

BRB No. 99-0448 BLA

DENZIL HOWARD)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Jill M. Otte (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Benefits (96-BLA-1610) of Administrative Law Judge Robert L. Hillyard 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 twenty years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2. This is the second time this case is on appeal before the Board. Pursuant to claimant's first appeal, the Board remanded this case for the administrative law judge to consider Dr. Baker's opinion in light of the exertional requirements of claimant's usual coal mine employment, and if reached to weigh all the contrary probative evidence, like and unlike, on the issue of total disability, and further, if reached, to make a causation finding. *Howard v. Director, OWCP*, BRB No. 98-0144 BLA

(Oct. 6, 1998)(unpub.).¹ On remand, pursuant to the Board’s instructions, the administrative law judge reconsidered Dr. Baker’s opinion and found the evidence of record insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Benefits were therefore denied. In the appeal before the Board, claimant now argues that the case must be remanded for a complete pulmonary evaluation. The Director, Office of Workers’ Compensation Programs (the Director), responds, urging that the case be remanded to the district director for the development of additional medical evidence.

The Board’s scope of review is defined by statute. If the administrative law judge’s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the Director failed to provide claimant with a complete pulmonary evaluation. We agree. Dr. Baker diagnosed chronic obstructive pulmonary disease and chronic bronchitis due to cigarette smoking/coal dust exposure, chest pain by history, and assessed the degree of impairment as “mild with decreased FEV1 and chronic bronchitis.” Director’s Exhibit 12. The administrative law judge noted, however, that there is no way to compare Dr. Baker’s response of “none” under the description of limitations on physical activities and his finding of “mild” impairment, to the exertional requirements of claimant’s last coal mine employment. Thus, the administrative law judge found that Dr. Baker’s opinion does not provide him with “sufficient guidance” regarding claimant’s ability

¹ In its previous Decision and Order, the Board affirmed the administrative law judge’s length of coal mine employment and 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(c)(1) and (2) findings as they were unchallenged on appeal. The Board noted that total disability could not be established at Section 718.204(c)(3) as there was no evidence in the record to support a finding of total disability under that subsection. Finally, the Board affirmed the administrative law judge’s finding that Dr. Clarke’s opinion of total disability could not establish total disability under Section 718.204(c)(4) as it was unreasoned and undocumented. *Howard v. Director, OWCP*, BRB No. 98-0144 BLA (Oct. 6, 1998)(unpub.).

to engage in usual coal mine employment and is therefore insufficient to establish total disability pursuant to Section 718.204(c)(4). *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986).

Thus, as claimant contends and the Director concedes, based on the evidence of record,² claimant has not been provided a complete, credible pulmonary evaluation to which he is entitled under the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401; 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2025 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*). We, therefore, vacate the administrative law judge's denial of benefits, and remand this case to the district director for further development of the medical evidence.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is vacated, and the case is remanded to the district director for further development of the evidence consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

² Dr. Clarke found a totally disabling respiratory impairment. Director's Exhibit 19. In its previous Decision and Order, however, the Board held that the administrative law judge properly discredited the opinion as not well reasoned and documented. *Howard v. Director, OWCP*, BRB No. 98-0144 BLA (Oct. 6, 1998)(unpub.).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge