

BRB No. 04-0505 BLA

ARCHIE C. LIVELY)
)
 Claimant-Petitioner)
)
 v.)
)
 V & C, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 03/30/2005
 PNEUMOCONIOSIS FUND)
)
 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 of Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Robert Weinberger, State of West Virginia Workers' Compensation Defense Division, Charleston, West Virginia, for employer/carrier.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA- 5553) of Administrative Law Judge Daniel L. Leland 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). Claimant filed this claim on January 23, 2001. Director’s Exhibit 2. The administrative law judge credited claimant with nineteen and one-quarter years of coal mine employment and found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4).¹ The administrative law judge found, however, that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge erred in discrediting Dr. Gaziano’s opinion, that claimant had moderate obstructive and restrictive impairments and could not perform his usual coal mine employment, Claimant’s Exhibit 1, because the administrative law judge found that it was inconsistent with the pulmonary function study and blood gas study results, which were non-qualifying. Claimant also contends that the administrative law judge erred in crediting Dr. Zaldivar’s opinion. Claimant argues that Dr. Zaldivar’s opinion, that “[t]here is no evidence of any pulmonary impairment,” is inconsistent with his findings, on pulmonary function testing, of “moderate irreversible airway obstruction” and “mild diffusion impairment.” Employer’s Exhibit 1. Employer/carrier (employer) responds, urging affirmance of the administrative law judge’s Decision and Order as supported by substantial evidence.

The Director, Office of Workers’ Compensation Programs, (the Director) has filed a Motion to Remand the case. The Director argues that the administrative law judge’s Decision and Order does not comply with the requirements of 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 30 U.S.C. §932(a), where the administrative law judge summarily concluded that Dr. Mullins’s opinion could not support a finding of total disability. The Director submits that Dr. Mullins’s assessment of a twenty-five percent disability may be sufficient to establish total disability when the administrative law judge compares her assessment to the exertional requirements of claimant’s usual coal mine employment. The Director further argues that the administrative law judge erred in finding that Dr. Gaziano did not provide a credible medical opinion on the issue of total respiratory or pulmonary disability. Employer responds to the Director’s Motion to Remand. Employer argues that the Director’s contention, that an administrative law judge must compare a medical assessment of disability to the exertional requirements of a miner’s coal mine employment, would require an administrative law judge to speculate

¹ We affirm the administrative law judge’s findings on the length of coal mine employment and at 20 C.F.R. §§718.202(a)(1)-(4) and 718.203(b), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

where a medical expert failed to state an opinion, as in the case of Dr. Mullins. Employer also argues that the administrative law judge properly discredited Dr. Gaziano's opinion on the basis that it was inconsistent with the objective studies of record. Employer thus urges the Board to deny the Director's Motion to Remand.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in discrediting Dr. Gaziano's opinion because he found that it was inconsistent with the objective studies of record. The administrative law judge stated, "Dr. Gaziano is the only physician to state that claimant's pulmonary condition prevents him from doing his usual coal mine job, and his opinion is not consistent with the nonqualifying pulmonary function and blood gas studies and the generally normal pulmonary examinations." Decision and Order at 6. The Director argues that the administrative law judge essentially found that a physician could never render a reasoned diagnosis of total disability if that conclusion rested upon non-qualifying studies. The Director relies on the regulation at 20 C.F.R. §718.204(b)(2)(iv), which provides, in pertinent part: "[w]here total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section,... total disability may nevertheless be found if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment..." 20 C.F.R. §718.204(b)(2)(iv).² Employer responds that administrative law judge properly discredited Dr. Gaziano's opinion.

² The United States Court of Appeals for the Seventh Circuit's decision in *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893, 13 BLR 2-348, 2-355, (7th Cir. 1990), was cited with approval by the United States Court of Appeals for the Fourth Circuit in *Peerless Eagle Coal Company v. Taylor*, No. 94-1806, slip op. at 2, (4th Cir. July 5, 1995) (unpub.), which the Director, Office of Workers' Compensation Programs, attaches to his Motion to Remand.

Based on the arguments advanced by the Director, we hold that the administrative law judge erred in finding Dr. Gaziano's opinion entitled to little weight because the pulmonary function study and blood gas study he relied upon were non-qualifying. *See* 20 C.F.R. §718.204(b)(2)(iv). The Director also correctly argues that the administrative law judge, by not crediting Dr. Gaziano's opinion because the pulmonary function study and blood gas study results were not qualifying, impermissibly interpreted the medical tests himself and refused to accept those interpretations offered by the medical experts of record. The objective tests listed in the regulations are not the only ones physicians may consider in offering medical opinions. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). An administrative law judge may not discredit a physician's opinion solely because the underlying objective studies are not qualifying; rather, the administrative law judge must consider the entire report. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Based on the foregoing, we vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) and remand the case. On remand, the administrative law judge must reconsider the medical opinions and determine whether each expert provided a reasoned opinion of a totally disabling respiratory impairment based on the totality of the medical report. The administrative law judge must determine whether Dr. Gaziano exercised "reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques," in opining that claimant could not perform his usual coal mine employment, despite the fact that the underlying pulmonary function study and blood gas study were non-qualifying. 20 C.F.R. §718.204(b)(2)(iv).

The Director further contends that the administrative law judge did not make "findings of fact and conclusions of law which adequately set forth the factual and legal basis for his decisions." Director's Motion to Remand at 3. The Director argues that the administrative law judge "summarily dismissed Dr. Mullins's conclusion of a 25 percent pulmonary impairment without determining whether that amount of impairment would preclude Mr. Lively from doing his usual coal mine work, which was described as involving heavy lifting of 50 to 100 pounds every day." *Id.* Dr. Mullins diagnosed a "mild ventilatory impairment without improvement with bronchodilator," specifically noting "FEV1 74% DLCO 60%." Director's Exhibit 12. Dr. Mullins assessed claimant's impairment as "25% from Criteria 4th Ed. AMA Guidelines to Eval. of Permanent disability." *Id.* The administrative law judge stated, without more, that Dr. Mullins' opinion "can not be construed as one finding that claimant is unable to do his usual coal mine work." Decision and Order at 6.

The Director's contention has merit. Only after comparing a physician's assessment of a miner's impairment to the exertional requirements of a miner's usual coal mine employment, can an administrative law judge determine whether a physician's

opinion supports or refutes a finding of total respiratory or pulmonary disability. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Wilt v. Wolverine Mining*, 14 BLR 1-70, 1-79 (1990). Because the administrative law judge erred in summarily concluding that Dr. Mullins's opinion could not support a finding of total disability at Section 718.204(b)(2)(iv), we further vacate the administrative law judge's finding. On remand, the administrative law judge must compare the exertional requirements of claimant's usual coal mine employment with Dr. Mullins's assessment of claimant's impairment. The administrative law judge must also explain the factual and legal bases for his each of findings, in accordance with the requirements of the APA. After reweighing the opinions of Drs. Mullins and Gaziano, the administrative law judge must compare the evidence relevant to the existence of a totally disabling respiratory or pulmonary impairment to the contrary probative evidence of record to determine whether claimant met his burden of persuasion at 20 C.F.R. §718.204(b). 20 C.F.R. §718.204(b); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff'd on recon.* 9 BLR 1-236 (1987).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion. The Director's Motion to Remand is granted.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge