BRB No. 89-0345 BLA

JOHN CUTLER)
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order and Denial of Claimant's Motion to Exclude of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

Eileen McCarthy (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and Denial of Claimant's Motion to Exclude (86-BLA-03703) of Administrative Law Judge Ralph A. Romano denying

benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). The administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with eleven years and five months of qualifying coal mine employment as stipulated to by the parties. The Director, Office of Workers' Compensation Programs (the Director), did not contest the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge found, however, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c), and accordingly denied benefits. Claimant appeals, contending that the administrative law judge erred in denying his motion to exclude evidence. Claimant further contends that the evidence is sufficient to establish total disability under Section 718.204(c)(1) and (c)(4). The Director responds,[1] requesting that the Board remand this case for the administrative law judge to state his grounds for denying claimant's motion to exclude evidence and to reconsider the evidence under

[1] The Director has filed a Motion to Remand in this case. The Board accepts the Director's Motion to Remand as his response brief.

Section 718.204(c)(1) and (c)(4).[2]

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 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 establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Claimant contends that the qualifying pulmonary function study obtained by Dr. Karlavage establishes total disability under Section 718.204(c)(1), and that the administrative law judge erred in denying his motion to exclude from the record the

[2] The administrative law judge's findings under Section 718.204(c)(2) and (c)(3), and with regard to length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

reports of Drs. Cander and Levinson, which invalidated this study. See Director's Exhibit 32; Claimant's Exhibit 4. Claimant and the Director assert that the administrative law judge's Denial of Claimant's Motion to Exclude does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), as the administrative law judge failed to explain why he rejected the motion. We agree. Consequently, we vacate the administrative law judge's Denial of Claimant's Motion to Exclude, and remand this case for the administrative law judge to provide his rationale for denying the motion. See Wojtowicz v. Duquesne Light Co., 12 BLR 1-162 (1989). Moreover, since the admissibility of this evidence is being reconsidered, see North American Coal Co. v. Miller, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), we also vacate the administrative law judge's findings under Section 718.204(c)(1) and (c)(4) for the administrative law judge on remand to reconsider the evidence thereunder. See Hall v. Director, OWCP, 12 BLR 1-80 (1988).

Finally, both claimant and the Director challenge the administrative law judge's analysis of the medical opinion evidence under Section 718.204(c)(4).[3] The Director notes that the administrative law judge did not address the physical limitations set

[3] Claimant asserts that the opinion of Dr. Karlavage, his treating physician, is entitled to great weight. Although an administrative law judge may, in his discretion, give greater weight to the opinion of a treating physician, he is not required to do so.

forth in the Medical Assessment portion of Dr. Kaplan's report, and asserts that the opinion of Dr. Kaplan may support Dr. Karlavage's assessment of total disability.[4] See Director's Exhibit 11; Claimant's Exhibit 8. Further, a review of the record indicates that the reports of Drs. Cubler and Ahluwalia also list physical limitations which may be attributable to claimant's pulmonary disease. See Director's Exhibits 10, 32. On remand, therefore, the administrative law judge must reassess the medical opinions under Section 718.204(c)(4), determine whether the physical limitations listed in the reports of Drs. Kaplan, Cubler and Ahluwalia reflect claimant's subjective complaints or the physicians' medical conclusions and, if the latter, the administrative law judge must then compare the exertional requirements of claimant's usual coal mine employment with these limitations and make a determination as to whether total respiratory disability may be inferred. See Jordan v. Benefits Review Board, 876 F.2d 2455, 12 BLR 2-371 (11th Cir. 1989); Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986). If on remand the administrative law judge finds total disability established under Section 718.204(c) pursuant to Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987), and Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986), he must then determine whether this total disability is due to pneumoconiosis under Section 718.204(b) pursuant to Scott v. Mason Coal Co., 14

See generally Wetzel v. Director, OWCP, 8 BLR 1-139, 1-142 (1985).

[4] The Director's argument that the administrative law judge failed to discuss Dr. Karlavage's reliance upon all of his own diagnostic tests as well as Dr. Kaplan's

BLR 1-37 (1990)(en banc).

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge

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diagnostic studies is without support in the record. See Decision and Order at 6.