BRB No. 02-0847 BLA

DANNY E. McCLOUD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CARTER-ROAG COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 08/26/2003
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on RemandBDenying Benefits of Administrative Law Judge Gerald M. Tierney, United States Department of Labor.

Danny E. McCloud, Beverly, West Virginia, *pro se*.

Robert Weinberger (West Virginia Coal-Workers= Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand- Denying Benefits (00-BLA-0207) of Administrative Law Judge Gerald M.

Tierney 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] This case is before the Board for the second time. In his Decision and Order-Denying Benefits issued on December 22, 2000, the administrative law judge credited claimant with twenty-five years of coal mine employment and adjudicated the case pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of claimant=s coal mine employment pursuant to 20 C.F.R. ''718.202(a), 718.203. However, the administrative law judge found that the evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. '718.204(c) (2000).

On claimant=s prior appeal, also without counsel, the Board affirmed the administrative law judge=s finding that total disability is not established pursuant to 20

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[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We note that claimant was not represented while his case was before the administrative law judge. After consideration of the evidence of record, we hold that claimant=s due process was not violated and that his hearing was in substantial compliance with *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

C.F.R. ' 718.204(b)(2)(i), (ii) or (iii).[3] However, the Board vacated the administrative law judge=s finding that the medical opinion evidence did not establish total disability at 20 C.F.R. ' 728.204(b)(2)(iv). The Board instructed the administrative law judge to make a determination regarding the exertional requirements of claimant=s usual coal mine employment. The Board specifically instructed the administrative law judge to consider claimant=s letter discussing the exertional requirements of claimant=s coal mine employment in making this determination and also in assessing the credibility of Dr. Scattaregia=s opinion concerning disability. The Board also instructed the administrative law judge to consider the findings of the West Virginia Occupational Pneumoconiosis Board and compare the finding made by it regarding the degree of claimant=s pulmonary function with the exertional requirements of claimant=s Alast usual coal mine employment.@ *McCloud v. Carter-Roag Coal Co.*, BRB No. 01-0416 BLA (Dec. 20, 2001)(unpub.).

On remand, the administrative law judge addressed the issue of claimant=s usual coal mine employment and the administrative law judge found the medical opinion evidence insufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. ' 718.204(b)(2)(iv) in light of the exertional requirements of claimant=s usual coal mine employment. On appeal, claimant discusses his employment history and medical evidence he believed he had given to the administrative law judge.

[3] The provision pertaining to total disability, previously set out at 20 C.F.R. ' 718.204(c), is now found at 20C.F.R. ' 718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. ' 718.204(b), is now found at 20 C.F.R. ' 718.204(c).

[4] Claimant also proposes the development of more evidence.
[5] Employer responds to claimant=s appeal, urging affirmance of the administrative law judge=s Decision and Order. The Director, Office of Workers' Compensation Programs , has not submitted a brief in this appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board will

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[4] Claimant asserts that neither of the administrative law judge=s Decision and Orders has addressed the pulmonary graded treadmill test administered by Dr. Scattaregia on January 12, 1999. Claimant states AI thought I presented Judge Tierney a copy of this pulmonary graded treadmill test and an interpretation of the writing at the bottom of this test at the formal hearing held on August 9, 2000Y.@ Claimant=s August 27, 2002 letter to the Board at 2-3. A review of the record reveals that the Pulmonary Graded Treadmill Maximal Exercise Tolerance Test administered on January 12, 1999, and referred to by claimant, is contained in the record as a part of a blood gas study documentation. Director's Exhibit 10. This blood gas study was considered by the administrative law judge in his previous Decision and Order. *See* Decision and Order at 3.

[5] In an Order dated October 16, 2002, we informed claimant that the Board only reviews the evidence submitted before the administrative law judge. Because the Board cannot consider new evidence, the Board returned to claimant the pulmonary test he had submitted to the Board. The Board also advised claimant regarding modification procedures.

consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board=s scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

In determining the exertional requirements of claimant=s usual coal mine employment, the administrative law judge, on remand, considered the relevant evidence of record. In claimant=s summary of coal mine employment, claimant described his last coal mine employment as working in Acleaning plant maintenance,@ as a heavy equipment operator, and in general mine maintenance. Director's Exhibit 2. In his medical report, Dr. Scattaregia identified claimant=s most recent coal mine employment as Aoutsideman,@ equipment operator and maintenance man. Dr. Scattaregia=s opinion also details claimant=s description of the limitations in his physical activity. Director=s Exhibit 9. The West Virginia Occupational Pneumoconiosis Board found that claimant had a twenty-six year history of dust exposure in his employment as a ACOAL MINER/PLANT WORKER/HEAVY EQUIPMENT OPERATOR.@ Director's Exhibit 6. The record also contains a six page document which claimant described as his Athoughts,@ *see* Hearing Transcript at 8. In this document claimant describes his coal mine employment, stating:

> When you are doing maintenance work there are certain things that must be with you at all times. You must have a hard ha[t], welding helmet and welding rod tools, tool belt with a variety of tool[s], self rescuer if going underground, steel toed boots, coveralls, knee pads, mining light and any special tools to perform your hob. These items add up to a weight of approximately 18 pounds. Try some day to put this much extra weight on and carry it all day, plus you have to carry the material or components to fix what you are going to be working on.

Claimant's Exhibit 3 at 4.

The administrative law judge found that claimant=s Alast usual coal mine employment entailed significant maintenance work.@ The administrative law judge stated, ABased upon Claimant=s description of such work, I find that Claimant=s last usual coal mine work routinely entailed [the] carrying of items weighing approximately 18 pounds and periodic, carrying and lifting of heavier items, in dusty conditions.@ Decision and Order on Remand at 7 (citations omitted). We affirm the administrative law judge=s finding concerning the exertional requirements of claimant=s usual coal mine

employment since the administrative law judge considered all of the relevant evidence of record in rendering his opinion, and this finding is supported by substantial evidence. *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Turning to the issue of total disability, the administrative law judge considered Dr. Scattaregia=s diagnosis of a mild obstructive ventilatory impairment, Director=s Exhibit 9, and the finding of the West Virginia Occupational Pneumoconiosis Board that claimant suffered a 10% pulmonary function impairment. Claimant=s Exhibit 2. The administrative law judge stated:

> Having made an independent assessment of the exertional requirements of Claimant=s usual coal mine employment, I find that the medical opinion evidence fails to establish the presence of a totally disabling respiratory or pulmonary impairment. At most, the medical opinion evidence is inconclusive regarding the total disability issue. In so finding, I note that although the Claimant=s maintenance work entailed considerable lifting and carrying in dusty conditions, the objective medical evidence is clearly and uniformly nonqualifying. Accordingly, Dr. Scattaregia[>s] opinion that Claimant only has a Amild@ impairment, and West Virginia Occupational Pneumoconiosis Board=s finding of only a 10% pulmonary function impairment are credibleY.Notwithstanding the physical demands of Claimant=s last usual coal mine work, the medical opinion evidence does not establish that such an impairment would prevent the Claimant from performing such work. At best, the medical opinion evidence neither precludes nor establishes the presence of a totally disabling respiratory or pulmonary impairment. Thus total disability has not been established under ' 718.204(b)(2)(iv)Y.

Decision and Order on Remand at 8.[6]

The administrative law judge must compare a physician=s comment concerning the extent of claimant=s respiratory or pulmonary disability or a medical assessment of claimant=s physical limitations with the exertional requirements of claimant=s usual coal mine employment to determine whether the medical opinion evidence supports a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4

[6] The administrative law judge improperly compared the exertional requirements of claimant=s usual coal mine employment with the results of the objective tests. However, since the administrative law judge properly compared the medical reports, which provide opinions regarding the extent of claimant=s disability, with the exertional requirements of claimant=s usual coal mine employment, any error by the administrative law judge in this regard is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

(1986). In the instant case, the administrative law judge compared the medical opinion evidence with the physical demands of claimant=s last coal mine employment and he rationally determined that the evidence does not establish that claimant is unable to perform his usual coal mine employment. Decision and Order on Remand at 8. We therefore affirm the administrative law judge=s finding that the evidence does not establish total disability at Section 718.204(b)(2)(iv) as this finding is supported by substantial evidence. *See Budash*, 9 BLR 1-48; *Gee*, 9 BLR 1-4.

Inasmuch as claimant has failed to established total disability at 20 C.F.R. ' 718.204(b)(2)(i)-(iv), a finding of entitlement is precluded. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge=s Decision and Order on Remand-Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER
Administrative Appeals Judge