

BRB No. 07-0431 BLA

M.W.)
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 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 02/29/2008
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 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Gregory F. Jacob, 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: SMITH, McGRANERY and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2005-BLA-5942) of
Administrative Law Judge Joseph E. Kane 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 Based on a concession by the Director,

¹ Claimant filed an initial claim for benefits on November 18, 1986, which was
denied by the district director, and the case was administratively closed on August 5,
1987. Director's Exhibit 1. Claimant filed a duplicate claim on January 30, 1990, which
was denied on July 12, 1990. Director's Exhibit 2. A third claim filed on February 11,
1994 was also denied on July 27, 1994. Director's Exhibit 2. Claimant also filed a fourth
claim on February 24, 1997, which was denied on June 24, 1997, for failure to establish

Office of Workers' Compensation Programs (the Director), that claimant proved the existence of clinical pneumoconiosis, the administrative law judge initially found that claimant satisfied his burden to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Reviewing the merits of the claim, the administrative law judge determined that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). However, because the administrative law judge determined that claimant failed to prove ten years of coal mine employment, he found that claimant was not entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).² Furthermore, as the administrative law judge determined that there was no evidence to establish disease causation, he found that claimant failed to prove that his pneumoconiosis arose out of coal mine employment. Additionally, the administrative law judge determined that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred by failing to provide a more detailed explanation of the analysis by which he found only 1.93 years of coal mine employment, and that he erred by failing to give any credible rationale for his

any of the requisite elements of entitlement. Director's Exhibit 4. Claimant filed his current subsequent claim for benefits on January 15, 2002. Director's Exhibit 6. The district director issued a Proposed Decision and Order denying benefits on June 18, 2003. Director's Exhibit 19. At claimant's request, the case was referred to the Office of Administrative Law Judges for a formal hearing. On September 17, 2004, Administrative Law Judge William S. Colwell issued an Order remanding the case to the district director in order for the Department of Labor (DOL) to provide claimant with a new pulmonary evaluation. After additional medical development, the district director denied benefits, and the case was assigned to Administrative Law Judge Joseph E. Kane (the administrative law judge) for a formal hearing, which was held on August 17, 2006. The administrative law judge issued his Decision and Order – Denial of Benefits on January 4, 2007.

² Section 718.203(b) provides:

[I]f a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of coal mine employment.

20 C.F.R. §718.203(b).

rejection of claimant's testimony that he worked at least fifteen years in the coal mines. Claimant's Brief at 3. Claimant also contends that the administrative law judge erred in determining that his pneumoconiosis and pulmonary disability were not related to coal dust exposure pursuant to Sections 718.203 and 718.204(c). *Id.* The Director responds, urging the Board to vacate the administrative law judge's denial of benefits on several grounds. First, the Director contends that the administrative law judge's evaluation of the employment evidence was incomplete and, therefore, that his determination on the length of coal mine employment cannot be sustained. Director's Brief at 4. Second, the Director contends that the Board must vacate the administrative law judge's finding on disease causation at Section 718.203 as it was dependent, in part, on his length of coal mine employment determination. *Id.* Third, the Director urges the Board to vacate the administrative law judge's total disability finding because the record lacks a credible opinion on this element of entitlement. Director's Brief at 4. Lastly, the Director contends that the Board must vacate the administrative law judge's finding at Section 718.204(c) because if the administrative law judge on remand finds that claimant has established that his clinical pneumoconiosis arose out of coal mine employment, the record would lack a credible medical opinion on disability causation. Director's Brief at 4-5.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (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, 718.204. Failure to establish any one of these elements precludes a finding of 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).

A. Length of Coal Mine Employment:

Claimant and the Director assert that the administrative law judge erred by failing to explain the basis for his length of coal mine employment determination and, therefore, that his resulting disease and disability causation findings, pursuant to Sections 718.203(b) and 718.204(c), are flawed. We agree. Claimant asserts that he worked fifteen years in the coal mines. In the Decision and Order – Denying Benefits (Decision and Order), the administrative law judge noted that the district director made a finding of 1.93 years of coal mine employment, that claimant alleged that he worked at least fifteen

years in coal mine employment, and that the Social Security earnings report showed fourteen quarters of coal mine employment (3.5 years). Decision and Order at 3, Director's Exhibit 19; Hearing Transcript at 9, 17. After identifying this conflicting evidence, the administrative law judge summarily concluded:

After considering all of the evidence of record, I find that [c]laimant worked in coal mine employment for only 1.93 years. He last worked in the Nation's coal mines in 1967. The evidence in the record does not support [c]laimant's argument of [fifteen] years.

Decision and Order at 3.

We agree with the parties that because the administrative law judge did not resolve the conflict in the evidence or explain why he accepted the district director's finding of only 1.93 years of coal mine employment, the administrative law judge has failed to comply with the Administrative Procedure Act (APA), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).³ Furthermore, as the administrative law judge did not consider all of the relevant employment evidence, which includes statements from former co-workers indicating that claimant worked for at least ten years in the coal mines, we must vacate his finding of 1.93 years of coal mine employment. Director's Exhibit 1; *see* 30 U.S.C. §932(b); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

B. Disease Causation:

To the extent that the administrative law judge erred in determining the length of claimant's coal mine employment, and that determination influenced his consideration of whether claimant established disease causation at Section 718.203, we vacate his finding that claimant failed to establish that his pneumoconiosis arose out of coal mine employment. Thus, we vacate the administrative law judge's denial of benefits in this claim and remand the case for further consideration.⁴

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because the claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 6.

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that, in establishing the existence of pneumoconiosis based on the concession of the Director, Office of Workers' Compensation (the Director), that claimant has the disease,

If, on remand, the administrative law judge finds that claimant established at least ten years of coal mine employment, he must find that claimant is entitled to the rebuttable presumption at Section 718.203(b), and evaluate the evidence relevant to rebuttal of that presumption. Alternatively, if the administrative law judge again determines that claimant has fewer than ten years of coal mine employment, claimant is not eligible for the Section 718.203(b) presumption. Pursuant to Section 718.203(c), a living miner with fewer than ten years of coal mine employment must prove, by competent evidence, that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(c). As the Director points out, however, if there is no competent evidence to satisfy claimant's burden of proving disease causation, the administrative law judge may infer that claimant's clinical pneumoconiosis is related to his coal mine employment, if he has had no other dust exposure. *See Wisniewski v. Director, OWCP*, 929 F. 2d 952, 957, 15 BLR 2-57, 2-67 (3d Cir. 1991); *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995) (Decision and Order on Reconsideration)(*en banc*); Director's Brief at 4-5.

C. Complete Pulmonary Evaluation:

If the administrative law judge finds that claimant has clinical pneumoconiosis arising out of coal mine employment, the Director maintains that the administrative law judge must remand the case to the district director in order for the DOL to satisfy its obligation to provide claimant with a complete pulmonary evaluation.⁵ *See* 20 C.F.R.

claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

⁵ Dr. Hussain examined claimant on March 13, 2002 at the request of the Department of Labor and diagnosed pneumoconiosis due to coal dust exposure of thirteen years' duration. Director's Exhibit 12. He further opined that claimant was totally disabled due, in part, to pneumoconiosis. *Id.* The DOL later advised Dr. Hussain that claimant worked only 1.93 years in coal mine employment. *Id.* In a report dated December 12, 2003, Dr. Hussain stated that he no longer attributed claimant's respiratory condition to coal dust exposure, and thus opined that claimant did not have coal workers' pneumoconiosis. *Id.* Similarly, on January 11, 2005, Dr. Simpao examined claimant at the request of DOL and diagnosed claimant with pneumoconiosis due to fifteen years of coal mine employment. Director's Exhibit 23. On February 25, 2005, Dr. Simpao submitted a supplemental opinion, taking into consideration a corrected coal mine history of 1.93 years, and opined that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 23. Dr. Simpao opined that claimant had a "mild impairment[,] which may affect his ability to perform regular coal miner duties." *Id.*

§725.406(a); *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); accord *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984); see also *Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.).

The Director explains that the Board may not affirm the administrative law judge's finding of total disability because the administrative law judge "failed to explain why he credited Dr. Hussain's 2002 qualifying blood-gas study over Dr. Simpao's non-qualifying 2005 study." Director's Brief at 5. According to the Director, the administrative law judge cannot consider the earlier arterial blood gas study to be more probative. *Id.* Moreover, since Dr. Hussain based his disability opinion solely on the results of the 2002 qualifying blood gas study, the Director asserts that the administrative law judge may not rely on his opinion to support a finding of total disability pursuant to Section 718.204(b)(2)(iv). Because the only remaining medical opinion of record is by Dr. Simpao, who failed to state a definitive opinion on the issue of total disability, the Director concedes that claimant has not received a complete pulmonary evaluation with respect to the issue of whether he has a totally disabling respiratory impairment.⁶ Director's Brief at 5.

Moreover, the Director further concedes that if the administrative law judge determines that claimant has coal workers' pneumoconiosis, the opinions of Drs. Hussain and Simpao are no longer credible with respect to the issue of disability causation, since neither physician diagnosed the disease. *Id.* Therefore, the Director maintains that claimant also is entitled to have the case remanded to the district director for further medical development on this element of entitlement. We accept the Director's

⁶ The Director maintains that the blood gas study evidence is, at most, equally probative and, therefore, insufficient to satisfy claimant's burden of proof. Director's Brief at 5. The Director further states:

Moreover, since Dr. Hussain's finding of total disability rests only upon his blood-gas study and since, in our view, the blood-gas study evidence as a whole does not indicate total disability, Dr. Hussain's opinion cannot be credited. Since, as the [administrative law judge noted], Dr. Simpao did not definitely address total disability, the record would lack a credible opinion on that issue."

Director's Brief at 5. Thus, the Director concedes that "if the administrative law judge again reaches total disability, he should remand the case for the Director to obtain a credible opinion on total disability." *Id.*

concession that claimant has not received a complete pulmonary evaluation if it is determined by the administrative law judge that claimant has clinical pneumoconiosis arising out of coal mine employment.

Thus, to summarize our instructions to the administrative law judge on remand, he must weigh all of the relevant evidence as to the length of claimant's coal mine employment and explain his factual determinations in accordance with the APA. Once he has determined the length of claimant's coal mine employment, the administrative law judge must reconsider whether claimant has established that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. As the Director concedes, if the administrative law judge determines that claimant has clinical pneumoconiosis arising out of coal mine employment, he must remand the case to the district director to obtain a credible medical opinion on the issues of total disability and disability causation.

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge