

BRB No. 06-0898 BLA

RODNEY D. MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 06/15/2007
	)	
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 – Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Rodney D. Miller, White Plains, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (04-BLA-5486) of Administrative Law Judge Alan L. Bergstrom rendered 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.* (the Act). Claimant filed his claim for benefits on March 4, 2002. Director’s Exhibit 2. On September 13, 2003, the district director issued a Proposed Decision and Order denying benefits. Director’s Exhibit 21. At claimant’s request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing; however, by letter dated July 3, 2006, claimant requested that a decision be made on the record. Claimant’s Exhibit 1. In his Decision and Order issued on July 31, 2006, the administrative law judge determined that

claimant's application for benefits was timely filed, that he worked thirty one years in coal mine employment, and that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). However, the administrative law judge also found that the evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally alleges that the administrative law judge erred in denying his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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 in accordance with law.<sup>1</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence. We specifically affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

In order to establish entitlement to benefits in a living miner's claim filed under the regulations at 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

In evaluating the evidence relevant to whether claimant has a totally disabling respiratory or pulmonary impairment, the administrative law judge properly found that there is no qualifying pulmonary function or arterial blood gas study evidence in the record; therefore, claimant is unable to establish total disability pursuant to 20 C.F.R.

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment occurred in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

§718.204(b)(2)(i) or (ii).<sup>2</sup> Decision and Order at 7-8; 15; Director’s Exhibits 13; Employer’s Exhibits 2, 3. Similarly, because there is no evidence of record to establish that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 15.

Furthermore, the administrative law judge properly found that claimant failed to establish a totally disabling respiratory or pulmonary impairment based on his review of the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv). The record reflects that claimant was examined by Dr. Simpao on June 18, 2002 at the request of the Department of Labor. Director’s Exhibit 13. Dr. Simpao opined that claimant suffered from a moderate respiratory impairment and check-marked a box indicating that claimant was not capable of performing the work of a coal miner. *Id.* Dr. O’Bryan also examined claimant on November 11, 2003, and diagnosed that claimant had no respiratory or pulmonary impairment. Employer’s Exhibit 2. Dr. Repsher performed a consultative review of the record and prepared his report on November 16, 2004. Employer’s Exhibit 3. Dr. Repsher opined that claimant had no respiratory impairment. *Id.*

In weighing the conflicting medical opinion evidence, the administrative law judge permissibly assigned determinative weight to Dr. O’Bryan’s opinion, that claimant was not totally disabled by a respiratory or pulmonary impairment, because the administrative law found that Dr. O’Bryan’s opinion was better supported by the objective evidence, including the non-qualifying pulmonary function studies and arterial blood gas studies.<sup>3</sup> *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 14, 15-16. The administrative law judge also properly considered the relative qualifications of the physicians, *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), and permissibly found Dr. O’Bryan’s opinion to be more credible than claimant’s expert on the issue of total disability, since Dr. O’Bryan was Board-certified in internal medicine, pulmonary disease, and critical care, while Dr. Simpao’s credentials were not included in

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<sup>2</sup> A “qualifying” objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A “non-qualifying” study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>3</sup> The administrative law judge assigned little probative weight to Dr. Repsher’s opinion, that claimant had no respiratory impairment, because the administrative law judge found that Dr. Repsher failed to adequately explain why he invalidated two pulmonary function studies. Decision and Order at 15; Employer’s Exhibit 3.

the record.<sup>4</sup> Decision and Order at 14-15. Therefore, because the administrative law judge was persuaded by Dr. O'Bryan's opinion, that claimant was not totally disabled by a respiratory or pulmonary impairment, the administrative law judge properly determined that claimant failed to carry his burden of proof to establish total disability by a preponderance of the credible medical opinion evidence under Section 718.204(b)(2)(iv).

The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, when rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that claimant failed to establish total disability based on the medical opinion evidence at Section 718.204(b)(2)(iv). We, therefore, affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(2).<sup>5</sup> Since claimant failed to establish total disability, a requisite element of entitlement, benefits are precluded. *See Trent*, 11 BLR at 1-27 (1987); *Perry*, 9 BLR at 1-2.

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<sup>4</sup> The administrative law judge noted that Dr. Simpao was associated with the Coal Miner's Respiratory Clinic in Greenville, Kentucky. Decision and Order at 9; Director's Exhibit 13.

<sup>5</sup> Employer contends that the administrative law judge erred in his consideration of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer's Response Brief at 9-13. Employer, however, also asserts that the administrative law judge's error in finding that claimant established the existence of pneumoconiosis is harmless if the Board affirms the denial of benefits based on his finding that claimant is not totally disabled. Employer's Response Brief at 13. Because we affirm the administrative law judge's determination that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we decline to address the propriety of the administrative law judge's finding as to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge 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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BETTY JEAN HALL  
Administrative Appeals Judge