BRB No. 00-0584 BLA

GEORGE ROGERS	)	
	)	
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 of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Timothy S. Williams (Judith E. Kramer, Acting 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0800) of Administrative Law Judge Rudolf L. Jansen 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).[1] In this request for modification of a duplicate claim, the administrative law

[1] 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted,

judge found that claimant's previous request for modification was denied on November 20, 1997, and claimant again petitioned for modification on November 19, 1998. In the instant request for modification, the administrative law judge considered the newly submitted evidence and the evidence from the prior claims together, and found it insufficient to establish either the existence of pneumoconiosis or total disability, and thus insufficient to establish a change in conditions.[2] *See* 20 C.F.R. §§718.202(a)(1)-(4); 718.204(b)(2)(i)-(iv); 725.310 (2000). Claimant appeals, challenging the administrative law judge's findings with respect to Dr. Marder's report. Specifically, claimant contends that the opinion of Dr. Marder establishes both the existence of pneumoconiosis and total disability. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C.

---

refer to the amended regulations.

[2] Since the miner's last coal mine employment took place in Alabama, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] We affirm the findings of the administrative law judge on the length of coal mine employment and at 20 C.F.R. §§718.202(a)(1)-(3)(2000), 718.204(c)(1)-(3)(2000), as unchallenged on appeal and as these sections have not been substantively changed under the amended regulations. 20 C.F.R. §§718.202(a)(1)-(3), 718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which claimant and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations and will proceed to adjudicate the merits of this appeal.

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 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis on the basis of a physician's opinion, claimant asserts that the administrative law judge erred in refusing to credit Dr. Marder's opinion on the existence of pneumoconiosis because Dr. Marder "did not explain why claimant's three-year coal mining history is more significant to his mild obstructive lung disease than his forty-nine year pipe smoking history." Decision and Order at 7. Specifically, claimant contends that because there is no requirement that coal dust exposure alone cause lung disease, there was no reason for the administrative law judge to reject Dr. Marder's opinion because Dr. Marder failed to explain why coal dust exposure was more or less significant than his pipe smoking or because Dr. Marder did address adequately claimant's pipe smoking history.

Regarding Dr. Marder's opinion, although the administrative law judge acknowledged that it "supports a finding of pneumoconiosis," he, nonetheless, found it "deficient inasmuch as Dr. Marder did not explain why Claimant's three year coal mining history is more significant to his mild obstructive lung disease than his forty-nine year pipe smoking history." Decision and Order at 7. As claimant contends, however, because he is not required to establish that coal dust alone caused his lung disease in order to establish that his lung disease arose out of coal mine employment, Dr. Marder was required to do no more than provide a reasoned opinion that claimant's lung disease arose out of his coal mine employment. Here, Dr. Marder opined that claimant had chronic obstructive pulmonary disease and that although "three and one-half years of coal dust exposure is generally less

likely to result in lung dysfunction...there is no doubt that three and one-half years in very dusty conditions has been shown to result in pneumoconiosis." Director's Exhibit 42. Dr. Marder further stated that while "pipe smoking is far less likely to cause obstructive lung disease...it might have played a role," and that in the absence of other "significant etiological factors" claimant's three and one-half years of occupational coal dust exposure substantially contributed to his COPD. *Id*. Thus, the administrative law judge's rejection of Dr. Marder's report as deficient since it failed to address the relative effects of both pipe smoking and coal dust exposure is not in accordance with law, 20 C.F.R. §718.201; *Stomps v. Director, OWCP*, 816 F.2d 1533, 10 BLR 2-107 (11th Cir. 1987), *see McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988), and we vacate the administrative law judge's finding and remand the case for the administrative law judge to reconsider the evidence pursuant to the proper standard. 20 C.F.R. §718.201; *Stomps*, *supra*; *see McClendon*, *supra*.

Claimant also challenges the administrative law judge's finding with respect to total disability. Specifically, claimant contends that the administrative law judge erred in finding Dr. Marder's opinion insufficient to establish total disability because Dr. Marder's reliance on the word "likely" indicated a degree of uncertainty in his opinion and was not a definite finding on claimant's work capability.

The administrative law judge found that while Dr. Marder's opinion, that it is very likely that claimant's chronic obstructive pulmonary disease rendered him unable to perform his last coal mine employment, was supportive of a finding of total disability, his use of the word "likely" indicated "a degree of uncertainty...and was not" a definitive finding as to the miner's work capability. Accordingly, the administrative law judge found Dr. Marder's opinion entitled to reduced weight due to its equivocal nature. Decision and Order at 8. Thus, in weighing all of the newly submitted medical evidence on total disability together, the administrative law judge concluded that it did not establish total disability as Dr. Marder's opinion was equivocal and the pulmonary function study and blood gas study evidence did not support a finding of total disability. Decision and Order at 8. The administrative law judge, therefore, concluded that because claimant failed to establish total disability he failed to establish a change in condition or a mistake in a determination of fact on this issue in the prior Decision and Order. Decision and Order at 8.

In his report, Dr. Marder states:

> There is no doubt that mild COPD is present as indicated by the reduced FEV1/FVC ratio. The lung volumes on this test did not indicate restriction. Given the extremely strenuous nature of Mr. Rogers' usual coal mine work (see attached work history), his complaints of dyspnea and the reduced FEV1/FVC ratio and markedly reduced FEF 25-75, it is very likely that his mild COPD renders him unable to perform his last coal mine job or any

employment requiring comparable physical abilities.

Director's Exhibit 42.

A physician's opinion may be rejected if it is equivocal, *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In *Piney Mountain Coal Co. v. Mays*, 176 F.3d 763, 21 BLR 2-587, 2-605 (4th Cir. 1999), however, the court stated:

> Of course, uncertainty is not proof, and claimants must prove entitlement. Nevertheless, a reasoned medical opinion is not rendered a nullity because it acknowledges the limits of reasoned medical opinions. Many wise speakers choose their words carefully and conservatively, never overstating as certain an opinion that admits of any doubt, and some timid ones unnecessarily couch a sound message in noncommittal language... In sum, the reliability of a given opinion is not necessarily revealed by the forcefulness of the speaker's language.

176 F.3d at 763, 21 BLR at 2-605.

In the instant case, it is not clear that the administrative law judge considered Dr. Marder's opinion as a whole rather than focusing on the use of a single word. Given the fact that Dr. Marder discussed the results of claimant's pulmonary function study in great detail and was aware of the extremely strenuous nature of claimant's usual coal mine employment, we cannot say that the administrative law judge acted rationally in finding the opinion equivocal by focusing on a single word. Accordingly, we vacate the administrative law judge's finding that Dr. Marder's opinion was too equivocal to support a finding of total disability and remand the case for the administrative law judge to reconsider the opinion in its entirety. *Mays, supra*; *see Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Moreover, as Dr. Marder found a mild impairment, the administrative law judge must determine whether that impairment, when compared to the exertional requirements of claimant's usual coal mine employment as a coal loader, is sufficient to establish total disability, if reached. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see also Cornett v. Benham Coal Co.*, F.3d , BLR , 2000 WL 1262464 (6th Cir. Sep. 7, 2000). Thus, we vacate the administrative law judge's finding at Section 718.204(c)(4) and remand for reconsideration of the evidence thereunder. Moreover, because we have vacated the administrative law judge's finding that Dr. Marder's opinion is insufficient to establish the existence of pneumoconiosis and total disability, we also vacate his finding on modification. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Further, as claimant contends, because we have vacated the administrative law judge's finding on the existence of pneumoconiosis, we must also vacate his finding on disability causation, and

remand for reconsideration of that issue, if reached. *See* 20 C.F.R. §718.204(c).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge