

BRB No. 05-0372 BLA

HARVEY FARLEY )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 HEARTLAND COAL COMPANY )  
 )  
 and ) DATE ISSUED: 11/22/2005  
 )  
 WEST VIRGINIA COAL WORKERS' )  
 PNEUMOCONIOSIS FUND )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayon, Inez, Kentucky, for claimant.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (04-BLA-5095) of Administrative Law Judge Richard A. Morgan 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).<sup>1</sup> This case involves a claim filed on October 1, 2002.<sup>2</sup> After crediting claimant with at least eighteen years of coal mine employment, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also 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). The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, however, found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant also 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. Carrier responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, contending that the administrative law judge erred in finding the evidence insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Director also argues that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.<sup>3</sup>

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<sup>1</sup>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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup>The administrative law judge noted that claimant filed an earlier claim on January 22, 1999. Decision and Order at 2 n.1. The administrative law judge further noted that this claim was withdrawn on May 8, 2001. This earlier 1999 claim is not found in the record.

<sup>3</sup>Because no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, pursuant to 20 C.F.R. §718.204(b) (2000),<sup>4</sup> a miner must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Revised Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner’s totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a “substantially contributing cause” of the miner’s disability if it:

- (i) Has a material adverse effect on the miner’s respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

In enacting this revised regulation, the DOL explained:

The Department did not mean to alter the current law through its proposals, however, or to suggest that *any* adverse effect, no matter how limited, was sufficient to establish total disability due to pneumoconiosis. Rather, the Department meant only to codify the numerous decisions of the courts of appeals which, in the process of deciding when a miner is totally disabled

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<sup>4</sup>The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

due to pneumoconiosis, have also ruled on what evidence is legally sufficient to establish that element of entitlement. In order to clarify this consistent intent, the Department has added the word “material” to §718.204(c)(i) and “materially” to §718.204(c)(ii). In so doing, the Department intends merely to implement the holdings of the courts of appeals. Thus, evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner’s total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability.

65 Fed. Reg. 79,946 (2000).

The administrative law judge found that the opinions of Drs. Zaldivar, Gaziano and Baker are insufficient to establish that claimant’s total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 18. Claimant and the Director contend that the administrative law judge erred in his consideration of Dr. Zaldivar’s opinion. We agree. Although Dr. Zaldivar opined that the vast majority of claimant’s pulmonary impairment was attributable to smoking, he also opined that claimant’s coal mine employment made a “small contribution.” Director’s Exhibit 12. After noting that Dr. Zaldivar opined that claimant’s coal workers’ pneumoconiosis made “only a small contribution” to his totally disabling pulmonary impairment, the administrative law judge found that the evidence was insufficient to support a finding that claimant’s coal workers’ pneumoconiosis was a substantially contributing cause of his totally disabling respiratory or pulmonary disability. Decision and Order at 18. The administrative law judge found that the evidence was sufficient to establish that claimant’s coal workers’ pneumoconiosis made “merely a negligible, inconsequential, or insignificant contribution to [his] total disability.” Decision and Order at 8. Although evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to a miner’s total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability, *see* 65 Fed. Reg. 79,946 (2000), Dr. Zaldivar found that claimant’s coal mine employment made a small contribution to his total disability. The administrative law judge failed to explain the basis for his finding that a “small contribution” is equivalent to a “negligible, inconsequential, or insignificant contribution.” Consequently, the administrative law judge erred in his consideration of Dr. Zaldivar’s opinion.

The administrative law judge also failed to explain the bases for his finding that the opinions of Drs. Gaziano<sup>5</sup> and Baker<sup>6</sup> are unreasoned. Decision and Order at 18. In

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<sup>5</sup>Dr. Gaziano examined claimant on November 7, 2002. Director’s Exhibit 11. In a report dated November 13, 2002, Dr. Gaziano diagnosed coal workers’ pneumoconiosis due to coal mining. Director’s Exhibit 11. Dr. Gaziano further opined that claimant suffered from a severe impairment and was “totally disabled for coal mining.” *Id.* In

addition, the administrative law judge failed to explain the significance of the fact that Drs. Gaziano and Baker did not have the results of Dr. Zaldivar's carboxyhemoglobin test.<sup>7</sup> *Id.* Consequently, the administrative law judge's analysis of whether the medical opinion evidence is sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) does not comply with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

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response to the question as to the extent that claimant's diagnosed conditions contributed to the impairment, Dr. Gaziano wrote "N/A." *Id.*

<sup>6</sup>Dr. Baker examined claimant on August 23, 2003. In a report dated August 23, 2003, Dr. Baker diagnosed coal workers' pneumoconiosis due to coal dust exposure. Claimant's Exhibit 1. Dr. Baker also diagnosed chronic obstructive pulmonary disease and bronchitis, each of which he attributed to coal dust exposure and cigarette smoking. *Id.* Dr. Baker opined that claimant suffered from a moderate impairment. *Id.* Dr. Baker further opined that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.* Dr. Baker attributed claimant's pulmonary impairment to his diagnosed conditions, which include coal workers' pneumoconiosis, chronic obstructive pulmonary disease and bronchitis. *Id.* On a separate questionnaire, Dr. Baker indicated that claimant's pulmonary impairment was due to cigarette smoking and coal dust exposure. *Id.*

<sup>7</sup>Although Dr. Zaldivar interpreted claimant's carboxyhemoglobin test as revealing a smoker of almost two packs of cigarettes a day, he failed to explain the significance of these findings. Although Dr. Zaldivar attributed the vast majority of claimant's pulmonary impairment to his smoking, he opined that claimant's coal mine employment also made a small contribution. Both Drs. Gaziano and Baker relied upon significant smoking histories. Dr. Gaziano noted that claimant had smoked a pack of cigarettes a day since 1958. Director's Exhibit 11. Dr. Baker opined that claimant had smoked cigarettes since he was a teenager. Claimant's Exhibit 1. Although Dr. Baker noted that claimant had smoked one pack of cigarettes per day, he noted that claimant was currently smoking one half a pack of cigarettes per day. *Id.* Dr. Baker attributed claimant's pulmonary impairment to both cigarette smoking and coal dust exposure. *Id.* Thus, both Drs. Gaziano and Baker were aware of claimant's extensive smoking history.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and remand the case for further consideration.

Finally, claimant argues that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We agree with the position of the Director, whose duty is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-89-90, that a remand of this case is not warranted based upon the facts of this case. Claimant selected Dr. Gaziano to perform his Department-sponsored pulmonary evaluation. As the Director notes, the administrative law judge did not "wholly discredit" Dr. Gaziano's opinion, but rather found that it was outweighed by Dr. Zaldivar's opinion. Director's Brief at 3-4. Consequently, we hold that the Director satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation.

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

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 concur in the majority's opinion insofar as it affirms Administrative Law Judge Richard A. Morgan's (the administrative law judge's) findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(b). I also agree with the majority's decision to vacate the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). However, I disagree with the majority's decision to accept the Director's position that he satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation.

Claimant selected Dr. Gaziano to perform his Department-sponsored pulmonary evaluation. Dr. Gaziano examined claimant on November 7, 2002. In a report dated November 13, 2002, Dr. Gaziano diagnosed coal workers' pneumoconiosis. Director's Exhibit 11. Dr. Gaziano also opined that claimant suffers from a severe impairment and is "totally disabled for coal mining." *Id.* In response to a question as to the extent that claimant's diagnosed conditions contributed to his impairment, Dr. Gaziano wrote "N/A." *Id.*

The administrative law judge found that Dr. Gaziano's opinion regarding the cause of claimant's totally disabling pulmonary impairment was "largely unreasoned." Decision and Order at 8. The administrative law judge also found that Dr. Zaldivar's opinion was the "best reasoned" opinion and was the only opinion supported by a carboxyhemoglobin test. *Id.* The Director contends that he satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation because the administrative law judge did not "wholly discredit" Dr. Gaziano's opinion but "simply found it outweighed by Dr. Zaldivar's opinion." Director's Brief at 4.

I would hold that claimant's argument, that Dr. Gaziano's report does not satisfy the Director's obligation to provide him with a complete, credible pulmonary evaluation, is premature. The case must be remanded for the administrative law judge to reconsider whether the evidence, including Dr. Gaziano's opinion, is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Should the administrative law judge, on remand, conclude that Dr. Gaziano's opinion is either incomplete or not credible,<sup>8</sup> it is my position that he would then address whether the Director has satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation. Hence, until the administrative law judge is provided an opportunity to reconsider the evidence on remand, it is premature to address whether the Director satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation in this case.

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>8</sup>I would further instruct the administrative law judge to consider whether Dr. Gaziano adequately addressed the etiology of claimant's total disability. I would specifically instruct the administrative law judge to address the significance of Dr. Gaziano notation of "N/A" in the section of his report concerning the etiology of claimant's impairment. *See* Director's Exhibit 11.