodilator and post-bronchodilator results. Director’s Exhibit 12. Regarding the arterial blood gas study evidence, the sole study dated September 12, 2002 produced qualifying values. *Id.* Turning to the medical opinion evidence, Dr. Mullins, in a report dated September 16, 2002, opined that claimant has a mild impairment that could not have prevented him from performing his last coal mine job. Director’s Exhibit 11. Dr. Mullins further stated, “[b]y Appendix C [of] part 718 [claimant] would be 100% disabled in absence of refuting evidence.” *Id.* In a report dated August 12, 2003, Dr. Zaldivar opined that, from a pulmonary standpoint, claimant is fully capable of performing his usual coal mine work or work requiring similar exertion. Director’s Exhibit 12.

The administrative law judge reasonably found the evidence sufficient to establish total disability at Section 718.202(b)(2)(ii), based upon the qualifying values produced on the sole arterial blood gas study of record. *Director, OWCP v. Greenwich Collieries*

¹ A “qualifying” pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A “non-qualifying” study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

[*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). However, the administrative law judge also reasonably found the preponderance of the pulmonary function study evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* Further, the administrative law judge reasonably found the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* Specifically, the administrative law judge reasonably found that Dr. Mullins' mere reference to 20 C.F.R. Part 718, Appendix C – Blood Gas Tables for establishing total disability under Section 718.204(b)(2)(ii) does not constitute an opinion that claimant is totally disabled at Section 718.204(b)(2)(iv). Decision and Order at 14. In addition, the administrative law judge reasonably found that Dr. Zaldivar “clearly and unequivocally found that the [c]laimant was not disabled from a pulmonary standpoint.” *Id.* It is within the administrative law judge's discretion, as the trier-of-fact, to assess the evidence of record and draw her own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Based upon her weighing of all of the contrary probative evidence of record together, like and unlike, the administrative law judge found the evidence insufficient to establish total disability at Section 718.204(b). The administrative law judge specifically stated:

As noted above, although the single arterial blood gas [study] taken in this case at rest was qualifying, the pulmonary function tests and medical opinions do not support a finding of total disability. I find that a single [arterial blood gas study] alone is insufficient to outweigh the medical opinions of two qualified pulmonologists. In particular, Dr. Zaldivar had the benefits of reviewing all the medical evidence of record, including the qualifying [arterial blood gas study], yet he determined that the [c]laimant was not totally disabled from a pulmonary or respiratory standpoint. Even taking into account the requirements of [claimant's] last coal mine work as a shuttle car operator, which required daily heavy lifting, there is insufficient evidence of impairment to support a finding that he can no longer perform that work based upon his pulmonary and respiratory condition, although undoubtedly his back condition would prevent such work.

Decision and Order at 14. Thus, since the administrative law judge reasonably found that the sole arterial blood gas study of record is outweighed by the contrary pulmonary function study evidence and medical opinion evidence of record, we reject claimant's assertion that the administrative law judge erred in finding the evidence, as a whole, insufficient to establish total disability at 20 C.F.R. §718.204(b). *Fields*, 10 BLR at 1-21;

Rafferty, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. Further, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b).

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement under 20 C.F.R. Part 718, *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2, we affirm the administrative law judge's denial of benefits.²

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

JUDITH S. BOGGS
Administrative Appeals Judge

² In light of our disposition of this case on the merits at 20 C.F.R. §718.204(b), we decline to address employer's contentions, on cross-appeal, that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Larioni v. Director, OWCP*, 6 BLR 1-710 (1983).