BRB No. 04-0569 BLA

EDWARD C. SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ENTERPRISE COAL COMPANY	)	DATE ISSUED: 04/15/2005
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (02-BLA-5279) of Administrative Law Judge Mollie W. Neal 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). The administrative law judge credited claimant with nineteen years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge erred in failing to enforce the evidentiary limitations set forth at 20 C.F.R. §725.414. The Director, however, asserts that the administrative law judge's error in admitting evidence in excess of the evidentiary limitations is harmless because the administrative law judge based her denial of benefits, in part, on a finding that there is no credible evidence of a totally disabling pulmonary impairment. In a reply brief, employer urges the Board to reject the Director's contention that it submitted evidence in violation of the evidentiary limitations set forth at 20 C.F.R. §725.414. Alternatively, employer contends that any error by the administrative law judge in admitting evidence in excess of the evidentiary limitations is harmless.[1]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Baker, Dahhan, and Jarboe. The administrative law judge stated that "[a]ll three physicians agreed…that the miner retains the pulmonary capacity to return to his last coal mining job." Decision and Order

[1]Since the administrative law judge's length of coal mine employment finding and her findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

at 10. In a report dated August 15, 2001, Dr. Baker opined that claimant suffers from a mild impairment but has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 10. Similarly, in a report dated January 24, 2001, Dr. Dahhan opined that claimant suffers from a mild impairment but has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 18. In a subsequent report dated November 21, 2001, Dr. Dahhan opined that claimant does not suffer from a pulmonary impairment or disability. Director's Exhibit 19. Dr. Dahhan further opined that, from a respiratory standpoint, claimant retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand. *Id*. Lastly, Dr. Jarboe opined that claimant does not suffer from a disabling respiratory impairment. Director's Exhibit 18. Dr. Jarboe additionally opined that claimant retains the functional respiratory capacity to do his last coal mining job or one of similar physical demand. *Id*.

Claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's and Dr. Hussain's assessments of claimant's impairment.[2] Although Dr. Baker opined that claimant suffers from a mild impairment, he also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 10. Thus, Dr. Baker's opinion is insufficient to establish total disability. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

As claimant asserts, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge should consider whether a physician who finds that a claimant is not totally disabled had any knowledge of the exertional requirements of claimant's last coal mine employment before crediting that physician's opinion. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. However, because Dr. Baker's opinion and the other medical opinions of record do not support a finding of total disability, the administrative law judge's failure to make such findings constitutes harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We also hold that, contrary to claimant's suggestion, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine work. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Further, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his

[2]Contrary to claimant's assertion, the record in this case does not contain Dr. Hussain's report, nor did the administrative law judge discuss such a report.

condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[3]

Since claimant failed to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[4] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[3]Since there is no credible medical opinion evidence that claimant is totally disabled at 20 C.F.R. §718.204(b), we hold that any error by the administrative law judge in admitting medical opinion evidence pertinent to the issue of total disability in violation of the evidentiary limitations set forth at 20 C.F.R. §725.414 is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]In view of our disposition of the case at 20 C.F.R. §718.204(b), we decline to address claimant's contentions of error by the administrative law judge at 20 C.F.R. §718.202(a)(1) and (a)(4).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to affirm the administrative law judge's decision denying benefits because I believe that claimant has identified an error in the administrative law judge's analysis of the evidence which requires that the case be remanded for reconsideration.

The administrative law judge credited the opinions of all three doctors finding claimant was not totally disabled. Dr. Jarboe found no impairment. Dr. Dahhan also diagnosed no impairment although he had previously diagnosed a mild impairment. Dr. Baker diagnosed a mild impairment. Claimant argues that because, as the Sixth Circuit held in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), a mild respiratory impairment may be totally disabling, depending upon the exertional requirements of claimant's usual coal mine employment, Dr. Baker's opinion could support a finding of total disability; moreover, the administrative law judge cannot rely upon the doctor's statement that claimant is not totally disabled unless the administrative law judge has determined both what those exertional requirements are and that the doctor understood those requirements. Claimant correctly states that the administrative law judge never determined his last job's exertional requirements and that

the record supports his contention that it was heavy manual labor. Furthermore, the record does not reflect that Dr. Baker understood the relevant exertional requirements. Hence, under the teaching of *Cornett*, claimant's argument has merit that Dr. Baker's report could support a finding of total disability, notwithstanding his statement that claimant retains the respiratory capacity to perform the work of a coal miner. An administrative law judge cannot credit an opinion that the miner could perform his work where the doctor does not know what the miner's job encompassed. *Cornett,* 227 F.3d at 578, 22 BLR at 2-124; *Eagle v. Armco, Inc*., 943 F.2d 509, 512, 15 BLR 2-201, 2-205 (4th Cir. 1991).

I cannot say that the administrative law judge's consideration of Dr. Baker's opinion constitutes harmless error because she did not recognize the opinion could support a finding of total disability. The case must be remanded for the administrative law judge to determine the exertional requirements of claimant's usual coal mine employment and to reconsider the medical opinions in light of these requirements. Since there was evidence supportive of a finding of total disability which the administrative law judge did not properly consider, I believe her decision denying benefits should be vacated and the case remanded for reconsideration. On remand she should exclude the evidence which employer submitted in excess of the regulatory limitations and reconsider all issues of entitlement. 20 C.F.R. §725.414.

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REGINA C. McGRANERY
Administrative Appeals Judge