BRB No. 06-0178 BLA

LANDON B. LUSK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 09/19/2006
	)	
and	)	
	)	
PEABODY INVESTMENTS, INCORPORATED	)	
	)	
Employer/Insurer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-6035) of Administrative Law Judge Alice M. Craft rendered 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). Based on the date of filing, July 12, 2001, the

administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and noted the parties' stipulation that claimant established thirty-three years and four months of coal mine employment. The administrative law judge found that the evidence of record was sufficient to establish the existence of coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), and 718.203(b), and a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(4), erred in finding total respiratory disability established at Section 718.204(b), and erred in finding that the disability was due to pneumoconiosis pursuant to Section 718.204(c). Claimant responds that substantial evidence supports the award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not participate in this appeal.

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'Keeffe v. Smith, Hinchman & Grills 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

We first address employer's contention that the administrative law judge erred by finding total disability established based on Dr. Mullins's opinion.[1] Employer contends that the administrative law judge erred in crediting the opinion of Dr. Mullins because Dr. Mullins did not discuss claimant's usual coal mine employment or indicate that she had any knowledge of the physical demands of claimant's coal mine employment and Dr. Mullins's opinion that claimant's impairment "probably" would have interfered with the

[1] We affirm, as uncontested, the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis, that the pulmonary function study evidence as a whole fails to establish total disability, and that no blood gas study of record was qualifying. Decision and Order at 11. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

performance of his last job was equivocal and could not, therefore, establish total respiratory disability. In addition, employer contends that the administrative law judge failed to weigh the like and unlike evidence before finding that claimant established total disability.

In finding that total respiratory disability was established, the administrative law judge found that the pulmonary function study evidence as a whole failed to establish total disability, and that no blood gas study established total disability. The administrative law judge found, however, that the opinion of Dr. Mullins established total respiratory disability. Acknowledging that Dr. Mullins's opinion was "somewhat equivocal," because Dr. Mullins opined that claimant's respiratory impairment would "probably" interfere with the performance of his last job, the administrative law judge nonetheless found the opinion sufficient to establish total disability. This was error. Inasmuch as the administrative law judge herself acknowledged that the opinion was equivocal, she erred in relying on it to find claimant totally disabled. *See U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Moreover, the administrative law judge did not evaluate whether Dr. Mullins considered the specific exertional requirements of claimant's usual coal mine employment in opining that his respiratory impairment would "probably" interfere with the performance of his last job. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Further, while the administrative law judge refers to the non-qualifying pulmonary function study and blood gas study evidence, she does not explain why Dr. Mullins's opinion outweighs this evidence, nor does she explain how Dr. Mullins's opinion is reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *see also Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987). The administrative law judge erred, therefore, in finding that claimant met his burden of establishing a totally disabling respiratory impairment. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub. nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 73, 17 BLR 2-64 (3d Cir. 1993).

As there is no other affirmative evidence of total disability, we must reverse the administrative law judge's finding. Further, because claimant cannot establish a totally disabling respiratory impairment on the record before him, claimant has failed to

establish a necessary element of entitlement, and benefits must be denied. 20 C.F.R. §718.1; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Because claimant has failed to establish a totally disabling respiratory impairment, a necessary element of entitlement, we need not reach his arguments regarding the existence of pneumoconiosis and disability causation.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is reversed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge