

BRB No. 05-0685 BLA

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| ARTHUR M. GOBERT |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 03/15/2006 |
| |) | |
| BETHENERGY MINES, INCORPORATED |) | |
| |) | |
| 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.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5079) of Administrative Law Judge Daniel L. Leland 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 fifteen years of coal mine employment, from 1969 through 1984, and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant’s April 3, 2002 filing date. Weighing the

medical evidence of record, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), but sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). However, because the evidence was insufficient to establish the existence of pneumoconiosis, the administrative law judge found that claimant's total respiratory disability was not due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. In particular, claimant contends that the administrative law judge erred in failing to consider all of the relevant medical evidence. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.¹

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'Keefe 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 establish 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge found the medical opinion evidence insufficient to establish the existence of pneumoconiosis. The record contains the medical opinions of Drs. Gress, Malhotra, Schaaf, Zlupko, and Pickerill. Decision and Order at 4-6. In weighing the medical opinion evidence, the administrative law judge found that the opinions of Drs. Gress, Schaaf, and Malhotra, which diagnosed pneumoconiosis, were not well reasoned and, therefore, entitled to little weight. Decision and Order at 6. Specifically, the administrative law judge found that Drs. Gress and Schaaf relied on their own positive x-ray readings, which were against the weight of the

¹ The parties do not challenge the administrative law judge's decision to credit claimant with fifteen years of coal mine employment, or his findings under 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(b)(2). These findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

x-ray evidence and, therefore, were not well reasoned. Decision and Order at 6; Director's Exhibits 16, 17, 23; Claimant's Exhibits 5, 6. In addition, the administrative law judge found that Dr. Malhotra failed to explain his finding that claimant's industrial bronchitis was due to coal dust exposure and not smoking and, thus, was poorly reasoned and accorded it no weight. Decision and Order at 6; Director's Exhibit 31; Claimant's Exhibit 7. Rather, the administrative law judge credited the contrary opinions of Drs. Zlupko and Pickerill, that claimant was not suffering from pneumoconiosis, finding that these opinions were consistent with the x-ray evidence of record and, thus, were well reasoned and documented. Decision and Order at 6; Director's Exhibit 31; Employer's Exhibits 4, 8.

In challenging the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis, claimant contends that the administrative law judge erred in failing to consider all of the relevant medical evidence. Specifically, claimant contends that substantial evidence does not support the administrative law judge's finding that Dr. Malhotra did not explain the basis for his diagnosis of industrial bronchitis due to coal dust exposure. Claimant's Brief at 4-5. Additionally, claimant contends that the administrative law judge failed to consider the deposition testimony of Dr. Schaaf. Claimant's Brief at 6. These contentions have merit.

In weighing the medical opinion evidence, the administrative law judge accorded no weight to the opinion of Dr. Malhotra, finding that the physician failed to explain his opinion that claimant's industrial bronchitis was due to coal dust exposure and not his history of smoking. Decision and Order at 6. However, as claimant contends, in his January 6, 2005 deposition Dr. Malhotra discussed the bases for his conclusion that claimant's industrial bronchitis was due to coal dust exposure. Claimant's Exhibit 7. Specifically, Dr. Malhotra stated that

I felt this man definitely was suffering from industrial bronchitis due to many years of coal dust exposure. That's the only way I could explain his advanced respiratory symptoms and especially his pulmonary ventilation studies and the blood gas reports that were given to me from Conemaugh Hospital. I felt he had a severe degree of industrial bronchitis from his coal dust exposure.

Claimant's Exhibit 7 at 16. He further stated that because claimant quit smoking well in advance of his leaving his coal mine employment and the beginning of his respiratory symptoms, if smoking had contributed at all to his respiratory symptoms, it was very minimal. Claimant's Exhibit 7 at 17. In light of Dr. Malhotra's deposition testimony, we hold that substantial evidence does not support the administrative law judge's finding that Dr. Malhotra failed to explain his diagnosis. Consequently, we vacate the administrative law judge's finding with regard to Dr. Malhotra's opinion and remand the case for the

administrative law judge to reassess Dr. Malhotra's opinion that claimant's industrial bronchitis was due to coal dust exposure. *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).

With respect to Dr. Schaaf, the administrative law judge found that Dr. Schaaf based not only his diagnosis of coal workers' pneumoconiosis on his "incorrect x-ray reading" but also his diagnosis of obstructive lung disease and chronic bronchitis due to coal dust exposure. Decision and Order at 6. In his January 30, 2004 deposition, Dr. Schaaf provided a detailed explanation of his diagnosis. Claimant's Exhibit 5. Specifically, Dr. Schaaf stated that the abnormal objective testing, including the abnormal blood gas studies, support a diagnosis of obstructive airways disease due to claimant's coal dust exposure and that smoking was excludable as a cause. Claimant's Exhibit 5 at 14-17, 21-23, 32-33. However, the administrative law judge did not include Dr. Schaaf's deposition in his recitation of the medical evidence, or discuss this testimony in weighing Dr. Schaaf's opinion. Decision and Order at 4-6. As Dr. Schaaf's testimony, if credited, may be supportive of a finding of legal pneumoconiosis and, because the administrative law judge has not considered all the relevant evidence of record, we vacate his weighing of Dr. Schaaf's opinion and remand the case to the administrative law judge for further consideration. *Hunley*, 8 BLR 1-326; *Tackett*, 7 BLR at 1-705; *Branham*, 2 BLR at 1-113.

On remand, the administrative law judge must consider all aspects of the physicians' opinions, including whether their opinions are supportive of a finding of legal pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.201(a)(2); 718.202; *Kline v. Director, OWCP*, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989). In reconsidering the medical opinion evidence, the administrative law judge must fully discuss not only the written reports of Drs. Malhotra and Schaaf, but also the explanations contained in their respective depositions. Director's Exhibits 16, 17, 31; Claimant's Exhibits 5, 7; 20 C.F.R. §§718.201, 718.202(a)(4); *Hunley*, 8 BLR at 1-326; *Tackett*, 7 BLR at 1-705; *Branham*, 2 BLR at 1-113. Consequently, we vacate the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4) and remand the case for the administrative law judge to reassess the relevant evidence.

If, on remand, the administrative law judge finds the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he must then weigh together all of the relevant evidence to determine whether the record as a whole supports a finding of pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Furthermore, if on remand, the administrative law judge finds the existence of pneumoconiosis established under Section 718.202(a), he must then determine whether claimant's total respiratory disability is due to pneumoconiosis pursuant to Section 718.204(c).

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge