

BRB No. 06-0921 BLA

G.J.)
)
 Claimant-Petitioner)
)
 v.)
)
 TROJAN MINING)
)
 and) DATE ISSUED: 09/24/2007
)
 TRAVELERS INSURANCE COMPANY)
)
 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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Shawn C. Conley and J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6329) of Administrative Law Judge Larry S. Merck denying benefits on a subsequent 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).¹ The administrative law judge credited claimant with sixteen years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment and total disability pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(b). However, the administrative law judge found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer filed a brief in response to claimant's Notice of Appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

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 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

¹ Claimant filed his initial claim on August 5, 1999. Director's Exhibit 1. It was denied on November 6, 2001, because the evidence did not establish the existence of pneumoconiosis. *Id.* Claimant and the primary responsible operator (Trojan Mining) did not pursue this claim any further. The secondary responsible operator (Sun Glo Coal Company, Incorporated) filed a motion for reconsideration on December 3, 2001 to request that the Decision and Order state that Sun Glo was formally dismissed as a party. *Id.* No additional documentation regarding this request is contained in the record. Claimant filed this claim on March 20, 2003. Director's Exhibit 2.

Claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability due to pneumoconiosis at Section 718.204(c). The administrative law judge considered the reports of Drs. Rasmussen, Broudy, and Jarboe.² Dr. Rasmussen opined that claimant has coal workers' pneumoconiosis, chronic obstructive pulmonary disease (COPD) related to coal dust exposure, and a disabling lung disease caused by coal dust exposure, cigarette smoking, and probable asthma. Director's Exhibit 7; Claimant's Exhibits 2, 4. Dr. Rasmussen also opined that claimant's coal dust exposure was a major contributing factor to his disabling lung disease. *Id.* Dr. Broudy diagnosed disabling COPD related to cigarette smoking and bronchial asthma, and opined that claimant does not have coal workers' pneumoconiosis or any chronic lung disease caused by coal dust exposure. Employer's Exhibit 2. Dr. Jarboe opined that claimant does not have coal workers' pneumoconiosis or any lung disease caused by coal dust exposure. Employer's Exhibit 1. Dr. Jarboe also opined that claimant's disabling respiratory impairment was due to his cigarette smoking and bronchial asthma, and not coal dust exposure. *Id.*

In considering the conflicting medical opinion evidence at Section 718.204(c),³ the

² In addition to the new medical opinions of Drs. Rasmussen, Broudy, and Jarboe, the record also contains previously submitted medical opinion evidence. The administrative law judge reasonably gave greater weight to the new medical opinion evidence "as it represents the [c]laimant's current respiratory condition." Decision and Order at 24; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). No party challenges the administrative law judge's finding in this regard.

³ 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)(i), (ii).

administrative law judge relied on the same reasons that he had provided when weighing the doctors' opinions to find that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 11-16, 24. Specifically, the administrative law judge assigned less weight to Dr. Rasmussen's opinion because "Dr. Rasmussen fails to explain why the clearly significantly reversible pulmonary obstruction was significantly related to coal dust exposure and not the other two factors, cigarette smoking and asthma." *Id.* at 12. The administrative law judge also assigned less weight to Dr. Broudy's opinion because "Dr. Broudy failed to explain how he eliminated [c]laimant's years of exposure to coal mine dust in excluding coal mine dust as a possible contributing cause of the [c]laimant's COPD." *Id.* at 13. By contrast, the administrative law judge assigned full probative weight to Dr. Jarboe's opinion because it was "detailed, well-reasoned and well-documented." *Id.* at 15. Consequently, the administrative law judge found that "Dr. Jarboe's opinion outweighs the opinions of Drs. Rasmussen and Broudy."⁴ *Id.* at 16.

Claimant asserts that substantial evidence does not support the reasons that the administrative law judge gave for discounting Dr. Rasmussen's opinion regarding the existence of pneumoconiosis.⁵ Specifically, claimant argues that substantial evidence does not support the finding that Dr. Rasmussen did not explain his opinion. Claimant's Brief at 10-11, 13-16. Claimant maintains that the administrative law judge focused on impairment reversibility when the mere fact of reversibility does not preclude a physician from finding the presence of a disabling pneumoconiosis.⁶ Claimant also asserts that the

⁴ No party contests the administrative law judge's weighing of Dr. Broudy's opinion.

⁵ Claimant generally suggests that there is a rebuttable presumption of total disability due to pneumoconiosis at Section 718.204(c). Specifically, claimant argues that "[t]here is no sufficiently reasoned contrary probative evidence to 'rule out' pneumoconiosis as a contributing factor of [claimant's] total disability." Claimant's Brief at 18. Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Thus, we reject claimant's suggestion.

⁶ We reject claimant's assertion that the administrative law judge erred in refraining from according greater weight to Dr. Rasmussen's opinion because "the qualifications of Dr. Rasmussen are superior in the field of pneumoconiosis." Claimant's Brief at 6. Contrary to claimant's assertion, an administrative law judge is not required to assign more weight to a physician's report based on that physician's superior qualifications. *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

administrative law judge selectively analyzed Dr. Rasmussen's opinion.⁷ The administrative law judge noted that Dr. Rasmussen opined that claimant has COPD and that claimant's disabling lung disease resulted from his coal mine dust exposure, cigarette smoking, and probable asthma, with coal mine dust as a significant contributing factor to the impairment. Decision and Order at 12. The administrative law judge also noted that Dr. Rasmussen's conclusion was based in part on a "significantly reversible obstructive ventilatory impairment."⁸ *Id.* The administrative law judge then stated that "[p]neumoconiosis is a fixed condition and any improvement caused by coal dust would not be improved by bronchodilator therapy." *Id.* The administrative law judge failed to explain the factual basis for this statement, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), and proceeded to discount Dr. Rasmussen's opinion that claimant has legal pneumoconiosis because "Dr. Rasmussen fails to explain why the clearly significantly reversible pulmonary obstruction was significantly related to coal dust exposure and not the other two factors, cigarette smoking and asthma." Decision and Order at 12. Contrary to the administrative law judge's finding, Dr. Rasmussen in fact explained his opinion that claimant's disabling lung disease was caused by coal dust exposure, cigarette smoking, and probably, asthma. Director's Exhibit 7; Claimant's Exhibits 2, 4. Specifically, Dr. Rasmussen explained that "[c]igarette smoking and coal mine dust exposure cause similar lung tissue destruction and use similar cellular and biochemical mechanisms," and cited medical studies in support. *Id.* Citing to medical literature, Dr. Rasmussen further explained that "[a]sthma makes the patient more susceptible to environmental exposures (i.e. cigarette smoking and coal mine dust exposure)." *Id.* Thus, because substantial evidence does not support the administrative law judge's finding that Dr. Rasmussen did not explain his opinion, *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at Section 718.204(c), and remand the case for further consideration of the evidence thereunder.

⁷ The administrative law judge permissibly discounted Dr. Rasmussen's opinion that claimant has coal workers' pneumoconiosis because "Dr. Rasmussen fails to explain any other reasons for his diagnosis of clinical pneumoconiosis beyond the x-ray and exposure history." Decision and Order at 11; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

⁸ In noting that the pulmonary function studies revealed moderately severe, partially reversible restrictive and obstructive ventilatory impairment, Dr. Rasmussen indicated that they showed that the maximum breathing capacity was moderately reduced, improving significantly after bronchodilator therapy. Director's Exhibit 7.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge