BRB No. 08-0710 BLA

L.D. Claimant-Petitioner v. TOP GUN COAL COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2009 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Administrative Law Judge Paul C. Johnson, Jr., United States Department of Labor.

L.D., English, Virginia, *pro se*.

John R. Sigmond (Penn, Stuart, & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2007-BLA-05996) of Administrative Law Judge Paul C. Johnson, Jr.,

on a subsequent[1] miner's claim filed on August 17, 2006, 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). Director's Exhibit 3. After crediting claimant with 28.85 years of coal mine employment, as stipulated by the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to a pulmonary or respiratory impairment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), 718.204(b)(2), but failed to meet his burden regarding whether his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

In claimant's Notice of Appeal, a counselor from Stone Mountain Health Services asserted on his behalf that the x-ray evidence and Dr. Patel's opinion were sufficient to satisfy claimant's burden of proof, particularly in light of Dr. Patel's credentials and his status as a treating physician.[2] Employer responds, urging the Board to affirm the denial of benefits because the administrative law judge properly weighed the medical evidence and rationally determined that claimant failed to meet his burden of proving that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[3] The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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[1] Claimant filed an initial application for benefits on March 23, 2000, resulting in a denial of benefits on the ground that claimant did not establish any of the elements of entitlement. Claimant then filed four requests for modification and the district director denied each request, with the final denial occurring in June of 2004.

[2] The Board initially instructed claimant to file a Petition for Review and Brief in support of his appeal. Board's Letter dated July 28, 2008. The Board subsequently issued an Order clarifying that Stone Mountain Health Services would not be representing claimant in the appeal and he would be treated as a *pro se* claimant. [*L.D.*] *v. Top Gun Coal Co., Inc.*, BRB No. 08-0710 BLA (Sept. 5, 2008) (unpub. Order).

[3] We affirm the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b) and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), as they are not adverse to claimant and are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[4] 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 order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a 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. 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*).

The record in this case contains the medical opinions of Drs. Roatsey, Patel, Forehand, Rosenberg, and Castle. Dr. Roatsey examined claimant on February 27, 2006 and August 13, 2007. Claimant's Exhibits 6, 7. During the first visit, Dr. Roatsey compared chest x-rays and noted that there was an increase in "bilateral calcified granulomas." Claimant's Exhibit 7. Dr. Roatsey also reviewed pulmonary function tests, which showed "severe obstructive pulmonary disease." *Id*. However, the referenced x-rays and tests are not in the record. Based on this information, Dr. Roatsey diagnosed claimant with coal workers' pneumoconiosis and severe chronic obstructive pulmonary disease (COPD). *Id*. In the report from claimant's second visit, Dr. Roatsey referenced a "new chest x-ray [that] shows perfusion 1/1 and shape/size is P/Q" and a pulmonary function study that "shows very severe obstruction with FEV-1 percent of 44." Claimant's Exhibit 6. These tests also are not in the record. Based on his evaluation, Dr. Roatsey again diagnosed claimant with coal workers' pneumoconiosis and COPD. In addition, Dr. Roatsey stated that claimant "should continue to receive his coal workers' pneumoconiosis benefits as he is considered disabled because of his breathing." *Id.*

Dr. Patel, one of claimant's treating physicians, indicated that an x-ray taken on October 18, 2006, in conjunction with a black lung evaluation, showed some abnormality. Claimant's Exhibit 8. This x-ray is not in the record. Dr. Patel diagnosed progressive dyspnea secondary to coal workers' pneumoconiosis. *Id*.

[4] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Dr. Forehand examined claimant at the request of the Department of Labor, diagnosed him as having coal workers' pneumoconiosis and cigarette smoker's lung disease, and concluded that claimant is totally and permanently disabled based on his ventilatory capacity. Director's Exhibit 14. As to the etiology of claimant's impairment, Dr. Forehand stated that "[c]laimant's 38 years in underground coal mining has had a greater impact on his lungs than his 18 years of smoking cigarettes. The two effects are additive and both contribute to respiratory impairment." *Id*.

Dr. Rosenberg examined claimant and reviewed additional medical data, including: x-ray interpretations dating back to 1988, evaluations of claimant by other doctors, pulmonary function test results, and hospital and treatment records for claimant. Employer's Exhibit 1. Based on the results of the lung biopsy performed by Dr. Naeye, Dr. Rosenberg ultimately concluded that claimant has "at worst…a minimal degree of [coal workers' pneumoconiosis]." *Id*. As to disability, Dr. Rosenberg concluded that claimant is disabled due to severe airflow obstruction caused by his history of smoking "coupled with chronic hyperactive airways disease and airway remodeling." *Id*. This finding was based on claimant's pulmonary function study results, which Dr. Rosenberg noted were consistent with studies summarized by the National Institute for Occupational Safety and Health, indicating that "while the FEV1 decreases in relationship to coal mine dust exposure, the [FEV1/FVC ratio] generally is preserved. In contrast, this parameter is decreased in smoking-related forms of airways disease…." *Id*. As a result, Dr. Rosenberg opined that "[claimant's] disabling respiratory impairment does not relate in whole or part to past coal mine dust exposure." *Id*.

Dr. Castle examined claimant and found that there was "[n]o evidence of coal workers' pneumoconiosis by physical examination, radiographic evaluation, or physiologic testing," but that claimant has a "[m]oderate airway obstruction without restriction with a reduction in the diffusing capacity due to tobacco smoke induced chronic bronchitis." Director's Exhibit 19. Dr. Castle then reviewed additional medical data related to claimant, including medical reports from other physicians, treatment records, and a pathology report regarding a lung biopsy of claimant's right lower and upper lobes, and concluded that claimant does not suffer from coal workers' pneumoconiosis. Dr. Castle explained that although claimant worked in "the underground mining industry for a sufficient enough time to have developed coal workers' pneumoconiosis," the results of his most recent pulmonary function studies have indicated "at least moderate or moderately severe airway obstruction associated with gas trapping and a reduction in the diffusing capacity," which is consistent with airway obstruction due to tobacco smoke, not coal mining. *Id*.; *see also* Employer's Exhibit 4 at 20-22. Dr. Castle also found that claimant is permanently and totally disabled due to tobacco smoke induced chronic obstructive airway disease, not due to coal workers' pneumoconiosis or any other coal mine dust induced lung disease.

In considering disability causation under 20 C.F.R. §718.204(c), the administrative law judge addressed only the opinions of Drs. Forehand, Rosenberg and Castle and concluded "Drs. Rosenberg and Castle have the better of the argument." Decision and Order at 24. The administrative law judge found that Dr. Forehand's diagnosis of total disability due to pneumoconiosis was not well-reasoned because it was based on a positive chest x-ray that the administrative law judge determined was negative and an inaccurate number of years of coal mine employment. *Id*. In addition, the administrative law judge noted that the results from the pulmonary function test Dr. Forehand performed were consistent with those obtained by Dr. Rosenberg in that "both the FEV1 value and the FEV1/FVC ratio were decreased below expected results"; however, the administrative law judge found that Dr. Forehand failed to "render an explanation for his conclusion that the pulmonary function test showed that [c]laimant's obstructive impairment was from exposure to coal dust rather than smoking." *Id*. In contrast, the administrative law judge found that Dr. Rosenberg provided "a reasoned and reasonable explanation for his finding" that the pulmonary function study results supported his conclusion. *Id*.

Similarly, the administrative law judge found that Dr. Castle's opinion was "well-documented and well-reasoned with respect to the causation of [c]laimant's total disability" because Dr. Castle explained that a diagnosis of disability due to coal dust was not supported by the x-ray evidence or the results of the pulmonary function or blood gas studies. Decision and Order at 24. Consequently, the administrative law judge concluded that claimant failed to meet his burden to prove that his pulmonary or respiratory disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) because the weight of the medical opinion evidence was not in claimant's favor. *Id*. at 24-25.

We affirm the administrative law judge's finding that claimant failed to prove, by a preponderance of the evidence, that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), as it is rational and supported by substantial evidence. As a threshold matter, we hold that the fact that the administrative law judge did not consider the opinions of Drs. Roatsey and Patel under 20 C.F.R. §718.204(c) does not constitute error. The administrative law judge acted within his discretion in determining, under 20 C.F.R. §718.204(b)(2), that Dr. Roatsey's opinion was not well-reasoned on the issue of total disability because "[t]he documentation and data on which he based his opinion are not in the record, and I have no basis to find that they are adequate to support his conclusions." Decision and Order at 15; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Based upon his appropriate finding that Dr. Roatsey's opinion was not well-reasoned because the underlying documentation is not in the record, the administrative law judge was not required to weigh Dr. Roatsey's opinion under 20 C.F.R. §718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). With respect to Dr. Patel's opinion, in light

of the fact that Dr. Patel did not diagnose an impairment, his opinion was not relevant to 20 C.F.R. §718.204(c). Claimant's Exhibit 8; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Concerning Dr. Forehand's opinion, the administrative law judge rationally found that the diagnosis in his October 8, 2006 report was not well-reasoned because he relied upon a coal mine employment period of 38 years while the administrative law judge determined that claimant's employment period was 28.85 years. *See Addison v. Director, 0WCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); Decision and Order at 21. In addition, the administrative law judge permissibly determined that Dr. Forehand's opinion is not well-reasoned, as he did not explain his finding that the pulmonary function test demonstrated that claimant's respiratory impairment was due to coal dust exposure rather than smoking. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983); Decision and Order at 21, 24.

Because the administrative law judge acted within his discretion in finding that the opinions of Drs. Roatsey and Forehand, the only evidence supportive of claimant's burden under 20 C.F.R. §718.204(c), were not well-reasoned, we affirm the administrative law judge's finding that claimant failed to prove, by a preponderance of the evidence, that his total disability is due to pneumoconiosis. In addition, since we have affirmed the administrative law judge's finding that claimant did not establish that his respiratory or pulmonary impairment is due to pneumoconiosis at 20 C.F.R. §718.204(c), an essential element of entitlement, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Because we have affirmed the denial of benefits on these grounds, we need not address claimant's assertions regarding the administrative law judge's consideration of the x-ray evidence at 20 C.F.R. §718.202(a)(1).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge