BRB No. 06-0446 BLA

FRANKLIN D. SCOTT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRANHAM & BAKER COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN ELECTRIC POWER CORPORATION	)	DATE ISSUED: 12/29/2006
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order of Remand and Order Denying Employer's Petition for Reconsideration of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Paul E. Jones (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order of Remand and Order Denying Employer's Petition for Reconsideration (04-BLA-6067) of Administrative Law Judge Thomas F. Phalen, Jr. remanding the case for further findings 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 found that employer was the responsible operator and that the parties stipulated to at least twenty years of coal mine employment. Order of Remand at 2-3; Hearing Transcript at 11. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Order of Remand at 7. The administrative law judge determined that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). Order of Remand at 8-9. The administrative law judge further found that the evidence was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 or to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Order of Remand at 10. In considering the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge concluded that claimant was not provided a complete pulmonary examination as required by the regulations, and he remanded the case to the district director. Employer requested reconsideration, which the administrative law judge denied.

On appeal, employer contends that the administrative law judge erred in remanding the case for a complete pulmonary examination and in failing to consider the opinions of Drs. Broudy and Dahhan. Claimant has not filed a response brief in the instant appeal. The Director, Office of Workers' Compensation Programs, responds asserting that the administrative law judge properly remanded the case to the district director for a complete pulmonary examination.[2]

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).

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[1] Claimant filed his claim for benefits on December 12, 2002. Benefits were denied by the district director on December 15, 2003. Director's Exhibits 2, 20. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 22.

[2] The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

Employer asserts that the administrative law judge erred in finding that Dr. Hussain's opinion was insufficient to constitute a complete pulmonary examination. Employer's Brief at 4-5. The Director responds that the case must be remanded to the district director as the administrative law judge properly found that claimant was denied the opportunity to substantiate his claim for benefits pursuant to Section 413(b). Director's Brief at 2.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The Director fails to meet this duty where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The administrative law judge found that the Department of Labor-sponsored pulmonary evaluation by Dr. Hussain stated claimant suffered from a mild pulmonary impairment. Order of Remand at 11. The administrative law judge determined that Dr. Hussain failed to offer any opinion as to whether this impairment left claimant totally disabled from performing his previous coal mine employment and therefore concluded that Dr. Hussain's report was unreasoned. *Id*. The administrative law judge further concluded that Dr. Hussain's consideration of the pulmonary function study was inconsistent and he did not provide an explanation for his opinion that claimant had a pulmonary impairment.[3] He concluded that Dr. Hussain's "complete pulmonary evaluation is of no value in determining whether claimant is totally disabled due to pneumoconiosis." Order of Remand at 11-12.

Employer contends that the administrative law judge erred because Dr. Hussain conducted an examination and valid testing, and that therefore no remand is necessary. Employer's Brief at 4-5. The administrative law judge permissibly discounted Dr.

[3] In the pulmonary function study report, Dr. Hussain indicated that claimant's cooperation and understanding was "good" but in the narrative report, the physician indicated that claimant's effort was "poor." Director's Exhibit 11.

Hussain's opinion because he found the report contained deficiencies that rendered it "virtually useless in determining whether claimant was totally disabled." *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Order of Remand at 11-12; Director's Exhibit 11. Substantial evidence supports this finding. Whether an opinion is reasoned and documented is for the administrative law judge to determine. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Because substantial evidence supports the administrative law judge's finding, and the Board is not empowered to reweigh the evidence, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 113 (1988), we reject employer's argument that the Director fulfilled his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR 1-84; *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990); *see also Newman*, 745 F. 2d 1162, 7 BLR 2-25.

Employer also contends that the administrative law judge erred in failing to consider the opinions of Drs. Broudy and Dahhan notwithstanding employer's inadvertent failure to include these reports on its evidence summary form. Employer's Brief at 5-6. The administrative law judge correctly indicated that while the narrative reports of Drs. Dahhan and Broudy were in the record, they had not been designated by either party as evidence to be considered pursuant to 20 C.F.R. §725.414.[4] *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); Order of Remand at 11 n.11.; Order Denying Employer's Petition for Reconsideration at 2; Claimant's Exhibit 6; Employer's Exhibit 6. In fact, on the evidence summary form, under Medical Reports, employer listed the reports of Dr. Sola and the West Virginia University School of Medicine in support of its case. These reports however, were x-ray interpretations and not medical reports as required by Section 725.414(a)(1)(i) and (3)(i). *See Smith v. Martin County Coal Corp.*, 23 BLR 1-69 (2004). Contrary to employer's contention, we hold the administrative law judge's decision to preclude consideration of Dr. Broudy's and Dahhan's narrative medical reports is not an abuse of discretion, but reasonable under the facts of this case.

[4] Revised 20 C.F.R. §725.414 applies to this claim because this claim was filed on December 12, 2002, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

Accordingly, the Order of Remand and the Order Denying Employer's Petition for Reconsideration of the administrative law judge are affirmed and the case is remanded to the district director to provide for a complete pulmonary evaluation.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge