BRB No. 01-0416 BLA

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

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

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (00-BLA-207) 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] Based on the filing date of November

[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

13, 1998, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge credited claimant with twenty-five years of coal mine employment and found employer to be the responsible operator. The administrative law judge also found the evidence of record established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish the presence of a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant challenges the finding of the administrative law judge concerning the issue of total disability, specifically referring to a letter he submitted to the administrative law judge concerning, among other things, the exertional requirements of his usual coal mine employment. Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), has responded to this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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*).

Considering the issue of total disability, the administrative law judge correctly found that both the pulmonary function studies and blood gas study were non-qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(i), (ii); Director's Exhibits 6, 8, 10. Likewise, because the record did not

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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, refer to the amended regulations.

contain evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge correctly found that total disability could not be established on that basis. 20 C.F.R. §718.204(b)(2)(iii). These findings are, accordingly, affirmed.

Turning to the medical opinion evidence, the administrative law judge concluded that while Dr. Scattaregia found "a mild ventilatory impairment," Director's Exhibit 9, the doctor "specifically concluded that this impairment does not prevent [c]laimant from doing his last [coal mine employment]." Decision and Order at 3. The administrative law judge relied on Dr. Scattaregia's opinion that claimant's mild respiratory impairment did not prevent claimant from performing his last coal mine employment because the employment history form completed by claimant had been provided to Dr. Scattaregia, Director's Exhibits 2, 9, and Dr. Scattaregia's handwritten notes indicate that he was aware that claimant was a heavy equipment operator, outside man, equipment operator and maintenance man. Director's Exhibit 9. The administrative law judge further found that while the West Virginia Occupational Pneumoconiosis Board decision, cited by claimant, assessed claimant's pulmonary function impairment at 10%, Director's Exhibit 6, he was not bound by that decision. Thus, considering Dr. Scattaregia's opinion and the decision of the West Virginia Occupational Pneumoconiosis Board, along with the non-qualifying pulmonary function and blood gas study evidence, the administrative law judge found that total disability was not established by the medical opinion evidence. Referring briefly to a letter submitted by claimant describing the exertional requirements of his coal mine employment, Claimant's Exhibit 3, the administrative law judge nonetheless found that the record lacked medical evidence sufficient to establish total disability. Accordingly, the administrative law judge found that the evidence did not establish a totally disabling respiratory impairment.

The ultimate finding of total respiratory disability is a legal determination to be made by the administrative law judge through consideration of the exertional requirements of a claimant's usual coal mine work in conjunction with a doctor's opinion regarding claimant's physical abilities. *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469, 1-471 (1984). Further, while an administrative law judge cannot rely solely on lay evidence to establish total respiratory disability in a living miner's claim, lay testimony, nonetheless, constitutes relevant evidence in determining whether claimant has established total respiratory disability and the administrative law judge can properly consider lay evidence in assessing the credibility of medical reports. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *see Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

In the instant case, claimant contends that, even though Dr. Scattaregia may have noted claimant's coal mine occupations on his medical report, because he never discussed with claimant the physical demands of claimant's job, he did not understand the strenuous exertional nature of that work which claimant described in his letter to the administrative law

judge. Claimant's Exhibit 3.[2] However, because the administrative law judge never made an independent determination regarding the exertional requirements of claimant's usual coal mine employment, we must remand the case for him to do. *Hvizdzak, supra*. Further, in making this determination the administrative law judge should consider claimant's letter discussing those exertional requirements, and should consider the letter in assessing the credibility of Dr. Scattaregia's opinion on total disability. *Fields, supra*; *see Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). Likewise, while not bound by the finding of the West Virginia Occupational Pneumoconiosis Board, the administrative law judge should compare the finding made by it regarding the degree claimant's pulmonary function with the exertional requirements of claimant's last usual coal mine employment. *Fields, supra*.

[2] In his report, Dr. Scattaregia noted that claimant's last coal mine employment from March 1986 to August 1987 was as an outside man, equipment operator, and maintenance man, and that his previous coal mine employment from January 1972 to December 1985 was as a heavy equipment operator. Dr. Scattaregia concluded that claimant had a mild obstructive ventilatory impairment which did not prevent him from doing his last coal mine job. Listing claimant's description of limitations on his physical activities, Dr. Scattaregia noted that claimant could walk three level city blocks, climb two flights of ten step stairs, and lift one hundred pounds. Director's Exhibit 9.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge