BRB No. 12-0451 BLA

VIRGIL P. SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ASSOCIATED CONTRACTING, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 05/23/2013
	)	
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 Denying Request for Modification of an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Request for Modification of an Initial Claim (2009-BLA-05721) of Administrative Law Judge Larry S. Merck (the administrative law judge). The claim at issue in this case was filed on September 11,

2007 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The relevant procedural history of the case is set forth herein: The district director issued a Proposed Decision and Order denying benefits on May 1, 2008, because claimant failed to establish any element of entitlement. On January 20, 2009, claimant filed a request for modification. On May 7, 2009, the district director, considering both the old evidence and the newly submitted evidence, denied claimant's modification request because the existence of pneumoconiosis, an essential element of entitlement, was not established. Claimant requested a hearing, and the claim was referred to the Office of Administrative Law Judges on July 8, 2009. Pursuant to the hearing held on May 26, 2011, the administrative law judge issued a Decision and Order on May 7, 2012. The administrative law judge found that claimant established 38.77 years of coal mine employment. Considering all of the evidence of record, the administrative law judge further found that, although claimant failed to establish the existence of legal pneumoconiosis, he established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). However, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b). In addition, the administrative law judge found that because claimant failed to establish total disability, he was not entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).[1] Accordingly, the administrative law judge denied benefits.[2]

On appeal, claimant argues that the administrative law judge erred in finding that the blood gas study evidence and the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iv), respectively, and that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b) overall. In addition, claimant contends that the administrative law judge erred in failing to give the opinion of Dr. Ammisetty, claimant's treating physician, controlling weight on the issue of total disability. In response, employer urges affirmance of the administrative law

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[1] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[2] The administrative law judge did not make a specific finding on modification pursuant to 20 C.F.R. §725.310.

judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in response to this appeal.[3]

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.[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 pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled 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).

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 is rational, supported by substantial evidence, and in accordance with law. In finding that total disability was not established, the administrative law judge first properly found that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), as none of the six pulmonary function studies, which were conducted between 2007 and 2011, was qualifying. The administrative law judge also properly found that the irrebuttable presumption of totally disabling pneumoconiosis was not established pursuant to 20 C.F.R. §718.304.

At 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that the blood gas study evidence did not establish total disability because the studies were inconclusive. Specifically, the administrative law judge concluded:

> In sum, one [blood gas study] was qualifying both at rest and exercise; two [blood gas studies] were non-qualifying both at rest and exercise; one [blood gas study] was non-qualifying at rest and no exercise results were

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[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

> recorded; and two [blood gas studies] were qualifying at rest but not at exercise. Based on this record,[5] I find that the [blood gas study] evidence neither proves nor disproves total disability, and is therefore inconclusive on the issue. Accordingly, [c]laimant has not proven total disability by a preponderance of the [blood gas study] evidence under [20 C.F.R.] §718.204(b)(2)(ii).

Decision and Order at 29.

Claimant contends, however, that the administrative law judge erred in finding that the blood gas study evidence did not establish total disability, as three of the four blood gas studies conducted between 2009 and 2011 resulted in qualifying at rest values. Claimant contends that because pneumoconiosis is a progressive disease, the blood gas studies conducted between 2009 and 2011 should be accorded more weight than the non-qualifying 2007 and 2008 studies.

Contrary to claimant's argument, however, we find no error in the administrative law judge's treatment of the blood gas study evidence. The administrative law judge was not required to find that the qualifying "at rest" blood gas studies established total disability. Rather, the administrative law judge rationally found that, because the studies contained mixed qualifying and non-qualifying values,[6] the evidence was inconclusive and did not, therefore, establish total disability pursuant to Section 718.204(b)(2)(ii). *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *see also Director, OWCP v. Greenwich Collieries*

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[5] In evaluating the blood gas study evidence pursuant to Section 718.204(b)(2)(ii), the administrative law judge noted the following: Dr. Ammisetty's November 5, 2007 blood gas study resulted in non-qualifying values both at rest and after exercise, Director's Exhibit 12; Dr. Jarboe's March 13, 2008 blood gas study resulted in non-qualifying at rest values and no after exercise values were reported, Director's Exhibit 41; Dr. Forehand's April 14, 2009 blood gas study resulted in qualifying values both at rest and after exercise, Director's Exhibit 20; Dr. Ammisetty's February 17, 2011 blood gas study resulted in qualifying values at rest and non-qualifying values after exercise, Claimant's Exhibit 1; Dr. Broudy's April 6, 2011 blood gas study resulted in non-qualifying values both at rest and after exercise, Employer's Exhibit 5; and Dr. Zaldivar's June 28, 2011 blood gas study resulted in qualifying values at rest and non-qualifying values after exercise, Employer's Exhibit 6.

[6] The administrative law judge noted that at least two of the blood gas studies, to which claimant refers, resulted in qualifying at rest values but also resulted in non-qualifying after exercise values. Claimant's Exhibit 1; Employer's Exhibit 6.

[*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Turning to the medical opinion evidence, the administrative law judge found that it failed to establish total disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge noted that Drs. Ammisetty and Forehand opined that claimant is totally disabled, while Drs. Jarboe, Broudy, and Zaldivar opined that he is not.[7] The administrative law judge found:

> Overall, of the five physicians who gave an opinion on total disability, two found that [c]laimant is totally disabled and three found that he is not. As all the opinions are based on an accurate understanding of [c]laimant's last position in the mines, and the physicians' own objective testing, I have found them all well-reasoned and well-documented. Accordingly, I find that the medical opinion evidence is inconclusive; [c]laimant has failed to satisfy his burden of demonstrating total disability under §718.204(b)(2)(iv).

Decision and Order at 32.

Contrary to claimant's argument, the administrative law judge adequately considered each medical opinion. As the administrative law judge found that equally well-reasoned and well-documented opinions were in conflict as to the presence of total disability, he permissibly found that the medical opinion evidence on the issue is inconclusive. *See Anderson*, 12 BLR at 1-113; *Worley*, 12 BLR at 1-23; *see Clark v.*

[7] In his first report, dated November 5, 2007, Dr. Ammisetty found that claimant is totally disabled based on a physical examination, objective medical testing and a review of claimant's work as an end-loader operator and other work for the past 40 years. Director's Exhibits 12, 18. On February 7, 2011, Dr. Ammisetty examined claimant a second time and recorded claimant's symptoms, history and objective testing. The doctor again opined that claimant is totally disabled. Claimant's Exhibit 1. Dr. Forehand also opined that claimant is totally disabled, based on the examination, objective medical testing and claimant's work history. Director's Exhibit 20. To the contrary, Dr. Jarboe evaluated claimant on March 13, 2008 and opined, on the basis of an examination, objective testing and a work history, that claimant is not disabled from performing his usual coal mine employment. Director's Exhibit 41. Likewise, Dr. Broudy, who evaluated claimant on April 6, 2011, and Dr. Zaldivar, who examined claimant on June 28, 2011, opined that claimant is not disabled from performing his usual coal mine employment, based on examination, objective testing and a work history. Employer's Exhibits 5, 6.

Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(en banc). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv). *See Ondecko*, 512 U.S. at 281, 12 BLR at 2A-12.

Finally, the administrative law judge concluded:

> Weighing all the evidence on total disability together, I find that the preponderance of the evidence does not establish that [c]laimant has a totally disabling respiratory impairment. The [pulmonary function study] evidence does not meet the criteria for establishing total disability; and the [blood gas] and medical opinion evidence is inconclusive. Therefore, [c]laimant has failed to satisfy his burden of demonstrating total disability by a preponderance of the evidence

Decision and Order at 32. Based on the foregoing, therefore, the administrative law judge properly found that total disability was not established pursuant to Section 718.204(b) overall.[8] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(en banc). As claimant failed to establish total disability pursuant to Section 718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27.

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[8] Claimant contends that the administrative law judge erred in failing to accord controlling weight to the opinion of Dr. Ammisetty on the issue of total disability pursuant to 20 C.F.R. §718.104(d)(5), as he was claimant's treating physician. The administrative law judge is not, however, required to accord greater weight to the opinion of a treating physician when there is other credible evidence. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). We note that the administrative law judge recognized that Dr. Srini Ammisetty conducted two examinations of claimant. The record contains treatment records of a Dr. Vijaya Ammisetty, but not treatment records from Dr. Srini Ammisetty. Thus, despite the fact that the administrative law judge did not specifically address Dr. Ammisetty's opinion pursuant to Section 718.104(d)(1)-(4), because the administrative law judge considered and weighed the totality of the evidence relevant to total disability pursuant to 20 C.F.R. §718.204(b), and rationally found that it did not establish total disability thereunder, we conclude that error, if any, made by the administrative law judge in not specifically addressing Dr. Ammisetty's opinion pursuant to Section 718.104(d)(1)-(4) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification of an Initial Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge