BRB No. 99-0641 BLA

RUSH GENT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEATRICE POCAHONTAS COMPANY	)	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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Rush Gent, Honaker, Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-0435) of Administrative Law Judge Mollie W. Neal 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*. (the Act).[1] The

[1]Claimant filed his initial claim on January 14, 1983. Director's Exhibit 33. However, on July 11, 1988, Administrative Law Judge Benjamin L. O'Brien issued an order, granting claimant's request to withdraw his 1983 claim. *Id*. Claimant filed his most recent claim on May 14, 1997. Director's Exhibit 1. In her decision, Administrative Law Judge Mollie W. Neal (the administrative law judge) correctly

administrative law judge credited claimant with at least twenty-seven years of coal mine employment 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)(1) and 718.203(b). However, the administrative law judge found the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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. 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).

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stated that "[b]ecause Claimant withdrew his prior claim, Section 725.309 does not apply in this case." Decision and Order at 3.

[2]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, we will address the administrative law judge's findings with respect to 20 C.F.R. §718.304. In finding the evidence insufficient to establish complicated pneumoconiosis, and thus, insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge considered and weighed all of the relevant medical evidence of record. With regard to 20 C.F.R. §718.304(a), the record consists of fifty-three interpretations of twenty-one x-rays.[3] However, as the administrative law judge correctly stated, "[o]nly four of those interpretations reported evidence of complicated pneumoconiosis."[4] Decision and Order at 10. The record contains no

[3]The administrative law judge did not consider the November 8, 1976 x-ray interpretation of Drs. Domm and Rogers, the November 19, 1987 and November 22, 1987 x-ray interpretations of Dr. Patel, and the November 18, 1987 and November 20, 1987 x-ray interpretations of Dr. Shah. Director's Exhibit 33. Nonetheless, inasmuch as none of the physicians found complicated pneumoconiosis, we hold that any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]The administrative law judge stated that whereas "Drs. Forehand and Alexander interpreted an August 1, 1997 [x-ray] as evidencing a large opacity, category A...[,] Drs. Cole, Lipeman, Spitz, Wiot, Shipley, Wheeler and Scott interpreted the x-ray as without evidence of complicated pneumoconiosis." Decision and Order at 10. Further, the administrative law judge stated that whereas "Drs. Forehand...[and] Alexander similarly interpreted...September 4, 1997 and [M]arch 11, 1998 x-rays, as evidencing a large opacity, category A...[,] Drs. Spitz, Wiot,

biopsy evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

With regard to 20 C.F.R. §718.304(c), the record contains the relevant medical opinions of Drs. Dahhan, Fino, Forehand, Hippensteel, Sargent, Wiot and Zaldivar. While Drs. Dahhan, Fino, Hippensteel and Wiot opined that claimant does not suffer from complicated coal workers' pneumoconiosis, Employer's Exhibits 1, 6, 13, 14, 15, Dr. Forehand opined that the "appearance of [the] chest x-ray suggests significant lung injury - [l]arge opacities evolving," Director's Exhibit 10, and Dr. Sargent stated, "I really am not sure that his pulmonary nodule is any bigger than it was in September of 1985," Claimant's Exhibit 3. In a report dated April 28, 1998, Dr. Zaldivar concluded that "[t]here is some question as to whether a granuloma or complicated pneumoconiosis is present." Employer's Exhibit 10. Further, in a subsequent report, Dr. Zaldivar concluded that "the situation is not quite clear as to whether or not there is or is not complicated pneumoconiosis." *Id*. The administrative law judge properly discredited the opinion of Dr. Sargent because he found that "Dr. Sargent's opinion is not probative of complicated pneumoconiosis as Dr. Sargent does not identify the x-rays reviewed nor specify the size of the nodule(s) observed or his interpretation." Decision and Order at 11; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Inasmuch as the administrative law judge, based on his weighing of all of the relevant evidence of record, rationally found that the findings of Drs. Dahhan, Fino, Hippensteel, Scott, Shipley, Spitz, Wheeler, Wiot and Zaldivar outweigh the findings of Drs. Alexander and Forehand, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Shipley, Wheeler and Scott interpreted the x-ray as without evidence of complicated pneumoconiosis." *Id*.

Next, we address the administrative law judge's findings with respect to 20 C.F.R. §718.204(c). Inasmuch as the administrative law judge properly found that none of the pulmonary function studies or arterial blood gas studies[5] of record yielded qualifying[6] values, we affirm the administrative law judge's finding that the

[5]Although the August 1, 1997 arterial blood gas study administered by Dr. Forehand yielded qualifying values before exercise, the same study yielded non-qualifying values after exercise. Director's Exhibit 11. Inasmuch as the administrative law judge found that "none of [the arterial blood gas studies]...produced observed PO2 values low enough to qualify to show disability," Decision and Order at 13, the administrative law judge implicitly accorded greater weight to the values after exercise than to the values before exercise, and thus, he found that the August 1, 1997 study did not yield qualifying values. *See Coen v. Director , OWCP*, 7 BLR 1-30 (1984); *see also Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984). In finding that the objective evidence did not support Dr. Forehand's opinion that claimant suffers from a disabling respiratory impairment, the administrative law judge observed "the improvement with exercise on arterial blood gas testing." Decision and Order at 17.

[6]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(c)(1), (c)(2).

evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2). Director's Exhibits 9, 11, 33; Employer's Exhibit 1. Further, inasmuch as the administrative law judge properly found that "there is no evidence that Claimant suffers from *cor pulmonale* with right-sided congestive heart failure," Decision and Order at 13, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3).

Finally, the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Whereas Drs. Forehand and Walker opined that claimant suffers from a disabling respiratory impairment, Director's Exhibit 10; Claimant's Exhibit 1, Drs. Abernathy, Dahhan, Fino, Hippensteel, Renn[7] and Zaldivar opined that claimant is not disabled from a respiratory impairment, Director's Exhibits 33; Employer's Exhibits 1, 6, 10, 11, 13, 15. The administrative law judge stated that "Dr. Kanwal assessed Claimant as able to go fast and upgrade 1/4 mile and to lift and carry 30-50 lbs." Decision and Order at 16; Director's Exhibit 33. The administrative law judge rationally found that Dr. Kanwal's opinion is insufficient to establish total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon. en banc*, 9 BLR 1-104 (1986). The administrative law judge stated that "[w]hile Claimant has described some of his work as 'very strenuous and back breaking lifting', he failed to quantify it in such a way that I can make a determination of disability in light of Dr. Kanwal's determination that the Claimant can lift and carry 50 lbs."[8] Decision and Order at 16. In addition, the administrative law judge properly accorded greater weight to the opinions of Drs. Abernathy, Dahhan, Fino and Zaldivar than to the contrary opinions of Drs. Forehand and Walker because he found them to be better documented and reasoned.[9] *See Clark,* supra; *Fields, supra*; *Lucostic, supra*; *Fuller, supra*. Thus, we

[7]The administrative law judge stated that Dr. Renn's "opinion is not accorded significant weight on...[the issue of total disability] as he was mistaken as to Claimant's most recent coal mine work." Decision and Order at 17.

[8]The administrative law judge stated that "Claimant described the demands of his most recent coal mine employment as a Longwall Jack Setter as requiring him to reset jacks, crawl and hump-walk between the jacks." Decision and Order at 16. The administrative law judge also stated that claimant "indicated that every six months or more they would have to move the section to another place which involved 'very strenuous and back breaking lifting, etc.'" *Id*.

[9]With respect to the opinions of Drs. Abernathy, Dahhan, Fino and Zaldivar, the administrative law judge stated, "I accord these opinions controlling weight as each physician has provided a documented, well-reasoned and detailed basis for his

hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

Since claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and failed to establish total disability at 20 C.F.R. §718.204(c), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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conclusion that the Claimant is not totally disabled due to pneumoconiosis." Decision and Order at 16. In contrast, the administrative law judge stated that "Dr. Forehand did not adequately explain the rationale for his opinion." *Id*. The administrative law judge observed that "[g]iven the normal ventilatory pattern reported on pulmonary function testing, and the improvement with exercise on arterial blood gas testing, it would appear Dr. Forehand's opinion is based upon his chest x-ray interpretation." *Id*. at 16-17. Further, the administrative law judge stated that "Dr. Walker's opinion of disability similarly appears to be based solely upon an abnormal chest x-ray, as he offers no other basis for his conclusion that the Claimant is disabled." *Id*. at 17.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge