BRB No. 01-0127 BLA

DONALD E. BALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL 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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Donald E. Ball, Raven, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2000-BLA-0627) of Administrative Law Judge Daniel F. Solomon denying benefits on a petition for modification of a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, on behalf of claimant, requested an appeal of the administrative law judge's Decision and Order, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2]Claimant's first claim, filed on December 31, 1982, was denied on October 5, 1983. Director's Exhibit 24. Claimant's duplicate claim, filed on October 25, 1994 was denied by Administrative Law Judge Joan Huddy Rosenzweig on May 7, 1997 because the evidence was insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. 718.204(c)(2000). Director's Exhibits 1, 34. The Board affirmed

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). After accepting the parties stipulation to forty years of coal mine employment, the administrative law judge found that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)(2000). However, the administrative law judge denied benefits because claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(2000), or the existence of a totally disabling respiratory impairment due to pneumoconiosis under 20 C.F.R. §§718.204(b), (c)(1)-(4)(2000). Accordingly, the administrative law judge denied benefits. Claimant appeals, generally challenging the denial of benefits. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, did not file a brief on the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 supported by substantial evidence, are rational, and are consistent with applicable 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 (1985).

Judge Rosenzweig's Decision and Order denying benefits. *Ball v. Island Creek Coal Co.*, BRB No. 97-1584 BLA (June 9, 1998)(unpublished). Claimant filed a petition for modification of that denial on April 14, 1999. Director's Exhibit 37.

[3]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board issued an order on July 27, 2001 requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). On August 10, 2001, the Board issued an Order rescinding its July 27, 2001 order.

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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 (2000); *Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that the Decision and Order denying benefits is supported by substantial evidence and contains no reversible error therein. In considering the evidence pursuant to Section 718.304(2000), the administrative law judge noted Dr. Forehand's status as claimant's treating physician and correctly found that of the fifteen x-ray interpretations and multiple medical opinions, Dr. Forehand, was the only physician of record who diagnosed complicated pneumoconiosis. Decision and Order at 6, 10*;* Director's Exhibits 13-15, 27, 30, 37, 39, 42, 47, 51; Employer's Exhibits 1, 7, 9. The administrative law judge further found that the May 26, 1999 x-ray read as ½ Category A by Dr. Forehand, a B reader, was subsequently reread as positive for simple pneumoconiosis by dually qualified physicians, and that all the succeeding x-rays did not show complicated pneumoconiosis. Decision and Order at 12. We hold that the administrative law judge's reliance on the preponderance of the better qualified physicians is rational and supported by substantial evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991)(*en banc*); Decision and Order at 12.

The administrative law judge also acted within his discretion in according less weight to Dr. Forehand's medical opinion because he failed to explain his diagnosis which was based, in part, on a single x-ray interpretation reading that was refuted by highly qualified radiologists and B readers. Decision and Order at 12-15. *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Moreover, the administrative law judge reasonably

---

[4]A dually qualified physician is a B reader and a Board-certified radiologist. A "B-reader" is a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2000); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A designation of "Board-certified" means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. *See* 20 C.F.R. §718.202(a)(1)(ii)(C) (2000).

found that Dr. Forehand's opinion was outweighed by the contrary opinions of Drs. Jarboe and Dahhan, who reviewed the available medical records, and provided reasoned and documented reports supported by the objective evidence of record. *See Melnick; Clark v. Karsts-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 15. We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the evidence under Section 718.304. *Ondecko; Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

Additionally, the administrative law judge rationally found that claimant failed to establish that he suffers from a totally disabling respiratory impairment pursuant to Section 718.204(c)(2000). The administrative law judge correctly found that none of the pulmonary function studies are qualifying under Section 718.204(c)(1)(2000), and that the record is devoid of any evidence regarding the existence of cor pulmonale with right sided congestive heart failure under Section 718.204(c)(3)(2000). Decision and Order at 16, 18; Director's Exhibits 8, 27, 39, 46, Employer's Exhibits 2-6, 8, 10. The administrative law judge reasonably found that pursuant to Section 718.204(c)(2)(2000), the qualifying blood gas study obtained by Dr. Forehand on May 26, 1999, the only newly submitted qualifying study, was outweighed by four more recent blood gas studies that were all non-qualifying. Decision and Order at 17-18; Director's Exhibits 39, 46; Employer's Exhibits 2, 8, 10; *Lane v. Union Carbide*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Under Section 718.204(c)(4)(2000), the administrative law judge noted Dr. Forehand's status as claimant's treating physician and that he was the only physician of record to opine that claimant's respiratory or pulmonary condition prevents him from engaging in past coal mine employment. Decision and Order at 18. The administrative law judge properly found that Dr. Forehand's opinion was outweighed by the contrary opinions of Drs. Dahhan and Jarboe based on their superior qualifications as Board-certified physicians in internal medicine and pulmonary diseases, and the supportive reports of Drs. Robinette, McSharry and Castle. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel, supra;* Decision and Order at 18; Director's Exhibits 27, ,28, 31; Employer's Exhibits 1, 2, 15, 16. Moreover, the administrative law judge

---

[5]The record contains no biopsy evidence. 20 C.F.R. §718.304(b).

[6]The administrative law judge correctly found that the record reveals that Drs. Dahhan, Jarboe and Castle are Board-certified in internal medicine and pulmonary diseases, Employer's Exhibits 12, 13, 15, 16; Decision and Order at 18. The record indicates that Dr. Forehand is a B reader. Director's Exhibit 39.

reasonably credited the opinions of Drs. Dahhan and Jarboe because they had "the opportunity to review all the medical evidence of record" and therefore, had a "more complete picture of the miner's health." *Lane, supra; Clark, supra;* Decision and Order at 18-19. The administrative law judge's findings pursuant to Section 718.204(c)(2000) are therefore affirmed.

Inasmuch as substantial evidence supports the administrative law judge's finding that claimant failed to establish a totally disabling respiratory impairment, an essential element of entitlement, the denial of benefits under 20 C.F.R. Part 718 is affirmed. *See Trent, supra; Perry, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[7]The criteria pertaining to total disability are now set forth in 20 C.F.R. §718.204(b)(2001). The amended regulations did not alter Section 718.204(c)(2000) in any material respect.