BRB No. 08-0348 BLA

D.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PENN ALLEGHENY COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 12/23/2008
INTERNATIONAL BUSINESS AND MERCANTILE REASSURANCE COMPANY	)	
	)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

D.C., Kittanning, Pennsylvania, *pro se*.[1]

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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[1] Lynda D. Glagola, Program Director of Lungs at Work in McMurray, Pennsylvania, requested on behalf of claimant that the Board review the administrative law judge's decision, but Ms. Glagola is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995) (Order).

Rita Roppolo (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (07-BLA-5754) of Administrative Law Judge Daniel L. Leland denying benefits 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). This case involves a subsequent claim filed on March 1, 2006.[2] After crediting claimant with forty-two years of coal mine employment,[3] the administrative law judge found that the new evidence established that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior 1986 claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2006 claim on the merits. The administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

[2] Claimant filed two previous claims. Director's Exhibits 1, 2. The first claim could not be located, but a note in the record indicates that this claim was denied by reason of abandonment on November 28, 1980. Director's Exhibit 1. The second claim, filed on October 1, 1986, was denied on March 27, 1987, because claimant did not establish either that his pneumoconiosis was caused at least in part by his coal mine employment, or that he was totally disabled due to pneumoconiosis. Director's Exhibit 2.

[3] The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 5. 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*).

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Although employer responds in support of the administrative law judge's denial of benefits, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge erred in his consideration of the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), but the Director has not taken a position on whether the error is reversible. In a reply brief, employer challenges the Director's contention that the administrative law judge erred in his consideration of the pulmonary function study evidence.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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, 1-27 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

In considering whether the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered five pulmonary function studies conducted on May 22, 2006, November 14, 2006, April 11, 2007, June 21, 2007, and September 21, 2007.[4] Director's Exhibit 17; Claimant's Exhibits 1, 4; Employer's Exhibit 1. The administrative law judge found that:

> [T]he pre-bronchodilator FEV1 from the May 22, 2006, June 21, 2007, and September 21, 2007 studies and the post-bronchodilator values from the June 21, 2007 studies are qualifying for a miner who is the same height as claimant and is seventy one [sic] years old, the highest age which Appendix

[4] The administrative law judge also noted that two pulmonary function studies conducted on November 7, 1986 and February 11, 1987, that were submitted in connection with claimant's 1986 claim, are non-qualifying. Decision and Order at 6.

> B includes. However, the miner was eighty two [sic] to eighty three [sic] years of age when these tests were administered and it [is] by no means clear that if the FEV1 values were extrapolated for a man of his age that they would be qualifying. Therefore, although the pre-bronchodilator May 22, 2006 studies, the pre- and post-bronchodilator studies of June 21, 2007, and the pre-bronchodilator studies of September 21, 2007 studies are qualifying for a miner who is seventy one [sic] years old, I give these studies diminished weight because they most likely would not have been qualifying for a miner of eighty two [sic] or eighty three [sic] years of age.

Decision and Order at 6.

Subsequent to the issuance of the administrative law judge's Decision and Order, the Board issued *K.J.M. v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008), wherein it held that pulmonary function studies performed on a miner who is older than 71 years old (the maximum age for which qualifying values are reported in Appendix B to Part 718) must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. The Director has pointed out this error in his response to claimant's appeal. Consequently, we vacate the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). On remand, the administrative law judge must reconsider the pulmonary function study evidence based upon the table values for a 71 year old male of claimant's height. The administrative law judge must also provide employer with an opportunity to submit evidence indicating that the "ventilatory function tests that yield qualifying values for age 71 are actually normal or otherwise do not demonstrate a totally disabling pulmonary impairment." *K.J.M.*, 24 BLR at 1-48. In response, claimant may provide medical evidence supporting a disability finding based on the test results and claimant's actual age. *K.J.M.*, 24 BLR at 1-47.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv),[5] the administrative law judge credited the

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[5] The administrative law judge properly noted that all of the arterial blood gas studies of record are non-qualifying. Decision and Order at 6; Director's Exhibit 17; Claimant's Exhibit 4; Employer's Exhibits 1, 2. We, therefore, affirm the administrative law judge's finding that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Moreover, because there is no evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 6.

opinions of Drs. Fino and Cohen, that claimant was not totally disabled from a pulmonary impairment, because he found that their opinions were consistent with a preponderance of the non-qualifying pulmonary function study evidence. Decision and Order at 6. Employer's Exhibits 1, 2, However, as discussed, *supra*, the administrative law judge's finding, that the pulmonary function study evidence did not establish total disability, cannot stand. Because the administrative law judge's weighing of the medical opinion evidence was based in part upon his weighing of the pulmonary function study evidence, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration.

On remand, should the administrative law judge find the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*). If the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), he must determine whether the evidence establishes that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989).

Because we must remand this case for the administrative law judge to reconsider his findings pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), we will also address employer's contention of error, raised in its response brief, regarding the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[6]

In support of his finding that the medical opinion evidence established the existence of legal pneumoconiosis,[7] the administrative law judge merely noted that "Dr. Celko, Dr. Fino, Dr. Cohen, and Dr. Begley . . . diagnosed a coal-dust related pulmonary impairment which meets the definition of legal pneumoconiosis." Decision and Order at 5. Although these doctors diagnosed pulmonary diseases other than coal workers'

[6] Because employer argues in support of the ultimate result reached by the administrative law judge - a denial of benefits - employer's argument is properly before the Board. *See King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-91-92 (1983); *see also Dalle-Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-68 (3d Cir. 1987).

[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

pneumoconiosis, the administrative law judge did not identify which of these diseases, if any, the doctors attributed to claimant's coal dust exposure. Consequently, the administrative law judge's analysis does not comport with the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented in the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Hence, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration. On remand, the administrative law judge should identify which diagnoses, if any, rendered by the physicians of record support a finding of legal pneumoconiosis and address whether these diagnoses are sufficiently reasoned. The administrative law judge should also consider all of the contrary medical opinion evidence.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge