BRB No. 04-0946 BLA

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| ANTHONY CLARK | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SHAMROCK COAL COMPANY, INCORPORATED | ) | DATE ISSUED: 08/30/2005 |
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| and | ) | |
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| JAMES RIVER COAL COMPANY, c/o ACORDIA EMPLOYERS SERVICE | ) | |
| | ) | |
| 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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5757) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) issued 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] The administrative law judge credited claimant with at least thirteen years of coal mine employment. Considering the merits of the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence is insufficient to establish both the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)–(4) and total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied. On appeal, claimant alleges error in the administrative law judge's finding at 20 C.F.R. §718.202(a)(1). Claimant also argues that, given the administrative law judge's rejection of the opinion of Dr. Baker, who examined claimant on behalf of the Director, Office of Coal Workers' Compensation Programs (the Director), the Director failed to meet his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Claimant thus urges the Board to reverse the administrative law judge's denial of benefits or, alternatively, to remand the case for further consideration. Claimant also alleges error in the administrative law judge's conclusion that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2). The Director has filed a response brief limited to the issue of whether a remand is required in this case for the Director to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds in support of the decision below.[2]

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 specifically challenges the administrative law judge's ultimate determination that claimant failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2). Claimant asserts that the administrative law judge "made no mention of the claimant's age or work experience in conjunction with his assessment that claimant was not totally disabled." Claimant's Brief at 6. Claimant's assertion is unavailing. These factors

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[1]Claimant filed the instant claim on May 22, 2001. Director's Exhibit 1.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Claimant states that pneumoconiosis is a progressive and irreversible disease, and asserts that "it can therefore be concluded" that his condition has worsened because "a considerable amount of time" has passed since he was initially diagnosed with pneumoconiosis. Claimant's Brief at 6. This assertion by claimant is likewise unavailing; an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Claimant further generally discusses an administrative law judge's duty to compare the exertional requirements of a miner's usual coal mine employment with medical reports assessing disability. Claimant Brief at 5, 6. Claimant does not, however, set forth any argument, refer to any medical evidence of record, or ask the Board for any particular result. *Id.* Claimant thereby fails to invoke further review of the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv). 20 C.F.R. §802.211(b). Moreover, the record shows that the administrative law judge considered the exertional requirements of claimant's usual coal mine employment in conjunction with his consideration of the evidence at 20 C.F.R. §718.204(b)(2)(iv). *See* Decision and Order at 16-17. Claimant presents no other argument with regard to the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv), and we affirm that finding.

Claimant contends that, given the administrative law judge's findings with regard to the weight and credibility of Dr. Baker's opinion, the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation.[3] Pursuant to

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[3]On behalf of the Director, Office of Workers' Compensation Programs (the Director), Dr. Baker examined claimant on October 2, 2001 and conducted objective testing, including an x-ray, pulmonary function study, arterial blood gas study and electrocardiogram. Director's Exhibit 11. By report dated October 2, 2001, Dr. Baker diagnosed chronic bronchitis and hypoxemia due to coal dust exposure, and chest pain by history due to "? ASHD." *Id.* Dr. Baker read the x-ray as negative, indicated that the pulmonary function study is "within normal limits," and that the arterial blood gas study shows "moderate hypoxemia at rest." *Id.* Dr. Baker found a minimal impairment with chronic bronchitis and decreased PO2, to which each diagnosis contributes fully. *Id.* In a separate report, also dated October 2, 2001, Dr. Baker checked boxes to indicate that claimant has no lung disease due to coal mine employment, has no pulmonary impairment, and has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.*

Section 413(b) of the Act, "Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a).

In the instant case, the administrative law judge noted that the diagnoses of chronic bronchitis and hypoxemia due to coal dust exposure and a minimal impairment with chronic bronchitis and decreased PO2 contained in Dr. Baker's narrative report, conflict with Dr. Baker's indications in his separate report that claimant has no occupational disease or impairment. *See* Director's Exhibit 11. The administrative law judge thus determined that Dr. Baker's report is neither well documented nor reasoned, and that the Director failed to fulfill his obligation to provide claimant with a complete, credible pulmonary evaluation. Decision and Order at 14. The administrative law judge ultimately found, however, that "Dr. Baker's opinion does not otherwise change the result of this determination," and thus declined to remand the case for a complete pulmonary evaluation. *Id.* Claimant urges the Board to remand the case for a complete pulmonary evaluation in light of the administrative law judge's weighing of Dr. Baker's report and determination that the Director has not met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.

The Director argues that a remand of the case for another pulmonary evaluation is not required based on the facts of this case. The Director asserts that, even if Dr. Baker were to clarify that he, in fact, diagnosed a lung disease related to claimant's coal mine employment and found a minimal impairment related to that disease, Dr. Baker's conclusion that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment, would still stand. Consequently, the Director submits, a more credible opinion from Dr. Baker, developed on remand, "would not convert the denial into an award" as the opinion cannot establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement at 20 C.F.R. Part 718. Based on his assertion that the outcome of the case would not change as a result of a remand, the Director urges the Board to deny claimant's request for a remand of the case. Employer argues that the Director provided claimant with a complete, credible pulmonary evaluation in this case by virtue of Dr. Baker's assessment, and urges the Board to affirm the decision below.[4]

[4] Employer notes that the Director does not request a remand of the case, whereas the Director in *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990), cited by claimant in support of his request for a remand, did request a remand. Employer also notes that no party to the

We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges,* 18 BLR at 1-87; *Pendley v. Director, OWCP,* 13 BLR 1-23 (1989)(*en banc order*), that a remand of the case is not warranted. The record shows that Dr. Baker ultimately opined, in a report supplemental to his October 2, 1001 narrative report, that claimant has *no* pulmonary impairment and retains the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment.[5] Director's Exhibit 11. Given Dr. Baker's findings, we agree with the Director's argument that Dr. Baker's opinion is not legally sufficient to establish total disability, an essential element of entitlement at 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Consequently, because we otherwise affirm the administrative law judge's finding of no total disability at 20 C.F.R. §718.204(b)(2), any clarification of Dr. Baker's opinion on remand could not change the outcome of the case. Because a remand would be futile, we deny claimant's request for a remand of the case. *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Because claimant failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law

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proceedings below objected to Dr. Baker's report, and, consequently, claimant waived his right to raise the issue on appeal. The issue of whether the Director fulfilled his statutory obligation to provide claimant with a complete, credible pulmonary evaluation is properly before the Board, however, where the Director has taken a position on appeal. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87-88 (1994). We thus reject employer's argument to the contrary. Because employer seeks an affirmance of the decision below, and we herein affirm that decision, we decline to address further employer's arguments.

[5] The record shows that claimant operated a shuttle car and other heavy equipment. Director's Exhibits 3, 4. At the hearing, claimant testified that he last worked as a shuttle car operator, which entailed driving the shuttle car to and from "the miner" where he loaded the shuttle car with coal and rock and then unloaded it at the "feeder dump." Hearing Transcript at 14. Claimant testified that in this job, he lifted, with assistance from others, cables weighing from two to three hundred pounds. *Id*. at 14-15. Claimant further testified that with the roof bolting machine, he drilled holes into rock and coal and inserted support bolts. *Id.* at 15. Claimant also stated that the "scoop" he operated was like a "high lift" with "a bucket on it," and that he scooped up loose coal and debris that was on "the rock bottom" and pushed it towards the face of the "miner" so that the "miner" could pick it up and put it in the cars. *Id.* Dr. Baker's report reflects his knowledge of claimant's last coal mine employment as an operator of a roof bolting machine, shuttle car, and continuous miner, with fifteen years of underground coal mine employment. Director's Exhibit 11.

judge's denial of benefits in this case. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We, therefore, need not address claimant's contentions of error at 20 C.F.R. §718.202(a)(1).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of the majority to deny claimant's request for a remand of this case. The administrative law judge properly found that Dr. Baker's October 2, 2001 opinion was patently deficient and worthy of no weight, and, consequently, that the Director, Office of Workers' Compensation Programs (the Director), had failed to fulfill his obligation, pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), to provide claimant with a complete, credible pulmonary evaluation by virtue of Dr. Baker's evaluation. Decision and Order at 13-14; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Given these findings by the administrative law judge, it was irrational for him to decline to remand the case for a complete pulmonary evaluation on the basis that "Dr. Baker's opinion does not otherwise change the result of this determination." Decision and Order at 14; *Pettry v. Director, OWCP*, 14 BLR 1-98, 1-100-101 (1990). Critically, Dr. Baker's report, supplied by the Director, is the only medical report upon which claimant relies. *See* Claimant's Exhibit 1 (Claimant's Evidence Summary Form). Further, the Director acknowledges that his statutory obligation is not fulfilled in this case; his assertion that "a more credible opinion from Dr. Baker [] would still fail to prove the necessary element of total respiratory impairment" constitutes pure speculation on his part. I would

hold that a remand of the case for further development of the medical evidence is necessitated by the facts of this case and would grant claimant's request for a remand.

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REGINA C. McGRANERY
Administrative Appeals Judge