BRB No. 97-0845 BLA

BURTON J. DILES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Burton J. Diles, Vansant, Virginia, *pro se*.[1]

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order (95-BLA-1618) of Administrative Law Judge Edward Terhune Miller denying benefits 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*. Claimant filed his claim on March 7, 1994. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. Claimant appeals without legal representation, contesting the denial of benefits. Employer responds,

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent 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).

In considering claimant's entitlement, the administrative law judge first correctly found that while the record includes nine readings of three x-rays relevant to 20 C.F.R. §718.202(a)(1), none of the readings is positive for pneumoconiosis. Decision and Order (D&O) at 6-7; Director's Exhibits (DXs) 11, 21; Employer's Exhibits (EXs) 1,2, 6. Because there is no autopsy or biopsy evidence of record, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Moreover, claimant is unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) as he is not eligible for the presumptions described therein. *See* 20 C.F.R. §§718.304, 718.305 and 718.306.

Additionally, the administrative law judge properly found the three medical opinions of record by Drs. Forehand, Dahhan, and Hippensteel insufficient to carry claimant's burden of proof at 20 C.F.R. §718.202(a)(4). D&O at 7; DX 11; EXs 1, 5. As noted by the administrative law judge, neither Drs. Forehand, Dahhan, nor Hippensteel diagnosed that claimant has pneumoconiosis. *Id*. The doctors also specifically attributed claimant's chronic bronchitis, an obstructive respiratory disorder, to smoking and not coal dust exposure in coal mine employment. *Id*. We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis.

Notwithstanding, even assuming that claimant has pneumoconiosis, the administrative law judge also reasonably determined that claimant is not totally disabled by a respiratory impairment. As noted by the administrative law judge, none of claimant's pulmonary function studies is qualifying for total disability pursuant to 20 C.F.R. §718.204(c)(1). [2] D&O at 4.; DX 10; EX 1. Relevant to 20 C.F.R. §718.204(c)(2), the record includes a resting arterial blood gas study performed by Dr. Forehand on March 17,

[2] Pulmonary function studies are considered "qualifying" when they show values equal to or less than those listed in 20 C.F.R. Part 718, Appendix B. 20 C.F.R. §718.204(c)(1). Arterial blood gas studies are considered "qualifying" when they satisfy the values listed in 20 C.F.R. Part 718, Appendix C. 20 C.F.R. §718.204(c)(2).

The record is devoid of any evidence that claimant has cor pulmonale with right sided congestive heart failure, which would establish total disability pursuant to 20 C.F.R. §718.204(c)(3).

1994 which is qualifying for total disability. The administrative law judge, however, permissibly found this single qualifying test to be outweighed by Dr. Forehand's March 17, 1994 non-qualifying exercise arterial blood gas study, as well as Dr. Dahhan's resting and exercise studies performed five months later on August 16, 1994, which are non-qualifying for total disability. *Id*. Consequently, we affirm the administrative law judge's finding under 20 C.F.R. §718.204(c)(2).

With respect to 20 C.F.R. §718.204(c)(4), the administrative law judge properly found that Drs. Dahhan and Hippensteel opined that claimant is not totally disabled from a respiratory standpoint. D&O at 8-9; EX 1, 5. Although Dr. Forehand diagnosed a mild respiratory impairment, and he stated that claimant should avoid heavy exertion, the administrative law judge permissibly determined that none of the jobs listed in claimant's personnel records appears to have required claimant to perform more than moderate exertion.[3] *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-104 (1986) (*en banc*); D&O at 3,9; DXs 5, 11. Thus, the administrative law judge properly found Dr. Forehand's opinion insufficient to carry claimant's burden of proof. Because the administrative law judge's finding that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(c) is supported by substantial evidence, it is affirmed.

Inasmuch as claimant has failed to establish pneumoconiosis and total disability, essential elements of entitlement, claimant is unable to establish his entitlement to benefits. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[3] The administrative law judge noted that the true nature of claimant's last coal mine job was difficult to assess as claimant did not testify, and the record is devoid of evidence to establish which position claimant last held in the mines. Decision and Order at 3. It is claimant's burden to establish the exertional requirements of his usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge