BRB No. 02-0571 BLA

ETHEL HAMBY (Widow of JAMES R. HAMBY) Claimant-Petitioner v. RICHLAND COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Fourth Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Ethel Hamby, Robbins, Tennessee, *pro se*.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] representing herself, appeals the Decision and Order on Fourth Remand

[1]Claimant, the surviving spouse of the deceased miner, is pursuing the miner's claim. *See Hamby v. Richland Coal Co.*, BRB No. 00-0410 BLA (Jan. 31, 2001) (unpublished).

(90-BLA-1759) of Administrative Law Judge Clement J. Kichuk 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).[2] The case is before the Board for the fifth time. In its most recent consideration of this case,[3] the Board, by Decision and Order dated January 31, 2001, affirmed the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000). *Hamby v. Richland Coal Co.*, BRB No. 00-0410 BLA (Jan. 31, 2001) (unpublished). The Board, however, vacated the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000) and remanded the case for further consideration. *Id.* Citing *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*), the Board instructed the administrative law judge that, should he find the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), he was required to weigh all the relevant evidence together, both like and unlike, to determine whether the miner had established total disability pursuant to 20 C.F.R. §718.204(c). *Id.* The Board further instructed the administrative law judge that, should he find the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), he must address whether the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.*

[2]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.

[3]A complete procedural history of the instant case is set forth in *Hamby v. Richland Coal Co.*, BRB No. 00-0410 BLA (Jan. 31, 2001) (unpublished).

On remand for the fourth time, the administrative law judge found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000).[4] The administrative law judge found that even if the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), he would find the evidence insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 (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).

Before addressing whether the medical opinion evidence was sufficient to establish total disability, the administrative law judge initially noted that clarification was needed regarding his previous finding that the miner was engaged in performing "moderate to moderate/heavy manual labor." Decision and Order on Fourth Remand at 9. The administrative law judge reexamined the nature of the miner's usual coal mine work.[5] At the 1991 hearing, the miner testified that his most recent coal mine employment was with Richland Coal Company (Richland) from 1978-1987. Transcript at 9-10. The miner testified that after Richland changed its name to Conridge, he worked for Conridge "about eight or nine months." *Id.* at 9.

While at Richland, the miner stated that he primarily operated equipment, working as a dozer operator and a shovel operator. Transcript at 12. In the twenty-two years that the

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[5]The Board has defined an individual's usual coal mine work as "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

miner worked at the strip mines, the miner operated the dozer for eight years and operated the shovel for about ten years. *Id.* at 14-15. The miner indicated that he spent most of his career operating heavy equipment in the mines. *Id.* The miner explained that his last coal mine work was at Conridge, where he worked the washer at the preparation plant. *Id.* at 12. However, because the miner's employment at the preparation plant occurred while he was working at Conridge, a company for which the miner worked only eight or nine months, the administrative law judge reasonably concluded that the miner's work at the preparation plant was not his usual coal mine employment. We affirm, as based upon substantial evidence, the administrative law judge's determination that the miner's usual coal mine employment was that of a heavy equipment operator (shovel and dozer operator). *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534 (1982); Decision and Order on Fourth Remand at 9.

The administrative law judge next considered the exertional requirements of the miner's usual coal mine employment. The miner indicated that his employment as a heavy equipment operator basically could be characterized as a "sit down all day job." Transcript at 18. The miner explained that he operated levers and foot pedals. *Id.* The miner testified that he would only have to move the levers four to six inches.[6] *Id.* Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the exertional requirements of the miner's usual coal mine employment as a heavy equipment operator were "light." *See Bartley v. L & M Coal Co.*, 7 BLR 1-243 (1984); Decision and Order on Fourth Remand at 9.

In considering whether the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), the administrative law judge properly noted that Dr. Seargeant, who examined the miner in 1979 and 1988, concluded that the miner suffered from no pulmonary impairment at all.[7] Decision and Order on Fourth Remand at 6; Director's Exhibits 6, 22. The administrative law judge found that Dr.

---

[6]The miner testified that putting on the brakes was "hard at times." Transcript at 19. The miner also indicated that when the equipment broke down, he had to help the mechanics fix it; work that he characterized as being heavier than operating the equipment itself. *Id.* The miner, however, never described how "hard" it was to push the brakes nor identified how often the equipment would break down.

[7]Dr. Seargeant examined the miner on July 3, 1979. Director's Exhibit 22. In a report dated July 3, 1979, Dr. Seargeant diagnosed possible early COPD, but did not express an opinion regard the extent of any pulmonary impairment. *Id.*

Dr. Seargeant reexamined the miner on January 6, 1988. Director's Exhibit 6. In a report dated January 6, 1988, Dr. Seargeant indicated that there was no respiratory or pulmonary impairment present. *Id.*

Seargeant's opinion supported a finding that the miner did not suffer from a disabling respiratory or pulmonary impairment in 1988. *Id.* at 7.

The administrative law judge next considered Dr. Baker's opinion. Dr. Baker examined the miner on November 6, 1990. Director's Exhibit 38. In a report dated November 7, 1990, Dr. Baker opined that the miner was not physically able, from a pulmonary standpoint, to do his usual coal mine employment. *Id.* The administrative law judge, however, properly discredited Dr. Baker's opinion because there was no indication that the doctor was aware of the exertional requirements of the miner's usual coal mine employment, *i.e.*, a heavy equipment operator.[8] *See generally Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984); Decision and Order on Fourth Remand at 8. In contrast, the administrative law judge noted that Dr. Hudson clearly opined that the miner was able to perform his usual coal mine employment as a heavy equipment operator.[9] Decision and Order on Fourth Remand at 8-10; Employer's Exhibit 1.

In summary, the administrative law judge, in his consideration of whether the evidence was sufficient to establish total disability, considered the relevant medical opinions of Drs. Seargeant, Hudson and Baker. The administrative law judge properly found that Dr. Seargeant opined that the miner did not suffer from a pulmonary impairment. The administrative law judge further properly found that Dr. Hudson's opinion supported a finding that the miner retained the pulmonary capacity to perform his usual coal mine employment. The administrative law judge also properly found that Dr. Baker's opinion was insufficient to establish total disability because there was no indication that Dr. Baker was aware of the exertional

---

[8]Although Dr. Baker indicated that he had a "general" understanding of the physical demands of the miner's coal mining job, Dr. Baker did not identify the miner's job or its specific exertional requirements. Director's Exhibit 38; Claimant's Exhibit 1.

[9]During Dr. Hudson's August 19, 1991 deposition, the following exchange took place:

> Q. Dr. Hudson, you did find, I think, that [the miner], in his pulmonary condition, is unable to perform manual labor. Is that correct?
>
> A. That would be correct. I think he could still operate a dozer or shovel, so long as he didn't have to, you know, get out and do hand shoveling to clear the way for the tracks.

Employer's Exhibit 1 at 9-10.

requirements of the miner's usual coal mine employment. We, therefore, affirm, as based upon substantial evidence, the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

In light of the Board's previous affirmance of the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), *see* 20 C.F.R. §718.204(b)(2)(i)-(iii); *Hamby*, *supra*, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). *Shedlock*, *supra*.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address the administrative law judge's finding that the evidence is insufficient to establish that the miner's total disability was due to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

Accordingly, the administrative law judge's Decision and Order on Fourth Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge