BRB No. 09-0264 BLA

WILLIAM H. COOK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BENHAM COAL COMPANY	)	DATE ISSUED: 12/07/2009
	)	
Employer-Respondent	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

H. Kent Hendrickson (Hendrickson & Williams), Harlan, Kentucky, Kentucky, for employer.

Emily Goldberg-Kraft (Deborah Greenfield, Acting 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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (06-BLA-5349) of Administrative Law Judge Robert D. Kaplan rendered on a subsequent 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] In the last appeal, the Board reversed the administrative law judge's finding that the claim was untimely filed pursuant to 20 C.F.R. §725.308, and remanded the case to the administrative law judge for a determination as to whether new evidence submitted in support of this subsequent claim was sufficient to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and consideration of the merits of entitlement, if reached. *W.C.* [*Cook*] *v. Benham Coal Inc.*, 24 BLR 1-50 (2008). On remand, the administrative law judge credited claimant with thirty-nine years of coal mine employment, and found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a), 718.203(b), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's finding that total disability was not established under Section 718.204(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge erred in weighing the conflicting evidence at Section 718.204(b).

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.[2] 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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,

[1] Claimant filed the instant claim for benefits on December 9, 2004. Director's Exhibit 3. Claimant's prior claim, filed on May 27, 1986, was denied on January 5, 1990, for failure to establish any element of entitlement. Decision and Order on Remand at 3; *see* Director's Exhibit 1 at 1.

[2] The record indicates that claimant's coal mine employment was in Kentucky; accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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).

We first address claimant's argument that Section 718.204(b) provides four alternative means of establishing total disability. Claimant maintains that because the administrative law judge found that the qualifying pulmonary function study and arterial blood gas study evidence demonstrated total disability under Section 718.204(b)(2)(i) and (ii), he was obligated to find total disability established as an element of entitlement, notwithstanding any contrary medical evaluations of record under Section 718.204(b)(2)(iv), opining that claimant retained the respiratory capacity to perform his usual coal mine employment. Claimant's argument lacks merit.

In adjudicating the issue of total disability, the administrative law judge initially determined that claimant's last usual coal mine employment was as a bathhouse attendant, requiring at most "light work." Decision and Order on Remand at 11-13. He next determined that the weight of the more recent pulmonary function studies and the arterial blood gas studies supported a finding that claimant was totally disabled pursuant to Section 718.204(b)(2)(i) and (ii). *Id.* at 13-14. With respect to the medical opinion evidence under Section 718.204(b)(2)(iv), the administrative law judge accurately summarized Dr. Loqman's opinion, that claimant was totally disabled, and Dr. Baker's assessment of a moderate pulmonary impairment that would prevent claimant from performing the work of a coal miner or comparable work. However, the administrative law judge determined that these medical opinions were unreasoned and entitled to no weight, because neither physician indicated any awareness of claimant's bathhouse attendant job. *Id.* at 14-15. The administrative law judge credited the contrary opinion of Dr. Dahhan, that claimant had a mild pulmonary impairment that did not prevent him from performing his bathhouse attendant job, finding that it was well-reasoned and documented. *Id*. The administrative law judge concluded that:

> [T]he pre-1990 medical evidence is outdated and is entitled to no weight. Weighing all the current medical evidence, including the current laboratory studies, regarding the element of total disability, I find that the opinion of Dr. Dahhan, supported by his interpretation of his PTF and ABG, is entitled to the greatest weight. Consequently, I find that total disability has not been established based on the medical evidence as a whole. Based on the foregoing, Claimant has not established this element of entitlement. §718.204(b).

Decision and Order on Remand at 14.

Claimant does not challenge the administrative law judge's weighing of the conflicting medical opinions at Section 718.204(b)(2)(iv), but asserts that total respiratory disability is established as a matter of law based on the pulmonary function study and blood gas study evidence. However, as the administrative law judge is required to weigh all relevant evidence together at Section 718.204(b)(2), like and unlike, we reject claimant's argument that the administrative law judge committed reversible error in failing to find total disability established automatically once he found that the evidence under any single subsection was sufficient to support a finding of total disability. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Since claimant does not challenge the administrative law judge's identification of his last coal mine employment as a bathhouse attendant requiring light work, this determination is affirmed. *See* Decision and Order on Remand at 11-14; Claimant's Brief at 2; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416 (6th Cir. 1997); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

We now turn to the Director's assignments of error. The Director contends that the administrative law judge erred in crediting Dr. Dahhan's opinion, that claimant has a mild pulmonary impairment but can perform his bathhouse attendant duties as well as "moderate manual labor," based on the results of the pulmonary function study and arterial blood gas study he conducted. Specifically, the Director argues that because Dr. Dahhan failed "to explain how he reached that conclusion despite the qualifying post-bronchodilator results performed under his aegis,"[3] or to address the other qualifying pulmonary function studies of record, his opinion is unreasoned and merits no weight. Director's Brief at 6-7. As Dr. Dahhan was the only physician who opined that claimant was not disabled, the Director maintains that there is no contrary probative evidence sufficient to outweigh the qualifying pulmonary function studies of record.[4] The Director also asserts that Dr. Loqman's opinion, that claimant is totally disabled "from the work of a coal miner," Director's Exhibit 14, can be interpreted as indicating that claimant is

[3] Under Section 718.204(b)(2)(i), the administrative law judge noted: "Dr. Dahhan testified that his prebronchodilator PFT results are not valid because Claimant had difficulty holding his breath during its performance. However, the physician did not question the validity of the post-bronchodilator PFT which also resulted in qualifying values." Decision and Order on Remand at 13.

[4] The Director notes that the preponderance of the blood gas studies of record produced nonqualifying values, but since pulmonary function studies and blood gas studies measure different types of impairment, the Director maintains that claimant's normal blood gas study results are not necessarily inconsistent with a finding of total disability based on the qualifying pulmonary function studies of record. Director's Brief at 6.

disabled for any work, thus it does not matter whether Dr. Loqman knew what claimant's usual work was. Director's Brief at 7. The Director's arguments lack merit.

The administrative law judge explicitly noted the qualifying values of Dr. Dahhan's objective testing, and his determination to credit Dr. Dahhan's interpretation of his own test results constitutes a proper exercise of the administrative law judge's discretion as trier-of-fact. Since Dr. Dahhan was the only physician of record with an accurate understanding of claimant's usual coal mine employment as a bathhouse attendant, the administrative law judge could rationally find that his opinion was well-reasoned and entitled to greater weight than the otherwise qualifying objective evidence and the contrary opinions of Drs. Baker and Loqman, who exhibited no awareness of claimant's usual coal mine employment and its exertional requirements. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578, 22 BLR 1-107, 2-124 (6th Cir. 2000); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983)(determination as to whether a physician's report is sufficiently reasoned and documented is a credibility determination for the fact-finder). The Director essentially argues that the administrative law judge's credibility determinations and resolution of the conflicting evidence be overturned, an exercise beyond the scope of the Board's review. *See Anderson v. Valley Camp of Utah*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988).

As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that the weight of the evidence was insufficient to establish total disability under Section 718.204(b). Because claimant has failed to establish total disability, an essential element of entitlement, we affirm the administrative law judge's denial of benefits, and need not address the Director's further contentions with respect to the issue of disability causation under Section 718.204(c).

Lastly, the Director contends that the administrative law judge's rejection of Dr. Baker's opinion demonstrates that the Department of Labor (DOL) failed to fulfill its obligation to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim, as required under the Act. Director's Brief at 7 n.15.[5] We disagree.

[5] The Director submits: "If on remand the ALJ again finds that the medical evidence fails to establish total disability he should remand the case to the district director so that Dr. Baker can submit a supplemental medical report. …Remand at this point [to the district director] would be premature, however, since the record evidence may establish disability and entitlement notwithstanding any flaw in Dr. Baker's report." Director's Brief at 7 n.15.

The United States Court of Appeals for the Sixth Circuit has held that:

> DOL's duty to provide a 'complete pulmonary evaluation' does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of 'completeness' is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a 'complete pulmonary evaluation' under 30 U.S.C. §923(b) when it pays for an examining physician who (1) performs all of the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, --- BLR --- (6th Cir. 2009); *accord R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, --- BLR 1-__, BRB No. 08-0491 BLA (Aug. 28, 2009)(*en banc*).

When the *Greene* case was on appeal before the Board, the Board agreed with the Director's position at oral argument that: "if the DOL–sponsored pulmonary evaluation is deficient solely because of a miner's failure to provide the physician with accurate and complete information, this would not necessitate a remand of the case to the district director."[6] *S.G.* [*Greene*] *v. King James Coal Co.*, BRB Nos. 07-0898 BLA and 07-0898 BLA-A, slip op. at 9 (July 17, 2008)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting) (unpub.). We conclude that under the standard set forth in *Greene*, absent a showing that Dr. Baker either failed to render an opinion on the issue of total disability, or failed to perform the required testing, his pulmonary evaluation for the Department of Labor is not deficient as a matter of law. The record reflects that Dr. Baker performed the required testing, and rendered an opinion on the issue of total disability, relying on the information provided to him, which did not include information identifying claimant's last coal mine employment as a bathhouse attendant.[7] We are unpersuaded,

[6] After determining that the physician had conducted the full range of testing and addressed each element of entitlement, but relied upon an inaccurate smoking history, the Board concluded: "[thus, the physician's] opinion was deficient, not because of any failure on behalf of the Director, but because claimant provided [the physician] with a smoking history considerably shorter in duration than that found by the administrative law judge. *S.G.* [*Greene*] *v. King James Coal Company*, BRB Nos. 07-0898 BLA and 07-0898 BLA-A, slip op. at 9 (July 17, 2008) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting) (unpub.).

[7] Dr. Baker's report reflects the claimant's coal mine employment history as comprising the period of June 1946 to June 1985, listing his coal mine employment jobs as: "miner, loader, shuttle-car, timbers, shot, fireman, track, beltline, rock duster" and

therefore, by the Director's assertion that "[t]he administrative law judge effectively found that Dr. Baker's opinion was incomplete because he did not fully address the issue of disability." Director's Response at 7 n.15. To the contrary, the administrative law judge did not find Dr. Baker's opinion to be incomplete, but rather, he determined that it was based on an inaccurate understanding of claimant's last coal mine employment, in that the physician was unaware of claimant's last job as a bathhouse attendant and its exertional requirements. Decision and Order on Remand at 14. Because the Director is required to provide miners with a complete evaluation, not a dispositive one, s*ee* 30 U.S.C. §932(b), 20 C.F.R. §725.406(a); *Newman v. Director, OWCP*, 745 F.2d 1162, 1168 (8th Cir. 1984), we conclude that the Director satisfied his statutory obligation to provide claimant with a complete pulmonary evaluation on all of the requisite elements of entitlement.

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

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

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adding: "Stated he worked 39 years. 38 years was underground and 1 year was surface mining." Director's Exhibit 15 at 10.