

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 15-0299 BLA

HERBERT GAMBLE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MILLER BROTHERS COAL,)	
INCORPORATED)	
)	
and)	
)	DATE ISSUED: 03/28/2016
NATIONAL UNION FIRE/CHARTIS)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

John C. Collins (Law Office of John C. Collins), Salyersville, Kentucky, for claimant.

Tighe Estes (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2011-BLA-5894) of Administrative Law Judge Alice M. Craft denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on June 14, 2010.

After crediting claimant with twenty-nine years of coal mine employment,¹ the administrative law judge found that the evidence did not establish that the claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that he is totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).² The administrative law judge also found that claimant was not entitled to benefits under 20 C.F.R. Part 718. The administrative law judge, therefore, denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that

¹ Claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

his disability is due to pneumoconiosis. *See* 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, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).³ The administrative law judge considered the medical opinions of Drs. Ammisetty, Broudy, and Westerfield. Dr. Ammisetty opined that claimant's July 14, 2010 resting arterial blood gas study results were "suggestive of significantly compromised . . . pulmonary status," and opined that the miner is "completely disabled to work in the coalmines that need high physical demand." *Id.* Conversely, Drs. Broudy and Westerfield opined that there was no evidence of any respiratory impairment. Director's Exhibit 12; Employer's Exhibits 3-5.

In considering whether Dr. Ammisetty's opinion supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge observed that Drs. Broudy and Westerfield each opined that the July 14, 2010 blood gas study results, upon which Dr. Ammisetty based his assessment of claimant's pulmonary status, were normal. Decision and Order at 15. The administrative law judge, therefore, discredited Dr. Ammisetty's opinion. *Id.* The administrative law judge further found that the opinions of Drs. Broudy and Westerfield, that claimant is not totally disabled from a respiratory standpoint, were consistent with the objective medical evidence. *Id.* at 15-16. The administrative law judge, therefore, found that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant argues that the administrative law judge erred in finding that Dr. Ammisetty's opinion did not establish total disability pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge accorded less weight to Dr. Ammisetty's opinion because Drs. Broudy and Westerfield each opined that the July 14, 2010 blood gas study results, on which Dr. Ammisetty relied, in part, to support his assessment of a disabling pulmonary impairment, were normal.⁴ Claimant does not challenge this basis

³ Because claimant does not challenge the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ Dr. Broudy opined that the results of the July 14, 2010 blood gas study revealed only "slight hypoxemia" at rest with a normal response to exercise. Employer's Exhibit 4 at 13. Dr. Broudy, therefore, opined that the blood gas study results did not reveal any

for discrediting Dr. Ammisetty's opinion. Consequently this finding is affirmed.⁵ *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁶

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.⁷ *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

impairment. *Id.* at 15. Dr. Westerfield, like Dr. Broudy, opined that the results of the July 14, 2010 blood gas study did not demonstrate any type of impairment. Employer's Exhibit 5 at 16-17.

⁵ Claimant argues that the administrative law judge should have accorded greater weight to Dr. Ammisetty's opinion based upon his status as claimant's treating physician. An administrative law judge is not required to accord greater weight to the opinion of a treating physician, based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, the opinions of treating physicians get the deference they deserve based on their power to persuade. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002). The administrative law judge accorded less weight to Dr. Ammisetty's opinion because his assessment of claimant's blood gas study results was called into question by Drs. Broudy and Westerfield. Decision and Order at 15. Consequently, we reject claimant's contention that the administrative law judge was required to accord Dr. Ammisetty's opinions greater weight, based upon his status as claimant's treating physician.

⁶ Because Dr. Ammisetty's opinion is the only opinion supportive of a finding of a totally disabling respiratory or pulmonary impairment, we need not address claimant's contentions of error regarding the administrative law judge's consideration of the opinions of Drs. Broudy and Westerfield, as any error would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁷ Because claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge