BRB No. 01-0856 BLA

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| DANIEL FARLEY | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| MEADOW RIVER COAL COMPANY | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND | ) | |
| | ) | |
| Employer/Carrier-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 and Decision On Motion For Reconsideration of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal-Worker's Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order - Denying Benefits and Decision On Motion For Reconsideration (00-BLA-0989) of Administrative Law Judge Robert J. Lesnick 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] In his May 18, 2001 Decision and Order Denying Benefits, the administrative law judge credited claimant with thirty-five years of coal mine employment, found employer to be the responsible operator, found the existence of pneumoconiosis established, found that claimant's pneumoconiosis arose out of coal mine employment, but found that total disability was not established because the pulmonary function studies of record were non-qualifying, the majority of the blood gas studies were non-qualifying, there was no evidence of cor pulmonale with right-sided congestive heart failure, and the two physicians' opinions of record did not establish total disability because they were in equipoise, *i.e.*, both physicians looking at generally the same evidence concluded, on the one hand, that claimant was totally disabled from a pulmonary standpoint, and on the other hand, that claimant was not. The administrative law judge, therefore, denied benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration arguing that the medical opinion evidence was not in equipoise because the more credible evidence, *i.e.*, the opinion of Dr. Rasmussen, established total disability due to pneumoconiosis. The administrative law judge, however, denied the Director's motion again finding that the medical opinion evidence was in equipoise and did not therefore establish total disability. Specifically, the administrative law judge found problems with both physicians' opinions; *i.e.*, Dr. Rasmussen failed to explain how and why the moderate respiratory impairment he diagnosed rendered claimant totally disabled, and Dr. Zaldivar failed to consider the exertional requirements of claimant's last coal mine job in determining that claimant was not totally disabled.

On appeal, claimant challenges the administrative law judge's finding regarding the medical opinion evidence of total disability. Carrier responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director is not participating in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 in a living miner's claim pursuant to 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, 718.202, 718.203, 718.204. Failure to establish any one 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*).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence was in equipoise and that claimant, therefore, failed to carry his burden of establishing a totally disabling respiratory impairment.[2] Specifically, claimant contends that Dr. Rasmussen's opinion was more credible on the issue of total disability because he was familiar with claimant's last coal mine employment while Dr. Zaldivar was not. Claimant also contends that the administrative law judge erred in finding the medical opinions in equipoise because Dr. Rasmussen's opinion that claimant was totally disabled was based on test results which were independently validated by the Department of Labor while Dr. Zaldivar's opinion, that claimant was not totally disabled, was based on an exercise blood gas study that showed less than predicted normal results. Thus, claimant contends that Dr. Zaldivar's opinion is unreasoned because he based his finding of no impairment on this one test result rather than on the evidence as a whole.

The administrative law judge acknowledged in his decision on reconsideration that Dr. Zaldivar's opinion was not well-reasoned because Dr. Zaldivar did not consider the exertional requirement of claimant's last coal mine job. This was proper. *See Eagle v. Armco*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991).[3] Because the administrative law judge's determination

[2] Since claimant does not challenge the administrative law judge's findings that total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii), because the pulmonary function studies were non-qualifying, the majority of the blood gas studies were non-qualifying and there was no evidence of cor pulmonale with right-sided congestive heart failure, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Dr. Zaldivar found that claimant's work for the last ten years of his coal mine employment was as a boss at the tipple, where he helped to do whatever work needed to be done. Dr. Zaldivar concluded that claimant was capable of performing his usual work which required arduous labor. Employer's Exhibit 1.

provided a valid reason for discrediting Dr. Zaldivar's opinion, we need not address claimant's additional argument, that his opinion was not supported by the objective data. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

In contrast, Dr. Rasmussen stated that claimant was employed as a preparation plant foreman during his last ten years of coal mine employment and that this job required considerable stair climbing, helping to lift heavy weights such as pipes, grates and screens, and assisting a mechanic doing repairs. Thus, Dr. Rasmussen concluded that claimant's last job entailed some heavy manual labor of which he was no longer capable. Director's Exhibit 11.

In *Eagle*, the Court rejected the Board's affirmance of an administrative law judge's finding that claimant failed to establish total disability when the administrative law judge relied on the opinion of a physician who found that claimant should be able to tolerate the usual activities required of a coal miner. Instead, the court held that "a physician who asserts that a claimant is capable of performing assigned duties 'should state his knowledge of the physical efforts required and relate them to the miner's impairment.'" *Eagle*, 15 BLR at 512, 2-205, *citing Walker*, 927 F.2d at 184, 2-22. The court vacated the decision of the Board denying benefits, and remanded the case to the Board to direct an award of benefits to claimant because the court held that there was no credible contradiction to the only other opinion of record, that of Dr. Rasmussen, finding claimant incapable of the heavy work required by his coal mine employment. Because the instant case, like *Eagle*, contains only one credible physician's opinion, *i.e.*, the opinion of Dr. Rasmussen, we hold that it is sufficient to establish total disability. Moreover, as claimant contends, in addition to various testing, including laboratory tests showing a moderate loss of pulmonary function, Dr. Rasmussen also conducted a physical examination of claimant, took work and medical histories of claimant, and considered claimant's symptoms. Dr. Rasmussen's opinion appears, therefore, to be based on a number of factors, in addition to test results. Director's Exhibit 11; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Additionally, because a moderate respiratory impairment may be totally disabling depending on the exertional requirements of claimant's usual coal mine employment, *see Eagle*, *supra*; *Walker*, *supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Steel Corp.*, 9 BLR 1-43 and 13 BLR 1-46 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *see also Cornett v. Benham Coal, Inc.* 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Black Diamond Coal Mining Co. v. Benefits Review Board*, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985), and Dr. Rasmussen opined that claimant's last usual coal mine employment entailed some heavy manual labor of which he was no longer capable, Dr. Rasmussen's opinion is sufficient, as a matter of law, to establish total disability. Director's Exhibit 11; *Eagle*, *supra*; *Walker*, *supra*.

Accordingly, we agree with claimant that the administrative law judge erred in finding the medical opinions to be in "equipoise," inasmuch as Dr. Rasmussen's opinion was clearly the more credible medical opinion and is sufficient, as a matter of law, to establish total disability. *Eagle*, *supra*; *Walker*, *supra*. In determining whether claimant has established total disability, however, the administrative law judge must weigh together all probative evidence, like and unlike. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Hence, the case must be remanded for the administrative law judge to weigh Dr. Rasmussen's opinion of total disability against the contrary pulmonary function and blood gas study evidence of record in order to determine whether the evidence establishes total disability. *See Shedlock*, *supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits and Decision On Motion For Reconsideration are affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring in part, dissenting in part:

I join with my colleagues in affirming the administrative law judge's rejection of Dr. Zaldivar's opinion as unreasoned, and would also remand the case to the administrative law judge to weigh Dr. Rasmussen's opinion along with the pulmonary function and blood gas study evidence of record in determining whether total disability is established at 20 C.F.R. §718.204(b)(2)(iv). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). I disagree with the majority, however, insofar as they hold that Dr. Rasmussen's opinion establishes total disability, as a matter of law, pursuant to

*Eagle v. Armco*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991). The Administrative Procedure Act (APA), 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), vests fact-finding jurisdiction with the Office of Administrative Law Judges. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). The Benefits Review Board is empowered to perform a substantial evidence review of the administrative law judge's findings of fact, not to render factual findings, including credibility determinations. While the facts of the within proceeding are similar to *Eagle* it is for the trier of the fact to render the findings of fact after consideration of all relevant evidence. Accordingly, I would also remand this case for the administrative law judge to determine whether Dr. Rasmussen's opinion, when considered in light of the exertional requirements of claimant's usual coal mine employment, establishes total disability and weigh the opinion along with the pulmonary function and blood gas study evidence. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Steel Corp.*, 9 BLR 1-43 and 13 BLR 1-46 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Black Diamond Coal Mining Co. v. Benefits Review Board*, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985).

ROY P. SMITH
Administrative Appeals Judge