

BRB No. 08-0315 BLA

H.G.)
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 Claimant-Petitioner)
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 v.) DATE ISSUED: 12/11/2008
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 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

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

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank
James, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05588) of
Administrative Law Judge Janice K. Bullard (the administrative law judge) on a living
miner's 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 claimant established 7.17 years of coal mine
employment, the existence of pneumoconiosis arising out of coal mine employment
pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(c), and a totally disabling respiratory
or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). However, the
administrative law judge determined that the evidence was insufficient to establish that

claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability established based on the qualifying pulmonary function studies at Section 718.204(b)(2)(i). Claimant also argues that the administrative law judge erred in failing to find the opinions of Drs. Kraynak and Talati to be sufficient to establish that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, asserting that because the administrative law judge "rationally found [that] no doctor provided a credible medical opinion on the cause of claimant's disability[,] it is necessary to remand this case for the Director to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation."¹ Director's Brief at 6.

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.² 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, 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 entitlement. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

¹ We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding as to the length of claimant's coal mine employment, and her determination that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(c), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4-17. Because we affirm the administrative law judge's finding that claimant established total disability based on her consideration of all of the contrary probative evidence, it is not necessary that we address claimant's assertion that the administrative law judge erred in weighing the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i). See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 17; Claimant's Brief at 3-15.

² This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as claimant's coal mine employment was in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 4, 6.

In this case, the administrative law judge denied benefits because she found that there was no reasoned medical opinion evidence establishing that claimant is totally disabled by pneumoconiosis. Claimant argues that the administrative law judge erred in concluding that the opinions of Drs. Kraynak and Talati were insufficient to satisfy claimant's burden of proving disability causation pursuant to Section 718.204(c). Claimant's argument is without merit.

Pursuant to Section 718.204(c), the administrative law judge considered the three medical opinions of record by Drs. Dittman, Kraynak and Talati. Dr. Dittman opined that claimant is totally disabled as a result of "idiopathic" chronic obstructive pulmonary disease, which is unrelated to coal dust exposure. Director's Exhibit 30. The administrative law judge rejected Dr. Dittman's opinion on the grounds that it was insufficiently reasoned, and we affirm that finding as it is unchallenged by the parties in this appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge found that Dr. Kraynak failed to provide a credible explanation for his opinion that claimant was totally disabled by pneumoconiosis in light of his inconsistent statements with respect to the length of claimant's work and smoking histories.³ The administrative law judge further found unpersuasive Dr. Kraynak's dismissal of smoking as a causative factor in claimant's disabling respiratory impairment because the doctor is not a pulmonary specialist and he provided no support for his opinion that the lack of reversibility post-bronchodilator demonstrated that cigarette smoking did not contribute to claimant's pulmonary impairment. Decision and Order at 11-12; Claimant's Exhibits 11, 16, 18. Contrary to claimant's contention, because the administrative law judge has discretion in determining the credibility of the medical experts, we affirm her decision to assign no weight to Dr. Kraynak's opinion pursuant to Section 718.204(c). *Gonzales v. Director, OWCP*, 869 F.2d 776, 779, 12 BLR 2-192, 2-197 (3d Cir. 1989); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985).

³ The administrative law judge noted that Dr. Kraynak was inconsistent: reporting at one time that claimant had never smoked and later dismissing claimant's thirteen year smoking history as "minimal." Decision and Order at 12; Claimant's Exhibits 11, 18. The administrative law judge also questioned the credibility of Dr. Kraynak's opinion, that claimant's respiratory impairment was due to coal dust exposure, because the doctor testified that his causation opinion had been based on less than one year of coal mine employment, although the record shows that his report and earlier testimony were based on seven years of coal mine employment. Decision and Order at 12; Claimant's Exhibit 16.

The administrative law judge found that Dr. Talati's report "was unclear on the etiology issue." Decision and Order at 18. As noted by the administrative law judge, Dr. Talati examined claimant at the request of the Department of Labor (DOL) and diagnosed simple coal workers' pneumoconiosis and severe chronic obstructive pulmonary disease, which he attributed to both coal dust exposure and smoking. Director's Exhibit 11. In response to the question on the DOL form asking Dr. Talati to indicate to what extent each condition contributed to claimant's impairment, Dr. Talati wrote "2° CWP. Smoking – Emphysema. Other etiology unknown." *Id.* In weighing Dr. Talati's opinion, the administrative law judge found that she was unable to discern "the degree to which Dr. Talati attributed [c]laimant's impairment to his pneumoconiosis, smoking or 'other' [conditions]." Decision and Order at 18. Therefore, the administrative law judge found that Dr. Talati's opinion was insufficient to satisfy claimant's burden of proof at Section 718.204(c). *Id.*

The Director maintains that claimant has not received a complete pulmonary evaluation⁴ on the issue of whether he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c) and, therefore, requests that the Board remand this case to the district director "in order for Dr. Talati to clarify his opinion on the cause of claimant's respiratory disability and to specify if any part of it arose out of claimant's 7.17 years of coal mine employment." Director's Brief at 6. In light of the Director's request, we vacate the administrative law judge's Decision and Order denying benefits and remand this case for the Director to provide claimant with a complete pulmonary evaluation on all of the necessary elements of entitlement, as required by 20 C.F.R. §725.406(a). *See Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *Ware v. Director, OWCP*, 814 F.2d 514, 10 BLR 2-1 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

⁴ The Department of Labor has a statutory duty to provide a miner with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

Accordingly, the Decision and Order Denying Benefits is affirmed in part, and vacated in part, and this case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge