

BRB No. 08-0628 BLA

C.L. (deceased))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 04/16/2009
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Rita Roppolo (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (07-BLA-5924) of Administrative Law Judge Michael P. Lesniak denying benefits 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). This case involves a subsequent claim filed on February 12, 2001² and is before the Board for the second time. In the initial decision,

¹ Claimant died on March 7, 2005. Director's Exhibit 44. Claimant's claim is being pursued by his surviving spouse.

² Claimant filed previous claims on September 9, 1980, November 10, 1982, October 20, 1987, and March 24, 1997. Director's Exhibits 1, 2. Claimant's most recent claim, filed on March 24, 1997, was finally denied on March 16, 1998 because claimant

Administrative Law Judge Richard A. Morgan found that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Consequently, Judge Morgan considered the merits of claimant's 2001 claim. In his *de novo* review of all of the evidence of record, Judge Morgan credited claimant with "about 6¾ years of coal mine employment." Decision and Order at 5. Judge Morgan further found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Judge Morgan, however, found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b) or that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Morgan denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Morgan's finding regarding the length of claimant's coal mine employment. [*C.L.*] *v. Director, OWCP*, BRB No. 05-0718 BLA (Feb. 16, 2006) (unpub.). The Board further affirmed Judge Morgan's findings and conclusions regarding the exertional requirements of claimant's usual coal mine employment. [*C.L.*], slip op. at 3-4. The Board also held that Judge Morgan properly found, on the issues of total disability and disability causation, that Dr. Gaziano's opinion was not well reasoned and was, therefore, entitled to little weight. [*C.L.*], slip op. at 3-4. However, given the concession of the Director, Office of Workers' Compensation Programs (the Director), that the Department of Labor (DOL) failed to provide claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim, the Board remanded the case to the district director for further development of the evidence.

On remand, the district director provided claimant with a list of physicians who were qualified to perform his complete pulmonary evaluation. Director's Exhibit 43. However, in a telephone conversation on March 7, 2007, claimant's wife informed the district director that claimant had died.³ Director's Exhibit 44. After claimant's wife indicated that she wished to pursue her husband's claim, the DOL asked Dr. Gaziano to provide a supplemental report, indicating whether the miner had physical limitations imposed by a respiratory impairment and describing the level of physical labor that he believed claimant was able to perform. Director's Exhibits 45, 46. Dr. Gaziano

did not establish the existence of pneumoconiosis or that he was totally disabled due to the disease. Director's Exhibit 2.

³ The district director noted that the Social Security Death Index indicated that claimant died on March 7, 2005. Director's Exhibit 44.

subsequently submitted a supplemental report dated April 2, 2007. Director's Exhibit 47. In a Proposed Decision and Order dated April 5, 2007, the district director denied benefits. Director's Exhibit 48. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 49, 50. Administrative Law Judge Michael P. Lesniak (the administrative law judge) held a hearing on January 16, 2008.

In a Decision and Order on Remand dated May 7, 2008, the decision currently before the Board, the administrative law judge noted that the Director stipulated that claimant worked for 6.75 years in coal mine employment and that claimant suffered from pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.202(a), 718.203(c). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director responds in support of the administrative law judge's denial of benefits.⁴

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 under 20 C.F.R. Part 718 in a living miner's claim, a 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. 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*).

Claimant argues that the administrative law judge erred in finding that Dr. Gaziano's April 2, 2007 supplemental report did not establish total disability pursuant to

⁴ Because no party challenges the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. §718.204(b)(2)(iv). In his supplemental report,⁵ Dr. Gaziano indicated that, from a pulmonary standpoint, claimant “would be able to walk, crawl, lift 50 [pounds] maximum, and carry objects weighing up to 25 [pounds].” Director’s Exhibit 47. From a pulmonary standpoint, Dr. Gaziano opined that claimant “would be able to do medium work.” *Id.* Although Dr. Gaziano opined that claimant suffered from a totally disabling cardiopulmonary condition, he opined that claimant did “not have a totally disabling pulmonary impairment.” *Id.* Dr. Gaziano characterized claimant’s pulmonary functional impairment as “moderate.” *Id.*

In considering whether Dr. Gaziano’s opinion supported a finding of total disability, the administrative law judge stated:

Dr. Gaziano’s supplement to his earlier report clarified that, based on the pulmonary testing, the miner was able to perform medium work from a pulmonary standpoint. His supplemental report also clarified that the miner was not totally disabled by his pulmonary condition. In addition, as noted above, the Board has affirmed Judge Morgan’s characterization of the miner’s usual coal mine employment as primarily sweeping coal and occasional helping with drilling and shooting coal and not requiring heavy lifting. Therefore, I find Dr. Gaziano’s opinion establishes that the miner was not totally disabled by his pulmonary condition, and I find the medical opinion evidence insufficient to establish total disability under subsection 718.204(b)(2)(iv).

Decision and Order on Remand at 5.

Claimant argues that the administrative law judge erred in not recognizing that claimant’s usual coal mine employment required heavy labor. Claimant acknowledges that Judge Morgan stated that claimant’s usual coal mine employment did not require heavy lifting. Claimant’s Brief at 15. Moreover, as the Director notes, the Board, in its 2006 Decision and Order, rejected claimant’s contention that Judge Morgan erred in his consideration of the exertional requirements of claimant’s usual coal mine employment, stating that:

[Judge Morgan] permissibly discounted claimant’s 2004 testimony that his last coal mine employment entailed considerable heavy lifting of up to 100 pounds, breaking up coal with a 12-pound sledgehammer, and considerable

⁵ In his May 7, 2004 report, Dr. Gaziano indicated that claimant suffered from a moderate pulmonary impairment. Director’s Exhibit 26. Dr. Gaziano also indicated that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.*

walking, finding it unreliable because it conflicted with claimant's 1985 testimony that he used a sledgehammer to crush coal in his first coal mine job at Copley's, and that his last job at Cravat involved sweeping and shooting the coal. Moreover, [Judge Morgan] noted that Dr. Zaldivar's 1983 report described claimant's last job as "Sweep Coal Shoot Coals." [Judge Morgan] thus acted within his discretion in finding that claimant's usual duties were not the ones described in claimant's 2004 testimony, but primarily involved sweeping coal, as well as helping with the drilling and shooting of coal, consistent with claimant's 1985 testimony before [Administrative Law Judge Anastasia Dunau]. [Judge Morgan's] findings and conclusions are supported by substantial evidence, and we may not substitute our judgment.

[*C.L.*], slip op. at 3-4.

The Board's previous holding on this issue constitutes the law of the case and governs the Board's determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Claimant, however, notes that Judge Morgan found that claimant's usual coal mine employment included working as a "shooter helper." Claimant's Brief at 15. Because the DOL's *Dictionary of Occupational Titles* indicates that the job of "shooter helper" requires heavy labor, claimant argues that claimant's usual coal mine employment required heavy labor. We disagree. In this case, the administrative law judge could not have relied upon the *Dictionary of Occupational Titles* because it is not contained in the record, either directly or by appropriate reference. *See* 20 C.F.R. §725.464; *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). Moreover, contrary to claimant's characterization, Judge Morgan did not characterize claimant's coal mine work as that of a "shooter helper." Judge Morgan found that claimant's usual coal mine employment "primarily required sweeping coal, as well as *helping with* the drilling and shooting of coal." Decision and Order at 17 (emphasis added). The fact that claimant's usual coal mine employment required him to help with the shooting of coal does not mean that claimant was required to perform all of the tasks required of a "shooter helper." We, therefore, reject claimant's contention that the administrative law judge erred in failing to find that claimant's usual coal mine employment required heavy labor. Because claimant does not raise any other allegations of error, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁶

⁶ On a "Description of Coal Mine Work and Other Employment" form, claimant indicated that his usual coal mine employment required him to lift a maximum of 45 pounds and carry objects weighing 15 to 25 pounds. Director's Exhibit 2. As previously

In light of our affirmance of the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

noted, Dr. Gaziano indicated that, from a pulmonary standpoint, claimant was able to lift a maximum of 50 pounds and carry objects weighing up to 25 pounds. Director's Exhibit 47.