

BRB No. 06-0795 BLA

FRANKIE J. ZEMO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED: 07/16/2007
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

I. John Rossi, West Des Moines, Iowa, for claimant.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers’ Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-113) of Administrative Law Judge Thomas M. Burke on a duplicate 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).¹ The parties stipulated to, and the

¹ Claimant filed his first claim for benefits on July 30, 1981. That claim was denied by the district director on February 17, 1982 because claimant failed to establish that his pneumoconiosis arose out of coal mine employment, that he was totally disabled by it, or that total disability was due to pneumoconiosis. Director’s Exhibit 27. Claimant took no further action until he filed the instant claim on January 15, 1992. This claim was ultimately denied by Administrative Law Judge Donald Mosser on November 20,

administrative law judge found, two and one-half years of coal mine employment and that claimant had clinical coal workers' pneumoconiosis. Hr. Tr. at 8, 10. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4-5. After determining that the instant claim was a duplicate claim, the administrative law judge found, based on the stipulation of the parties, that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d)(2000) because the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a) and 718.203(c). Decision and Order at 2-4; Director's Exhibit 1. Considering all of the evidence of record, the administrative law judge concluded that claimant failed to establish that he had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order at 6-12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find total respiratory disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv).²

1998, because, although claimant established that his pneumoconiosis arose out of coal mine employment and, therefore, claimant established a material change in conditions, he failed to establish total disability. Director's Exhibit 47. The Benefits Review Board affirmed the denial of benefits on December 17, 1999, and again on April 12, 2000, after reconsideration. Director's Exhibits 52, 54. Claimant appealed and on April 14, 2001, the United States Court of Appeals for the Eighth Circuit vacated the denial of benefits and remanded the case to the district director, as claimant had not been provided a complete pulmonary evaluation by the Department of Labor, as required under the Act. *Zemo v. Director, OWCP*, 2 Fed. Appx. 687 (8th Cir. 2001)(unpub.). In response to the Eighth Circuit's directive, claimant was provided an examination and testing by Dr. Bruyntjen, who issued a report dated July 22, 2002. Director's Exhibit 66. The district director found, however, that the July 22, 2002 report was insufficient to satisfy the Department's obligation under the Act to provide a complete, credible pulmonary evaluation. After numerous requests for supplemental opinions from Dr. Bruyntjen and supplemental opinions by Dr. Bruyntjen, the district director determined that they were insufficient to meet the Department's statutory obligation. The district director, therefore, sent claimant's medical records and employment data, including Dr. Bruyntjen's examination report and testing, to Dr. Cecile Rose and requested a consultative report. Director's Exhibit 64. Director's Exhibit 56. Subsequent to the submission of Dr. Rose's opinion, the district director reviewed the claim, including the new evidence, and denied benefits on February 9, 2004. Claimant requested a hearing before an administrative law judge. Director's Exhibit 64.

² The administrative law judge's finding that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii) is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant also asserts that he was not provided with a complete, credible pulmonary evaluation as required by the Act, 30 U.S.C. §923(b), because the administrative law judge found Dr. Bruyntjen's opinion unreasoned. The Director, Office of Workers' Compensation Programs (the Director), responds that substantial evidence supports the administrative law judge's denial of benefits and that claimant was provided with a complete, credible pulmonary evaluation by Dr. Rose.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the arguments on appeal, the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order Denying Benefits is rational, supported by substantial evidence, and in accordance with law. Contrary to claimant's argument, the administrative law judge fully considered the new medical opinions of Dr. Bruyntjens. The administrative law judge rationally found that the opinions, that claimant was totally disabled due to pneumoconiosis, were unreasoned and undocumented since the physician did not offer any explanation or basis for his conclusion, as he did not include any laboratory studies that supported his opinion or explain how he arrived at his conclusions, in light of the non-qualifying pulmonary function and blood gas studies underlying his opinion.³ *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*).

³ 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), (ii).

Considering to the opinion of Dr. Rose, who reviewed the testing and reports of Dr. Bruyntjens at the request of the district director, the administrative law judge noted that although Dr. Rose found that claimant had significant exertional limitations, she nonetheless opined that a number of non-respiratory conditions may have contributed to the claimant's disability.⁴ Based on Dr. Rose's review of the medical evidence, the administrative law judge properly concluded that her opinion was reasoned and documented. The administrative law judge, therefore, rationally concluded that the medical opinion evidence did not establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv); *see Phillips v. Director, OWCP*, 768 F.2d 982, 10 BLR 2-160 (8th Cir. 1985); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989).

Further, contrary to claimant's contention, the administrative law judge did consider claimant's hearing testimony. Lay testimony, without credible, corroborating medical evidence, however, is insufficient to establish a totally disabling respiratory or pulmonary impairment in a living miner's case and cannot, therefore, satisfy claimant's burden of proof on this issue. *See* 20 C.F.R. §718.204(d)(5); *Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999). The administrative law judge's finding that the evidence failed to establish a total respiratory disability is, therefore, affirmed.

Additionally, contrary to claimant's argument, we agree with the Director that Dr. Rose's pulmonary evaluation of claimant satisfies the Department of Labor's statutory obligation to provide claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim.⁵ Thus, as the Director provided

⁴ The administrative law judge noted that Dr. Rose's January 30, 2004 consultative report was based on claimant's symptoms, his history of hypertension and peripheral vascular disease, and all of his pulmonary function and blood gas studies, which were non-qualifying. The administrative law judge further noted that Dr. Rose was the Director of the Department of Occupational Medicine at the National Jewish Medical and Research Center and that she was an Associate Professor of Medicine and Preventive Medicine and Biometrics in the Division of Pulmonary Medicine at the University of Colorado School of Medicine. Decision and Order at 10; Director's Exhibit 64.

⁵ Contrary to claimant's assertion, the Director is not required to develop evidence supportive of claimant's entitlement. *See Belcher v. Beth-Elkhorn Corp.*, 6 BLR 1-1180 (1984); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Rather, the Department of Labor is required only to provide claimant with a complete, credible pulmonary evaluation. *See Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). The burden rests with claimant to establish his entitlement to benefits by a

claimant with a complete, credible pulmonary evaluation, we reject claimant's argument that the case be remanded. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*).

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

preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).