BRB No. 04-0236 BLA

ROBERT H. BEVILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TAFT COAL SALES & ASSOCIATES, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 11/26/2004
	)	
NATIONAL UNION FIRE INSURANCE, COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls, LLP), Birmingham, Alabama, for claimant.

Dana C. Hulbert (Ferreri & Fogle), Louisville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2002-BLA-5457) of Administrative Law Judge Robert J. Lesnick awarding 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 found, in accordance with the parties' concessions, twenty-eight years and four months of coal mine employment and that employer was the proper responsible operator. Decision and Order at 3, 7-8. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that claimant[1] established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). Decision and Order at 9-11. The administrative law judge further found that the record evidence was also sufficient to establish that claimant suffered from a totally disabling respiratory impairment and that claimant's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(b),(c). Decision and Order at 12-14. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of a totally disabling respiratory impairment and that this impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 filed pursuant to 20 C.F.R. Part 718, 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

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[1]Claimant, Robert H. Bevill, filed his claim for benefits on March 19, 2001 and the district director awarded benefits on June 27, 2002. Director's Exhibits 1, 23. Employer subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 24.

[2]The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order must be vacated and the case remanded to the administrative law judge for further consideration.[3]

Employer argues that the administrative law judge erred in finding that claimant was totally disabled and that claimant's total disability was due to pneumoconiosis because the administrative law judge mischaracterized the medical opinion of Dr. Hawkins, and thereby violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).[4] Employer's Brief at 8-11. We agree. In finding that claimant established a totally disabling respiratory impairment, the administrative law judge considered the opinions of Drs. Hawkins, Goldstein and Broudy.[5] The administrative law judge noted that the exertional requirements of claimant's last coal mine job, as a dozer operator, required moderate physical exertion.[6] Decision and Order at 12. The administrative law judge then concluded that total disability was established as he accorded controlling weight to the medical opinion of Dr. Hawkins, that claimant had a "severe pulmonary impairment." Decision and Order at 12. Based on Dr. Hawkins's assessment, the administrative law judge found that claimant would not be able to perform the duties of his last coal mine employment which would require

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit as the miner was last employed in the coal mine industry in the State of Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

[4]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

[5]The administrative law judge's credibility determinations with respect to the opinions of Drs. Goldstein and Broudy are affirmed as these findings are not specifically challenged on appeal. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack*, 6 BLR 1-710.

[6]The administrative law judge made this determination based on claimant's testimony that although the actual running of the dozer did not take much physical effort, he had to perform maintenance on his equipment requiring the use of 25-30 pound sledge hammers, crow bars and jacks as well as the use of a shovel up to three times a day to clean the dozer of mud and rock. Decision and Order at 12; Hearing Transcript at 23-26.

moderate physical exertion. Decision and Order at 12. Earlier in his Decision and Order, however, the administrative law judge found that Dr. Hawkins had opined that claimant had a "mild pulmonary impairment" based on claimant's complaints.[7] *Id.*; Director's Exhibit 7. Since the issue is the degree of difficulty caused by the impairment in performing claimant's usual coal mine employment, the administrative law judge must explain how he interprets Dr. Hawkins's opinion as finding an impairment which is both mild and severe.

Although the administrative law judge is empowered to weigh the evidence, inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, the basis for the administrative law judge's inference of total disability in this particular case cannot be affirmed without further explanation. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We therefore vacate the administrative law judge's findings under Section 718.204(b)(2)(iv) and remand this case to the administrative law judge for further consideration.

Employer further contends that the administrative law judge erred in finding that claimant established that his total disability was due to pneumoconiosis as he failed to properly weigh the opinion of Dr. Hawkins. Employer's Brief at 9-11. Specifically, employer contends that the administrative law judge erred in finding disability causation established pursuant to Section 718.204(c) as the opinion of Dr. Hawkins is equivocal and unsubstantiated. We reject employer's argument that the opinion of Dr. Hawkins, linking the miner's impairment to coal dust exposure, is equivocal.[8] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Director's Exhibit 7. The administrative law judge's finding that Dr. Hawkins attributed 50% of claimant's respiratory impairment to his pneumoconiosis is supported by the record. Decision and Order at 13-14; Director's Exhibit 7. However, because we are remanding this case for reconsideration of Dr. Hawkins's opinion on the issue of total disability, we must vacate the administrative law judge's disability causation finding and instruct the administrative law judge to reconsider the credibility of Dr. Hawkins's

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[7]Regarding the degree of impairment, Dr. Hawkins reported:

> Mild impairment. While Mr. Bevill describes little dyspnea on exertion, spirometry demonstrates severe airflow obstruction and chest x-ray demonstrates multiple abnormalities described.

Director's Exhibit 7.

[8]Dr. Hawkins opined that 50% of claimant's pulmonary impairment is due to coal dust exposure, based on claimant's clinical and work histories as well as the objective test results. Director's Exhibit 7.

opinion on the issue of disability causation if the opinion is found to establish a totally disabling respiratory impairment. Decision and Order at 14.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge