

BRB No. 02-0454 BLA

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| GRADY G. BURSON |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| MAGOFFIN COAL, INCORPORATED |) | DATE ISSUED: |
| |) | |
| and |) | |
| |) | |
| KENTUCKY COAL PRODUCERS’ |) | |
| SELF INSURANCE 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 on Remand - Denying Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

John T. Chafin (Kazee, Kinner, Chafin & Patton), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (99-BLA-0878) of Administrative Law Judge Daniel J. Roketenetz 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).¹ This case has a lengthy history.² Pursuant to

¹ The Department of Labor has amended the regulations implementing the Federal

claimant's prior appeal, the Board affirmed the administrative law judge's finding that no mistake in the determination of fact had been made pursuant to Section 725.310 (2000) as no

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant filed his original claim for benefits on March 18, 1986. Director's Exhibits 1, 18, 19. Administrative Law Judge Daniel J. Roketenetz denied benefits on June 26, 1990 because claimant failed to establish a totally disabling respiratory impairment. Director's Exhibits 35A, 42. The Board affirmed the denial on January 11, 1994. *Burson v. Magoffin Coal, Inc.*, BRB No. 90-1875 BLA (Jan. 11, 1994)(unpub.)(Director's Exhibit 58). Claimant subsequently requested modification of his denied claim. Director's Exhibits 59, 60. The administrative law judge denied this request, and the Board affirmed the administrative law judge's denial. *Burson v. Magoffin Coal, Inc.*, BRB No. 90-1875 BLA (May 29, 1997)(unpub.). Claimant filed a second request for modification which was again denied by the administrative law judge because claimant failed to establish a totally disabling respiratory impairment. The Board vacated the administrative law judge's finding on total disability, and remanded the case for further consideration of the issue of total disability and for consideration of causation, if reached. *Burson v. Magoffin Coal, Inc.*, BRB No. 00-0976 BLA (Jul. 20, 2001)(unpub.).

party had challenged that finding. The Board, however, vacated the administrative law judge's finding that the new evidence was insufficient to establish total disability and, therefore, vacated the administrative law judge's finding that a change in conditions was not established because the administrative law judge did not properly weigh the newly submitted medical opinion evidence of record. Accordingly, the Board remanded the case for reconsideration of the medical opinion evidence on the issue of total disability and causation, if reached. On remand, the administrative law judge concluded that the newly submitted evidence failed to establish total disability, and, therefore, found that a change in conditions had not been shown. Accordingly, the administrative law judge found that claimant failed to establish a basis for modification of the prior denial. Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence failed to establish total disability. In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating 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 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 to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 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*).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 296 (6th Cir. 1994), that the fact-finder "has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." Because the Board previously affirmed the administrative law judge's determination that there had been no mistake of fact in the prior decision denying benefits, the only issue currently before the Board is whether the administrative law judge erred on remand in determining that claimant had not shown a change in conditions.

Claimant contends that the administrative law judge erred in finding that the opinions of Drs. Myers, Sundaram and Dahhan did not establish total disability because the doctors were, contrary to the administrative law judge's finding, aware of claimant's job duties and

stated claimant's job titles in their reports finding claimant to be totally disabled. Claimant also contends that the administrative law judge erred in rejecting medical opinions because they were based, in part, on nonconforming and non-qualifying pulmonary function studies.

Reviewing the evidence presented by claimant regarding the nature of his coal mine employment, the administrative law judge noted that at the hearing held on October 5, 1999, claimant testified that he had worked over ten years as a surface miner. The administrative law judge further noted that claimant stated, on Form CM-913 filed with his original claim, that he worked as a heavy equipment operator, coal loader, dozer operator, and rock truck driver. Director's Exhibits 2, 9. At the May 18, 1989 hearing, the administrative law judge noted that claimant had described his job as a loader operator as follows:

you clean the coal, you know, then you load it. And you have to grease and take care of it, you know, fuel it. And keep it clean you know. Have to clean it up three and four times a day.

Hearing Transcript at 11-15.

Turning to the medical opinion evidence of record, the administrative law judge found no physician of record actually discussed or described the exertional requirements of claimant's coal mine employment in his report. Specifically, the administrative law judge stated: Dr. Myers noted only that claimant worked as a heavy equipment operator and loader, working fifty to sixty hours per week, Director's Exhibit 113; Dr. Sundaram noted only that claimant was employed in the strip mines for eleven years, Claimant's Exhibit 6; and Dr. Dahhan did not indicate what claimant's coal mine duties were. Director's Exhibit 124. The administrative law judge stated that because none of the physicians' opinions demonstrated an understanding of the exertional requirements of claimant's last coal mine employment, none was probative on the issue of total disability. The administrative law judge concluded, therefore, that because neither claimant's testimony nor the medical reports of record presented a clear picture as to the exertional requirements of the claimant's last coal mine employment, he was unable to make a definitive finding as to what those exertional requirements were. Decision and Order at 7.

After reviewing the record, however, we conclude that the administrative law judge failed to properly consider the medical opinions of total disability. Dr. Myers found that claimant showed some impairment from a pulmonary standpoint that would meet the federal black lung criteria.³ Further, after stating that claimant worked eleven years in above ground

³ Interpreting the results of claimant's 1998 pulmonary function study, Dr. Myers found a moderate restrictive defect in ventilation, Class III under the AMA Guidelines and stated that "[t]hese do meet the criteria for disability under Federal Black Lung Regulation 718. . . ." Director's Exhibit 113.

mining as a heavy equipment operator and loader, averaging 50-60 hours per week, the doctor opined that claimant could “walk fifteen to twenty feet only or two to three steps.” Director’s Exhibit 113. Dr. Sundaram offered an opinion that claimant could not do his usual coal mine employment from a pulmonary standpoint due to shortness of breath with limited activity. Dr. Sundaram further opined that claimant experienced shortness of breath on walking one-half block or going up one flight of steps. Claimant’s Exhibit 1. Dr. Dahhan opined that claimant did not retain the respiratory capacity to return to his previous coal mine employment, but the doctor attributed this condition to claimant’s obesity and orthopedic problems (resulting from an injury in the mines), not coal workers’ pneumoconiosis. Director’s Exhibit 124. Dr. Dahhan noted that all of claimant’s mining work was outside as a loader and dozer operator. Director’s Exhibit 119.

In the most recent hearing on this claim, held before Administrative Law Judge Daniel J. Roketenetz, claimant testified that he had worked a little over ten years as a surface coal miner, and that he suffered from breathing problems along with coughing and wheezing. Hearing Transcript at 11-13.

Thus, in this case, in addition to listing claimant’s job titles, *i.e.*, as a heavy equipment operator and loader, and dozer operator, the long hours of his work week, *i.e.*, fifty to sixty hours per week, and that he worked eleven years in surface strip mining, Dr. Dahhan opined that claimant could not perform his usual coal mine employment, Dr. Sundaram opined that claimant had some respiratory impairment, and Dr. Myers opined that claimant had some respiratory impairment which would meet the federal criteria for establishing total disability.

Accordingly, in light of these statements, this case must be remanded to the administrative law judge for a determination of whether the opinions when considered as a whole are sufficient to show that the doctors had an understanding of the requirements of claimant’s usual coal mine employment upon which the administrative law judge could make a finding of total disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-25 (4th Cir. 1995) *rev’g*, 14 BLR 1-37 (1990)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984).

Claimant next contends, generally, that the administrative law judge erred in rejecting medical opinions solely because they were based on non-conforming or non-qualifying pulmonary function studies. We agree. While the administrative law judge, following the Board’s instructions on remand, could accord little weight to Dr. Myers’s opinion regarding the extent of disability because it was based partly on a 1998 pulmonary function study that was invalidated by Drs. Burki and Fino, physicians with superior qualifications, *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147; *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985);

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), he must still consider the opinion as a whole. The administrative law judge while acknowledging that he had impermissibly discredited Dr. Sundaram's opinion because it was based, in part, on a non-qualifying pulmonary function study, *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Estep v. Director, OWCP*, 7 BLR 1-904 (1984), nonetheless concluded that Dr. Sundaram's opinion could not establish total disability because Dr. Sundaram did understand the exertional nature of claimant's usual coal mine employment. Because we are remanding this case for reconsideration of whether Dr. Sundaram's description of claimant's respiratory impairment can establish total disability, however, the administrative law judge must also reconsider the reasoning of Dr. Sundaram's opinion despite the fact that it was based, in part, on a non-qualifying pulmonary function study. *Cornett, supra*. Further, the administrative law judge concluded that, as the Board noted, the etiology of claimant's disability was irrelevant to Section 718.204(b)(2), and that he had, therefore, impermissibly discredited Dr. Dahhan's finding of total disability because Dr. Dahhan had attributed claimant's disability to obesity. Because Dr. Dahhan found that claimant could not perform his usual coal mine employment based on a respiratory impairment, however, the administrative law judge must reconsider his opinion at Section 718.204(b)(2)(iv).

Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence fails to establish total disability pursuant to Section 718.204(b)(2)(iv),⁴ and therefore a change in conditions, and remand the case for the administrative law judge to reconsider the evidence regarding total disability. *See Cornett, supra; Worrell, supra; Gee, supra*, and causation, if reached.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with these proceedings.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

⁴ The Board affirmed the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i)-(iii) as unchallenged on appeal in its previous Decision and Order.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge