BRB No. 07-0536 BLA

R.C. Claimant-Petitioner v. LONE MOUNTAIN PROCESSING, INCORPORATED and ARCH COAL, INCORPORATED c/o UNDERWRITERS SAFETY & CLAIMS Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/14/2008 DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (05-BLA-5968) of Administrative Law Judge Adele Higgins Odegard 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). This case involves a claim filed on March 17, 2004. After crediting claimant with twenty-four years of coal mine employment,[1] the administrative law judge found that, although the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director responds, urging that the case be remanded for the administrative law judge to reconsider whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[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,

[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 16. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983).

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 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 initially contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We need not address this issue. Section 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Consequently, the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is alone sufficient to establish the existence of pneumoconiosis. Thus, any error committed by the administrative law judge in her consideration of the x-ray evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant and the Director each assert that the administrative law judge erred in her consideration of whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The record contains only one medical report; Dr. Rasmussen's report of the Department of Labor-sponsored pulmonary evaluation conducted on June 29, 2004. In his report dated August 26, 2004, Dr. Rasmussen noted that, while claimant's resting blood gases were normal, his pulmonary function study "revealed [a] minimal, irreversible obstructive ventilatory impairment." Director's Exhibit 12 at 22. Dr. Rasmussen further noted that claimant's "single breath carbon monoxide diffusing capacity was minimally reduced." Director's Exhibit 12 at 26. Dr. Rasmussen concluded that, "Overall, these studies indicate minimal loss of resting lung function. [Claimant] is not able to perform heavy and very heavy manual labor."[3] Director's Exhibit 12 at 27. Dr. Rasmussen concluded that the miner's "coal mine dust exposure with its resultant complicated Category A pneumoconiosis is the primary cause

[3] In rendering this opinion, Dr. Rasmussen characterized claimant's last coal mine employment as "that of a continuous miner operator. He pulled and hung heavy electrical cable. He rock dusted lifting 50 [pound] rock dust bags. He set timbers when pillaring. Thus, he did considerable heavy manual labor." Director's Exhibit 12 at 26.

of [the miner's] impaired function." *Id.* The administrative law judge found, and it is not contested, that claimant did not suffer from complicated pneumoconiosis.

In her consideration of whether Dr. Rasmussen's opinion supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the opinion was unclear and inadequately reasoned:

> Dr. Rasmussen concluded that the Claimant had a minimal loss of lung function and he could not do heavy manual labor (DX 12). Dr. Rasmussen also noted that, "he has complicated pneumoconiosis Category A, which is qualifying for black lung benefits." It is not clear if Dr. Rasmussen concluded that Claimant was unable to do heavy manual labor because he found complicated pneumoconiosis, or if he concluded Claimant was unable to do heavy manual labor due to his minimal loss of lung function. However, because the pulmonary test results submitted with Dr. Rasmussen's report are all non-qualifying, Dr. Rasmussen's cursory and conclusory statement is not sufficiently reasoned or supported to establish that the Claimant is totally disabled.

Decision and Order at 12-13.

Upon review, we conclude that substantial evidence supports the administrative law judge's determination that it was unclear to what extent Dr. Rasmussen's assessment of claimant's inability to perform heavy labor was based upon the doctor's inaccurate diagnosis of complicated pneumoconiosis. The administrative law judge acted within her discretion in finding that Dr. Rasmussen's statement, that claimant was unable to perform heavy manual labor, was "cursory and conclusory" and, therefore, was not sufficiently reasoned or supported to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 13; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Because there is no other medical opinion evidence of record, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Perry*, 9 BLR at 1-2.

Claimant finally contends that because the administrative law judge did not credit Dr. Rasmussen's opinion, the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994). The record reflects that Dr. Rasmussen conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement. Director's Exhibit 12; 20 C.F.R. §§718.101, 718.104, 725.406(a). The administrative law judge acted within her discretion to find that Dr. Rasmussen's opinion was not sufficiently reasoned or supported to establish total disability. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 12-13. We, therefore, hold that the Director provided claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring and dissenting:

I respectfully disagree with the majority's decision to affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

As the Director, Office of Workers' Compensation Programs (the Director), accurately notes, Dr. Rasmussen did not base his assessment of the extent of claimant's pulmonary impairment and inability to perform heavy labor on his diagnosis of complicated pneumoconiosis. Dr. Rasmussen explained that his finding of a minimal yet disabling pulmonary impairment was based upon his interpretation of the results of claimant's pulmonary function study and claimant's single-breath diffusing capacity test. Director's Exhibit 12 at 26-27. Consequently, the administrative law judge's finding that Dr. Rasmussen's assessment of an inability to perform heavy labor may have been based upon the doctor's diagnosis of complicated pneumoconiosis is not supported by substantial evidence. *See* 33 U.S.C. §921(b)(3); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Moreover, the administrative law judge erred in finding that Dr. Rasmussen's opinion was not sufficiently reasoned because he relied upon the results of a non-qualifying[4] pulmonary function study. Test results that exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Dr. Rasmussen diagnosed a minimal pulmonary impairment that would preclude claimant from performing heavy and very heavy manual labor. Dr. Rasmussen's assessment, if credited, could support a finding of total disability, depending upon the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Director's Exhibit 12. Thus, the administrative law judge should have determined the nature of claimant's usual coal mine work and compared the exertional requirements of that work with Dr.

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Rasmussen's opinion as to claimant's work capability.[5] Consequently, I would vacate the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration.[6]

Because I would remand the case to the administrative law judge to reconsider whether Dr. Rasmussen's opinion supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), I agree with the Director that claimant's argument regarding the Director's obligation to provide him with a complete pulmonary evaluation is "premature." Director's Brief at 2.

[5] Before an administrative law judge can determine whether a claimant is able to perform his usual coal mine work, she must identify the claimant's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). It is claimant's burden to establish the exertional requirements of his usual coal mine employment. *Id.*; *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984). In addition to Dr. Rasmussen's description of claimant's coal mine employment, the record contains claimant's statement that his last coal mine employment as a continuous miner operator required him to sit for three hours a day, stand for six hours a day, lift twenty pounds twenty times per day, and carry twenty pounds thirty feet, twenty times per day. Director's Exhibit 4; *see also* Hearing Transcript at 11.

[6] If, on remand, the administrative law judge found the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), she would be required to weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*). If the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), she would have to determine whether the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

I concur in all other respects with the majority decision.

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BETTY JEAN HALL
Administrative Appeals Judge