

BRB No. 06-0425 BLA

LEE R. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 10/26/2006
	)	
JAMES RIVER COAL COMPANY c/o	)	
ACORDIA EMPLOYERS SERVICE	)	
	)	
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-Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (04-BLA-6598) of Administrative Law Judge Daniel J. Roketenetz on a subsequent claim<sup>1</sup> 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). Pursuant to 20 C.F.R. Part 718, based on claimant's August 25, 2003 filing date, the administrative law judge credited claimant with twenty years of coal mine employment<sup>2</sup> and found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, the administrative law judge found that claimant established a "material change in conditions" pursuant to 20 C.F.R. §725.309(d). The administrative law judge then considered all the evidence of record and determined that claimant established he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). However, the administrative law judge found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Specifically, claimant contends that the administrative law judge erred in not crediting the medical opinions of Drs. Baker and Simpao, which support a finding that claimant's total disability is due to pneumoconiosis. Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds arguing that claimant's assertion regarding a remand for a credible pulmonary examination is premature because the administrative law judge erred in considering Dr. Simpao's opinion on the cause of claimant's disability. The Director argues that the case should be remanded for the administrative law judge to reconsider the disability causation issue and if he again finds

---

<sup>1</sup> Claimant's previous claim for benefits, filed on August 10, 1993, was denied on February 2, 1994, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

<sup>2</sup> This case arises within the jurisdiction 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*); Director's Exhibits 1, 4.

Dr. Simpao's opinion to be unreasoned, then he should remand the case to the district director so that Dr. Simpao may supplement his opinion.<sup>3</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the opinions of Drs. Baker and Simpao are well reasoned and well documented and should not have been rejected concerning the etiology of claimant's pulmonary disability. Claimant argues that Dr. Baker clearly stated that claimant's pulmonary impairment was the result of his exposure to coal dust and this diagnosis was based on claimant's work and medical histories, objective studies, physical examination, and chest x-ray. Claimant's Brief at 4. Claimant specifically contends that the administrative law judge improperly used his determination that Dr. Simpao's opinion was unreasoned regarding the issue of total disability to disregard the doctor's opinion regarding the etiology of claimant's pulmonary disability. Claimant argues further that although the administrative law judge determined that remand was not necessary for a complete pulmonary evaluation because claimant prevailed on the issue of total disability, the administrative law judge failed to consider if remand was necessary on the issue of causation, the basis for the denial of benefits. *See* 20 C.F.R. §718.204(c). Claimant asserts that because Dr. Simpao's opinion was found unreasoned and was not credited, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5.

The Director responds seeking remand of this case to the administrative law judge because he erred in discounting Dr. Simpao's opinion in finding disability causation not established. Director's Response Brief at 2. The Director states that although the

---

<sup>3</sup> The administrative law judge's length of coal mine employment determination is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge found Dr. Simpao's opinion unreasoned, and rejected it on the issue of disability, he ultimately found the evidence established that claimant is totally disabled. Therefore, the Director argues that since Dr. Simpao's opinion is consistent with this finding, the administrative law judge has not provided a sufficiently detailed explanation for why Dr. Simpao's disability causation opinion was discounted, on the facts of this case. Consequently, the Director asserts that the case should be remanded for the administrative law judge to reconsider the issue of disability causation. *Id.* He suggests that if the administrative law judge again finds Dr. Simpao's opinion to be wholly unreasoned, he should remand the case to the district director so that Dr. Simpao may supplement his opinion.

Employer responds arguing that remand is not required because the Director fulfilled his duty to provide claimant a complete pulmonary evaluation and that he does not have the duty to provide an examination that is persuasive. Employer argues that the administrative law judge reasonably concluded, based on Dr. Rosenberg's opinion, that claimant failed to establish total disability due to pneumoconiosis.

As the Director contends, the administrative law judge has not provided an adequate rationale for discounting Dr. Simpao's opinion under Section 718.204(c). Inasmuch as the administrative law judge properly found that claimant established a totally disabling respiratory impairment, the issue is no longer whether Dr. Simpao's opinion is reasoned with respect to the extent of disability, but rather whether Dr. Simpao's opinion is sufficient to establish that claimant's total respiratory disability is due to pneumoconiosis. *See Smith v. Martin County Coal Co.*, 23 BLR 1-69, 1-75 (2004). We therefore agree with the Director that whether Dr. Simpao's opinion was sufficient to qualify as a complete pulmonary evaluation is premature in light of the fact that we must vacate the administrative law judge's findings at Section 718.204(c) and remand the case for further consideration.

However, contrary to claimant's contention, the administrative law judge did not err in finding that Dr. Baker's opinion is insufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). The administrative law judge properly determined that Dr. Baker did not credibly opine that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv), as Dr. Baker merely indicated that claimant should avoid further exposure to coal dust. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). Because the basis for Dr. Baker's opinion is insufficient to establish a totally disabling respiratory or pulmonary impairment, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Baker's causation opinion was entitled to little weight under 20 C.F.R. §718.204(c). *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996).

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge