

BRB No. 06-0384 BLA

SAMUEL C. HOUSE)
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 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 10/31/2006
 LESLIE RESOURCES, INCORPORATED)
)
 and)
)
 ZURICH AMERICAN INSURANCE)
 GROUP)
)
 Employer/Carrier-)
 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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Donald G. Smith (Morgan, Madden, Brashear & Collins), London, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (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.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-5366) of Administrative Law Judge Rudolf L. Jansen rendered 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). Based upon his review of the record, the administrative law judge accepted the stipulation by the parties as accurate and credited claimant with 11.86 years of coal mine employment.¹ The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that although the evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(i)-(iv), the evidence did not establish that claimant's total disability is 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 misconstrued the parties' stipulation as the length of claimant's coal mine employment, and therefore erred in crediting claimant with only 11.86 years of coal mine employment. Claimant argues further that the administrative law judge erred in excluding post-hearing evidence proffered by the parties. Claimant further contends that the administrative law judge erred in his consideration of Dr. Baker's opinion when he found that claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that if the Board affirms the administrative law judge's finding that Dr. Baker's opinion was non-probative, then the Director has failed to fulfill his statutory duty, pursuant to Section 413(b), 30 U.S.C. 932(b), to provide claimant with a complete pulmonary evaluation.

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).

¹ The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

With respect to the administrative law judge's length of coal mine employment finding, claimant asserts that the administrative law judge misconstrued the parties' stipulation, arguing that they agreed that claimant had "*at least* 11.86 years of coal mine employment, not that there w[ere] only 11.86 years" of coal mine employment. Claimant's Brief at 4 (emphasis in original). We disagree. At the hearing, the administrative law judge inquired, "I believe we're going to stipulate, are we not, that [claimant] had 11.86 years of qualifying coal mine employment, as demonstrated on the Social Security Earnings Record? Is that correct?" Hearing Transcript (Tr.) at 8-9. Both claimant's and employer's counsel replied, "Yes, your Honor." Tr. at 9. The Social Security Administration records support the administrative law judge's finding. Director's Exhibit 5. Therefore, the administrative law judge did not mischaracterize the parties' stipulation and he properly credited claimant with 11.86 years of coal mine employment.

Claimant next contends that the administrative law judge erred in excluding evidence submitted by the parties post-hearing.² Claimant's contention lacks merit. As the administrative law judge found, no party requested that the record be left open to receive post-hearing evidence, and consequently, the record was closed. Tr. at 5-8, 26.

² The administrative law judge noted that, although the record was not left open for the submission of post-hearing evidence, both claimant and employer had submitted additional evidence after the hearing:

Following the hearing, Claimant and the Employer both submitted additional evidence in support of their positions. Claimant's evidence consisted of the following: a copy of a medical report issued by Dr. Glen R. Baker on April 26, 2002 and his Curriculum Vitae; a copy of the March 17, 2003 chest x-ray interpretation report of an undated x-ray by Dr. Bapuji Narra; and a copy of the July 10, 2002 chest x-ray interpretation report of an x-ray dated February 10, 2002 by Dr. Baker. Employer's evidence consisted of the following: a copy of a May 3, 2005 chest x-ray interpretation of an x-ray dated April 26, 2002 by Dr. Dennis Halbert together with his Curriculum Vitae; a copy of the May 3, 2005 chest x-ray interpretation of an x-ray dated July 9, 2002 by Dr. Halbert; a copy of the May 10, 2005 chest x-ray interpretation of an x-ray dated July 9, 2002 by Dr. Larry West together with his Curriculum Vitae; a copy of the April 27, 2005 chest x-ray interpretation of an x-ray dated April 26, 2002 by Dr. William Kendall and his Curriculum Vitae; and a copy of the April 27, 2005 chest x-ray interpretation of an x-ray dated July 9, 2002 by Dr. Kendall and his Curriculum Vitae.

Decision and Order at 2 n.1.

Therefore, the administrative law judge acted properly in excluding the proffered post-hearing evidence from the record. *See Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-359 (1985).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to Sections 718.202(a)(4) and 718.204, the administrative law judge considered two medical opinions. Dr. Baker, who examined claimant on behalf of the Department of Labor, diagnosed claimant with COPD with moderate obstructive defect, hypoxemia, and chronic bronchitis, all of which Dr. Baker indicated were due to “cigarette smoking/? coal dust exposure.” Director’s Exhibit 9. Dr. Broudy examined claimant on behalf of employer and opined that claimant does not suffer from pneumoconiosis, but has chronic obstructive pulmonary disease due to cigarette smoking. Director’s Exhibit 11.

With respect to the existence of pneumoconiosis, the administrative law judge found that, by using a question mark when listing coal dust exposure as a possible cause for claimant’s lung diseases, Dr. Baker failed to provide a definite opinion as to the etiology of the lung conditions he diagnosed. Consequently, the administrative law judge found that Dr. Baker’s opinion was poorly reasoned and documented. Decision and Order at 11. In addressing total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge stated that:

Dr. Baker diagnosed Claimant with a moderate respiratory impairment. However, he failed to discuss whether Claimant was capable of performing his previous coal mine work. A physician’s report which is silent as to a particular issue is not probative of that issue. Therefore, I find Dr. Baker’s report to be non-probative regarding the issue of total disability.

Decision and Order at 13. With respect to disability causation, the administrative law judge again found that Dr. Baker’s opinion was “non-probative.” Decision and Order at 15.

Claimant contends that the administrative law judge erred in failing to accord additional weight to Dr. Baker’s opinion. Specifically, claimant argues that Dr. Baker “has the best view of the Claimant’s position” because he “has examined the Claimant on multiple occasions” and thus “has had more contact with the Claimant” Claimant’s Brief at 6. Contrary to claimant’s contention, the administrative law judge was not required to credit Dr. Baker’s opinion based on the number of times he has examined

claimant. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Additionally, the administrative law judge was within his discretion to find that Dr. Baker's opinion was not well documented or reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We therefore reject claimant's contention that the administrative law judge erred in his weighing of Dr. Baker's opinion.

In view of the administrative law judge's finding that Dr. Baker's opinion was indefinite and non-probative, the Director requests that we remand this case to the district director "for Dr. Baker to provide a more definitive explanation of his disease causation findings." Director's Brief at 1. A remand to the district director is appropriate because of the Director's concession that Dr. Baker's opinion fails to meet the Director's statutory obligation to provide claimant with a complete pulmonary evaluation sufficient to substantiate his claim. *See Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994)(granting the Director's motion to remand for a complete pulmonary evaluation to be provided); *Petry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990)(*en banc*)(same); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-53 (1990)(*en banc*)(same).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is vacated, the Director's motion is granted, and the case is remanded to the district director for a complete pulmonary evaluation to be provided to claimant, and for reconsideration of his claim in light of the new evidence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge