BRB No. 04-0359 BLA

JOHN W. MULLERY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 12/14/2004
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Michael D. Yelen (Yelen Law Offices), Wilkes-Barre, Pennsylvania, for claimant.

Sarah M. Hurley (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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (02-BLA-0318) of Administrative Law Judge Janice K. Bullard rendered 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] Claimant filed this application for benefits

[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.

on October 11, 1988, more than one year after the final denial of his previous claim.[2] Director's Exhibit 1. This duplicate claim, which is now pending on claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000), is before the Board for the third time. The Board's prior decision in *Mullery v. Director, OWCP*, BRB No. 99-0595 BLA (Mar. 10, 2000)(unpub.), contains a full procedural history of the case. *Mullery*, slip op. at 1-2. We now address the procedural aspects relevant to the administrative law judge's decision to deny claimant's request for modification and claim for benefits.

In a Decision and Order Denying Benefits issued on April 4, 1997, Administrative Law Judge Ralph A. Romano accepted the concession by the Director, Office of Workers' Compensation Programs (the Director), that claimant was totally disabled by a respiratory or pulmonary impairment and thereby established a material change in conditions as required by 20 C.F.R. §725.309(d) (2000). Director's Exhibit 67 at 4. Upon review of the entire record on the merits of the claim, however, Judge Romano found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Romano denied benefits. Upon review of claimant's appeal, the Board affirmed Judge Romano's denial of benefits as supported by substantial evidence and in accordance with law. *Mullery*, slip op. at 3-5.

On March 7, 2001, within one year of the Board's decision, claimant filed another application for benefits, which was treated as a request for modification pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 74. The district director denied claimant's request for modification, and claimant requested a hearing, Director's Exhibits 87, 90, 93, 94, which was held before the administrative law judge on April 9, 2003.

In the Decision and Order Denying Benefits that is the subject of this appeal, the administrative law judge credited claimant with eight years of coal mine employment.[3] The administrative law judge found that although the Director again conceded that

[2] Claimant's previous claim, filed with the Social Security Administration on June 29, 1973, was ultimately denied on March 26, 1985 by Administrative Law Judge Frank J. Marcellino of the Department of Labor. Director's Exhibit 15. Judge Marcellino credited claimant with eight years of coal mine employment and found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414(a), but did not establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §410.414(c).

[3] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 75. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

claimant is totally disabled, the evidence submitted on modification, considered in conjunction with that previously submitted, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in determining that claimant has eight years of coal mine employment. Claimant further asserts that the administrative law judge erred in her analysis of the chest x-ray and medical opinion evidence when she found that claimant did not establish the existence of pneumoconiosis. The Director has filed a Motion to Remand, arguing that the administrative law judge failed to consider a medical opinion and improperly weighed others when she found that the existence of pneumoconiosis was not established. The Director argues, however, that the administrative law judge properly determined that claimant has eight years of coal mine employment and that the chest x-ray evidence did not establish the existence of pneumoconiosis.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge erred in crediting claimant with eight years of coal mine employment when, claimant asserts, he has established ten to twenty-three years of coal mine employment. Contrary to claimant's contention, the administrative law judge acted within her discretion as fact-finder when she determined that claimant's testimony alleging additional coal mine employment was "inconsistent and unsupported." Decision and Order at 3; *see Garrett v. Cowin & Co.*, 16 BLR 1-77, 1-81 (1990). Moreover, substantial evidence supports the administrative law judge's permissible finding that claimant's Social Security Administration earnings records do not document coal mine employment with the Pennsylvania Railroad between 1941 and 1961, as alleged by claimant. *See Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985). Therefore, we reject claimant's allegation of error and affirm the administrative law judge's finding of eight years of coal mine employment.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that the weight of the chest x-ray readings by the most highly-qualified physicians established that claimant's x-rays are negative for pneumoconiosis. Claimant contends that the administrative law judge failed to consider Dr. Navani's 0/1 reading of the July 15, 2002 x-ray as a positive reading for pneumoconiosis. Director's Exhibit 102. Claimant's contention lacks merit. An x-ray classified as category 0/1 "does not constitute evidence of pneumoconiosis." 20 C.F.R. §718.102(b). Consequently, the administrative law judge correctly considered Dr. Navani's 0/1 reading as negative for pneumoconiosis. *Trent*, 11 BLR at 1-28. We therefore reject claimant's assertion of error and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that the weight of the medical opinion evidence did not establish the existence of pneumoconiosis. However, as the Director correctly notes, the administrative law judge did not consider Dr. Talati's May 3, 2001 medical opinion diagnosing claimant with "coal workers' pneumoconiosis" and "mild COPD from pneumoconiosis." Director's Exhibit 89. We must therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand this case for her to consider Dr. Talati's opinion. 30 U.S.C. §923(b); Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Also pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge accorded less weight to the opinions of Drs. Blomain and Liuzzi diagnosing pneumoconiosis because she found the opinions unexplained and unsupported by objective evidence. Contrary to claimant's contention, the administrative law judge permissibly discounted Dr. Blomain's "brief, three-sentence" opinion, Decision and Order at 5, because it was inadequately explained. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1985)(*en banc*). A review of the record, however, reflects that Dr. Liuzzi rendered her diagnosis of pneumoconiosis with specific references to claimant's medical, coal mine employment, and smoking histories, physical examination findings, chest x-ray, and pulmonary function study results. Claimant's Exhibit 1 at 1-3. On remand the administrative law judge should reconsider Dr. Liuzzi's report and more fully explain her findings regarding whether Dr. Liuzzi's opinion supports a finding of the existence of pneumoconiosis.[4] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[4] The Director, Office of Workers' Compensation Programs (the Director), argues that the administrative law judge on remand should reconsider Dr. Liuzzi's opinion. In the Director's view Dr. Liuzzi's opinion is "problematic" because it is based partly upon a positive x-ray reading and a thirty-eight-year coal mine employment history. Director's Brief at 5-6.

We disagree, however, with the Director's argument that the administrative law judge erred in her analysis of Dr. Corraza's opinion. Director's Brief at 4-5. Dr. Corraza indicated that he could not state with reasonable medical certainty whether coal dust inhalation played a role in the development of claimant's chronic bronchitis. Director's Exhibit 109. The administrative law judge thus properly found that Dr. Corraza's opinion did not establish the existence of legal pneumoconiosis.[5] *See* 20 C.F.R. §718.201(a)(2).

Finally, we instruct the administrative law judge that on remand she must ultimately determine whether the x-rays and medical opinions weighed together establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) by a preponderance of the evidence. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). If so, then the administrative law judge must determine whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See* 20 C.F.R. §718.204(c); *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

[5] The Director appears to take issue with the administrative law judge's decision to give the greatest weight to Dr. Corraza's opinion, when, by its terms, Dr. Corraza's opinion was inconclusive. Director's Brief at 4-5. On remand, however, the administrative law judge should consider Dr. Corraza's opinion alongside those of Drs. Talati and Liuzzi who affirmatively diagnosed pneumoconiosis. Further, on remand the administrative law judge should include in her reconsideration of the medical opinion evidence Dr. Sheerer's treatment notes and Dr. Koval's pulmonary consultation report. Director's Exhibit 89.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge