BRB No. 06-0528 BLA

POSEY L. STUMP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	DATE ISSUED: 01/26/2007
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-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (04-BLA-6736) of Administrative Law Judge Daniel L. Leland rendered on a claim filed on May 13, 2003 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). After crediting claimant with thirty-five years of coal mine employment, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and found that although the x-ray and medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4), the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative

law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii),(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits.[1] The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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, 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, 718.201, 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*).

Pursuant to 20 C.F.R. §718.202(b)(2)(ii), the administrative law judge found that none of the four blood gas studies of record was qualifying[3] for total disability. Claimant contends that the administrative law judge erred in failing to find that total disability was established, arguing that there was a qualifying September 12, 2002 blood gas study submitted in this case. Claimant's Brief at 6-7. Claimant's contention is misplaced. In his Decision and Order, the administrative law judge listed the resting and exercise values of four blood gas studies dated June 30, 2003, August 26, 2003, January 29, 2004, and January 19, 2005, and found that all of the studies were nonqualifying. Decision and Order at 4, 7; Director's Exhibits 10, 26; Claimant's Exhibit 3; Employer's Exhibit 1. As employer asserts and a review of the record discloses, the record does not contain a blood gas study dated September 12, 2002. Accordingly, we reject claimant's allegation of

[1] Employer notes its disagreement with the administrative law judge's finding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a).

[2] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b)(2)(i),(iii), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix C. *See* 20 C.F.R. §718.204(b)(2)(ii). A "nonqualifying" study exceeds those values.

error at Section 718.204(b)(2)(ii). *See Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985).

Pursuant to 20 C.F.R. §718.202(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Gaziano, Rasmussen, Zaldivar, and Crisalli. Dr. Gaziano diagnosed a moderate pulmonary impairment that would prevent claimant "from performing heavy to very heavy work." Claimant's Exhibit 3. Dr. Rasmussen diagnosed a moderate loss of lung function, and concluded that claimant "does not retain the pulmonary capacity to perform his last regular coal mine job." Director's Exhibit 9. By contrast, Dr. Zaldivar opined that although claimant had a moderate obstructive ventilatory impairment, his cardiopulmonary stress test was normal, and taking all of claimant's testing into account, claimant was able to perform his last coal mine work as a truck driver. Employer's Exhibit 1 at 3. Upon review of evidence of claimant's other coal mine jobs, Dr. Zaldivar concluded that claimant is "fully capable of performing medium work on a regular basis and intermittent heavy work." Employer's Exhibit 8 at 2. Dr. Crisalli concluded that claimant has a mild to moderate obstructive impairment, but his exercise tolerance is not limited and he retains the capacity to perform his "previous jobs in the coal mines." Employer's Exhibit 4 at 6; Employer's Exhibit 9.

The administrative law judge found that claimant's usual coal mine employment was as a supply motorman.[4] Decision and Order at 7 n.5. Then, considering the medical opinions, the administrative law judge found that Dr. Gaziano's opinion did not support a finding of total disability because Dr. Gaziano "did not indicate whether claimant's pulmonary impairment precludes him from performing his usual coal mine work." Decision and Order at 7. The administrative law judge further found that, in view of Dr. Zaldivar's opinion that claimant's cardiopulmonary stress test was normal, Dr. Rasmussen's opinion that claimant is totally disabled was not supported by the stress test, or by pulmonary function or blood gas testing. Finally, the administrative law judge determined that although Drs. Zaldivar and Crisalli had incorrectly stated that claimant's usual coal mine work was driving a rock truck, "their opinions clearly demonstrate that claimant is able to do the heavier work of a supply motorman." Decision and Order at 7. The administrative law judge therefore credited the "well reasoned and documented" opinions of Drs. Zaldivar and Crisalli over Dr. Rasmussen's opinion. *Id*.

Claimant contends that the administrative law judge could not rely on the reports from Drs. Zaldivar and Crisalli because the doctors based their opinions on the mistaken

[4] As summarized by the administrative law judge, in his job as a supply motorman claimant had to load, haul, and unload supplies, including belt structures weighing over one hundred pounds, fifty-pound bags of rock dust, and timbers that were seven to ten feet long. Decision and Order at 2-3.

view that claimant's usual coal mine work was that of a truck driver. Contrary to claimant's contention, the administrative law judge properly considered the opinions based on his finding that claimant worked as a supply motorman, and he reasonably compared the doctors' opinions with the "heavier work" required of a supply motorman. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). We therefore reject claimant's contention.

Claimant argues further that the administrative law judge failed to consider the supplemental report by Dr. Gaziano dated March 8, 2004, and thus failed to consider all relevant evidence in determining whether claimant was precluded from performing his usual coal mine work. Claimant's Brief at 8-9; *see* Decision and Order at 7. Claimant's argument has merit.

In weighing the medical opinion evidence, the administrative law judge did not address the supplemental letter wherein Dr. Gaziano stated that upon reviewing his evaluation of claimant, "this degree of impairment would prevent [claimant] from performing heavy to very heavy work." Claimant's Exhibit 3. In light of the administrative law judge's finding that claimant's work as a supply motorman involves "heavier work," and Dr. Gaziano's statement in the supplemental report refers to claimant's ability to perform heavy work, the administrative law judge's failure to consider this supplemental report cannot be ignored. *See* 30 U.S.C. §923(b). Consequently, we vacate the administrative law judge's finding with regard to Dr. Gaziano's opinion and remand the case for the administrative law judge to consider if Dr. Gaziano's supplemental letter, offering an opinion on whether claimant's impairment would preclude him from performing his usual coal mine work, is sufficient to establish total disability. *Hunley v. Director, OWCP*, 8 BLR 1-323, 1-326 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-705 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Consequently, we vacate the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(b)(2)(iv) and remand the case for him to reconsider the medical opinion evidence, in light of the exertional requirements of claimant's job duties. *See Walker*, 927 F.2d at 1-183-84, 15 BLR at 2-22.

If, on remand, the administrative law judge finds the medical opinion evidence sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), he must then weigh together all of the relevant evidence to determine whether the record as a whole

supports a finding of total disability, *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*), and then must determine whether claimant's total respiratory disability is due to pneumoconiosis pursuant to Section 718.204(c)(1). *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

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

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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BETTY JEAN HALL
Administrative Appeals Judge