BRB No. 99-0619 BLA

GEORGE H. SAYLOR Claimant-Petitioner v. CRYSTAL COAL COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

George H. Saylor, Loyall, Kentucky, *pro se*.

Deron L. Johnson (Boehl Stopher & Graves), Prestonsburg, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (1998-BLA-593) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits 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). The administrative law judge credited

claimant with at least twelve years of coal mine employment based on the parties stipulation, and as this case was filed after March 31, 1980, applied the regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge concluded that if claimant had established the existence of pneumoconiosis, he would be entitled to the presumption at 20 C.F.R. §718.203(b) as rebuttal had not been established. The administrative law judge found the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c), but insufficient to establish that claimant's totally disabling respiratory impairment was caused by his coal mine employment at 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant generally challenges the findings of the administrative law judge on entitlement. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 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.[1] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, we note that the administrative law judge properly found that claimant had

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[1] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit, the jurisdiction where the miner last worked. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

two dependents, and that claimant had smoked one pack of cigarettes a day for thirty years. *See* Decision and Order at 3; Director's Exhibit 1; Hearing Transcript at 19-20. Furthermore, the administrative law judge correctly concluded that claimant was entitled to the presumption at Section 718.203(b) based on his more than twelve years of coal mine employment and that rebuttal had not been established. *See* 20 C.F.R. §718.203(b). We, therefore, affirm these findings of the administrative law judge as supported by substantial evidence.

At Section 718.202(a)(1), the administrative law judge considered all the x-rays in the record and acted within his discretion when he accorded greater weight to the x-ray interpretations of the physicians who are both Board-certified radiologists and B-readers. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge properly concluded that the weight of the x-ray interpretations by the most qualified readers was negative for pneumoconiosis, and therefore, insufficient to meet claimant's burden of proof. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Perry*, *supra*; Director's Exhibits 17-19, 43-51, 53, 54, 57-60. At Section 718.202(a)(2), the administrative law judge correctly found that claimant, a living miner, had not established the existence of pneumoconiosis as the record did not contain any biopsy evidence. *See* 20 C.F.R. § 718.202(a)(2). Likewise, at Section 718.202(a)(3), the administrative law judge correctly concluded that claimant, a living miner, was not entitled to the regulatory presumptions as the record contained no evidence of complicated pneumoconiosis, and this claim had been filed after January 1, 1982. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306. We, therefore, affirm the findings of the administrative law judge that claimant failed to establish the existence of pneumoconiosis at Sections 718.202(a)(1)-(3) as it is supported by substantial evidence.

At Section 718.202(a)(4), however, we must vacate the findings of the administrative law judge and remand this case for further consideration. While it is permissible for the administrative law judge to accord less weight to the diagnosis of coal workers' pneumoconiosis by Dr. Baker because his positive x-rays were read as negative by the more qualified readers, *see Winters v. Director, OWCP*, 6 BLR 1-877 (1984); *see also Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996), the administrative law judge, in the instant case, failed to consider Dr. Baker's additional diagnosis of chronic bronchitis, possible COPD, and hypoxemia, which the physician related to coal mine employment and cigarette smoking, under 20 C.F.R. §718.201. *See* 20 C.F.R. §§718.201, 718.202(a)(4); *Perry*, *supra*. In addition, the administrative law judge should also consider the medical opinion of Dr. Dahhan in light of Section 718.201.[2] *Id*.

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[2] While the administrative law judge permissibly discredited the medical opinion of Dr. Dalloul because the opinion did not reflect the physician's knowledge of claimant's

At Section 718.204(c)(1), the administrative law properly concluded that the only qualifying pulmonary function study of record [3] was not supportive of claimant's burden of proof as the physician who administered the test invalidated it due to suboptimal effort. *See* 20 C.F.R. §718.204(c)(1), Appendix B; Director's Exhibits 53, 65 at 10-11. Likewise, the administrative law judge correctly concluded that the blood gas study evidence of record was nonqualifying under the regulatory criteria, and thus, insufficient to establish the presence of a totally disabling respiratory impairment, and that the record did not contain any evidence of cor pulmonale. *See* 20 C.F.R. §§718.204(c)(2), Appendix C, 718.204(c)(3). Thus, the administrative law judge properly concluded that claimant failed to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(1)-(3).

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smoking history, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993), the administrative law judge's discounting of Dr. Dalloul's opinion because of his erroneous length of coal mine employment finding is questionable since both Drs. Dahhan and Baker relied on twenty-four years of coal mine employment while Dr. Dalloul relied on twenty-seven years of coal mine employment. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). The administrative law judge, however, need not reconsider this opinion on remand as he has provided a proper rational for rejecting this report. *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984).

[3] A qualifying pulmonary function study is one which meets the regulatory criteria for total disability. *See* 20 C.F.R. §718.204(c)(1), Appendix B.

Moreover, the administrative law judge did not err when he found the evidence of record sufficient to meet claimant's burden of demonstrating the presence of a totally disabling respiratory impairment at Section 718.204(c)(4). In so doing, the administrative law judge permissibly accorded greatest weight to the medical opinion of Dr. Dahhan, which indicates that claimant lacked the respiratory capacity to perform his usual coal mine employment or comparable work, because the physician thoroughly examined claimant and considered the information provided by his objective test results, and because the physician is highly qualified in pulmonary medicine. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g*, 16 BLR 1-11 (1991); *Carson, supra*; *Clark, supra*. The administrative law judge also permissibly found the report of Dr. Dalloul, "that the miner's breathing is greatly affected by his Black Lung disease", supportive of Dr. Dahhan's finding of a totally disabling respiratory impairment.[4] Thus, the administrative law judge properly found that the medical opinion evidence of record was sufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c). *See Director, OWCP v. Rowe*, 719 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We, therefore, affirm this finding of the administrative law judge as it is supported by substantial evidence.

Finally, in light of the Board's decision to vacate the findings of the administrative law judge on the existence of pneumoconiosis at Section 718.202(a)(4), we must also vacate the administrative law judge's findings at Section 718.204(b) and remand this case for further consideration. Although the administrative law judge correctly stated that claimant must establish that his totally disabling respiratory impairment was due at least in part to his pneumoconiosis, *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), the administrative law judge improperly applied a rule out standard to the report of Dr. Dalloul. *See* Decision and Order at 13; *Id.* Thus, should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge must consider if claimant's totally disabling respiratory impairment arises at least in part from his pneumoconiosis as defined at Section 718.201. *Id.*

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[4] The administrative law judge correctly noted that Dr. Baker diagnosed a mild impairment due to chronic bronchitis and pneumoconiosis, but did not render an opinion on the issue of total disability. *See* Director's Exhibit 15; *Moore v. Hobet Mining & Construction Co.*, 6 BLR 1-706 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge