BRB No. 97-0169 BLA

CHARLES E. SPARTMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TROJAN MINING & PROCESSING	)	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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Charles E. Spartman, Elkhorn City, Kentucky, *pro se.*

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order (95-BLA-1740) of Administrative Law Judge Paul H. Teitler denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

[1]Claimant is Charles E. Spartman, the miner, who initially filed a claim for benefits on December 5, 1978 and took no further action on the claim following employer's controversion. Director's Exhibit 42. Claimant filed the instant claim for benefits on March 15, 1994. Director's Exhibit 1.

Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate on appeal.

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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance 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 (1965).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*. Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the x-ray evidence of record which consists of sixteen interpretations of nine x-rays. Director's Exhibits 15, 16, 36-42; Employer's Exhibit 1. Of the sixteen interpretations, five are positive for the existence of pneumoconiosis. Director's Exhibits 36, 42. Upon weighing the x-ray evidence, the administrative law judge stated that he would assign the greatest weight to the interpretations of physicians who are both B-readers and board-certified radiologists. Decision and Order at 5. The administrative law judge then permissibly found that the positive interpretation of Dr. Baker, a B-reader, of an x-ray dated September 17, 1990, and the positive interpretation of Dr. Myer, whose qualifications are not listed in the record, dated June 20, 1990, are outweighed by the negative interpretations of the same x-rays by Drs. Sargent and Barrett, both board-certified radiologists and B-readers, based on their superior qualifications. Decision and Order at 5; Director's Exhibits 36-40; *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts, supra.* The administrative law judge further acted within his discretion in

finding that the negative interpretations of Drs. Wiot and Felson of an x-ray dated April 8, 1980, are entitled to greater weight than the positive interpretation of Dr. Loudon because, unlike Dr. Loudon, Drs. Wiot and Felson are B-readers. Decision and Order at 5; Director's Exhibit 42; *Id.* Next, the administrative law judge found that Dr. Lane's positive interpretation of an x-ray dated March 25, 1992 "is not convincing considering the later negative readings of x-rays in 1994 and 1995 by Doctors Broudy, Poulos, and Sargent did not indicate pneumoconiosis, and 1/0 P is the lowest positive reading." Decision and Order at 6; Director's Exhibits 15, 16, 36; Employer's Exhibit 1. The administrative law judge's finding regarding Dr. Lane's interpretation requires remand because where the evidence taken at face value shows that the miner has improved, it is impossible to reconcile the evidence and the application of the "later evidence is better" theory is inappropriate. *See Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Also the administrative law judge failed to weigh the positive interpretation of Dr. Brandon, a board-certified radiologist and B-reader, of an x-ray dated October 24, 1979. Director's Exhibit 42. Thus, we vacate the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[2]

The administrative law judge next considered whether claimant established total respiratory disability pursuant to Section 718.204(c) after noting that he would address Section 718.202(a)(4) when he addressed Section 718.204(b). Decision and Order at 7. Pursuant to Section 718.204(c)(1), the administrative law judge considered the ten pulmonary function studies of record. Decision and Order at 8; Director's Exhibits 11, 36, 41, 42; Employer's Exhibit 1. Of the ten studies, only one, dated May 10, 1995 and performed by Dr. Broudy, yielded qualifying results.[3] Employer's Exhibit 1. The administrative law judge rationally assigned this study no weight as it was discredited by Dr. Broudy who, in a narrative explanation, stated that claimant's effort was poor. Decision and Order at 8; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Trent, supra.* Pursuant to Section 718.204(c)(2), the administrative law judge

considered the arterial blood gas study evidence and properly found that none of the arterial blood gas studies yielded qualifying results. Decision and Order at 9; Director's Exhibits 14, 36, 42; Employer's Exhibits 1, 2. Further, the record contains no evidence

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[2]We affirm the administrative law judge's findings that 20 C.F.R. §718.202(a)(2)-(3) is unavailable to claimant inasmuch as the record contains no autopsy or biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305(e), 718.306; Decision and Order at 3; Director's Exhibit 1.

[3]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. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

of cor pulmonale with right sided congestive heart failure. Thus, we affirm the administrative law judge's findings that claimant failed to establish total respiratory disability pursuant to Sections 718.204(c)(1)-(3).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the medical opinion evidence of record, which consists of the opinions of seven physicians. Decision and Order at 10; Director's Exhibits 13, 36, 41, 42; Employer's Exhibit 1. Dr. Baker, in a report dated September 17, 1990, opined that claimant "should have no further exposure to coal dust, rock dust or similar noxious agents due to his pneumoconiosis, chronic bronchitis and chronic obstructive airways disease" and further opined that claimant "may have difficulty doing sustained manual labor on an eight hour basis, even in a dust-free environment due to these conditions." Director's Exhibit 36. Dr. Myers, in report dated June 20, 1990, stated that claimant's "respiratory function impairment falls into a low Class II, which results in approximately 25% impairment to the body as a whole." Director's Exhibit 36. Dr. Fritzhand, in a report dated June 29, 1994, opined that claimant has a mild impairment due to his smoking history. Director's Exhibit 13. Dr. Loudon, in a report dated April 8, 1980, did not offer an opinion as to the degree of claimant's respiratory impairment. Director's Exhibit 42. The remaining physicians, Drs. Broudy, Vuskovich, and Lane, opined that claimant has no respiratory impairment. Director's Exhibits 36, 41, 42; Employer's Exhibit 1.

After listing all of the medical opinion evidence, the administrative law judge stated that he credited Dr. Broudy's opinion that claimant's non-respiratory conditions disabled him and limit his ability to perform coal mine work or other arduous work. Decision and Order at 14. The administrative law judge provides no other discussion or weighing of the medical opinion evidence pursuant to Section 718.204(c)(4). Decision and Order at 10-14. The administrative law judge's failure to weigh the medical opinion evidence and to provide reasons for his rejection of the opinions of Drs. Myers and Baker requires remand for further discussion in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). *See Brewster v. Director, OWCP,* 7 BLR 1-120 (1984); *Ridings v. C & C Coal Co. Inc.*, 6 BLR 1-227 (1983). Additionally, the administrative law judge failed to determine whether Drs. Myers' opinion, that claimant has a "25%" respiratory impairment, and Dr. Baker's opinion, that because of his pneumoconiosis, claimant would "have difficulty doing substantial manual labor on an 8 hour basis," are supportive of a finding of total respiratory disability when compared with the physical requirements of claimant's coal mine employment. Director's Exhibit 36; *see Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) *aff'd*, 9 BLR 1-104 (1986); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986). Thus, we vacate the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4).

The administrative law judge next considered the medical opinion evidence

pursuant to Sections 718.202(a)(4) and 718.204(b). Decision and Order at 14-16. In making his finding that claimant failed to establish the existence of pneumoconiosis and, thus, failed to establish total disability due to pneumoconiosis, the administrative law judge stated that he credited the opinions of Drs. Lane, Vuskovich, Fritzhand and Broudy that claimant does not have pneumoconiosis. Decision and Order at 16. However, contrary to the administrative law judge's finding, Dr. Lane opined that claimant has pneumoconiosis. Director's Exhibit 36. Further, the administrative law judge failed to provide a reason for rejecting the opinions of Drs. Baker and Myers, both of whom examined claimant and opined that he has pneumoconiosis. Decision and Order at 14-16; Director's Exhibit 36; *see Brewster, supra; Ridings, supra.* Thus, we vacate the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(b) and remand the case for the administrative law judge to make additional findings pursuant to Sections 718.202(a)(1), (4), and 718.204(b), (c)(4).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge