

BRB No. 05-0718 BLA

CHARLES LEMASTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED: 02/16/2006
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-6660) of Administrative Law Judge Richard A. Morgan denying benefits on a subsequent 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 credited claimant with six and three-quarters years of qualifying coal mine employment, and adjudicated this claim, filed on February 12, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that new evidence submitted in support of this subsequent claim established that claimant had developed radiological pneumoconiosis since the denials of his prior claims, and as the absence of pneumoconiosis was one of the bases for the prior denials, claimant had established a change in at least one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d)(3). Weighing all of the evidence of record together, the administrative law judge found that claimant had established the existence of pneumoconiosis arising out of

coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(c), but failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings regarding the length of claimant's qualifying coal mine employment, his findings as to the exertional requirements of claimant's usual coal mine employment, and his finding that Dr. Gaziano's opinion was insufficiently reasoned to support a finding of total respiratory disability or disability causation pursuant to Section 718.204(b)(2)(iv), (c). Alternatively, claimant asserts that Dr. Gaziano's opinion failed to satisfy the statutory duty of the Department of Labor (DOL) to provide claimant with a complete and credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand this case to the district director for further development of the evidence but to reject claimant's remaining arguments on appeal.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially contends that the administrative law judge erred in discounting claimant's 2004 hearing testimony and relying instead upon claimant's 1985 hearing testimony in determining the length of claimant's coal mine employment and the exertional requirements of his last mining job. Claimant maintains that there was no inconsistency in his testimony at the two hearings, but rather, his 2004 testimony supplemented and clarified the 1985 testimony. Claimant's arguments are without merit.

Although claimant asserts that his 2004 testimony, in conjunction with Social Security Administration (SSA) records, establishes that his work for various coal barge companies entitles him to credit for an additional three and one-half years of qualifying coal mine employment, the administrative law judge noted the inconsistency in the number of years listed as covered employment in claimant's multiple applications for benefits,¹ and cited Administrative Law Judge Anastasia T. Dunau's observation,

¹ The administrative law judge determined that claimant alleged "about" four years of coal mine employment in his initial claim filed on September 9, 1980; his November 8, 1982 claim alleged eight or nine years; his October 19, 1987 claim alleged 14 years; his March 14, 1997 claim alleged 12 or 13 years; and his current application listed 17-20 years. Decision and Order at 4; Director's Exhibits 1, 4.

following claimant's 1985 hearing, that claimant's memory concerning the dates and nature of his coal-related activities for the barge companies was extremely poor. Decision and Order at 4-5; Director's Exhibit 1. While claimant provided additional testimony at his subsequent 2004 hearing, the administrative law judge reviewed the 1985 hearing transcript and determined that claimant repeatedly testified therein that he could not remember specific information regarding his employment history. Decision and Order at 5; *see* Director's Exhibit 1, 1985 Hearing Transcript at 10, 11, 13, 17, 18. The administrative law judge reasonably concluded that "I see no basis for finding that Claimant's recollection improved 19 years later," Decision and Order at 5 n.2, and found that claimant's 2004 testimony was unreliable and entitled to little weight. Decision and Order at 5; *see generally* *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003). The administrative law judge thus acted within his discretion in crediting claimant with a total of six and three-quarters years of qualifying coal mine employment, based on SSA records reflecting three quarters of employment with Rapoca Energy Corporation, three quarters of employment with Boyd County Coal Company, and approximately one and one-quarter years of employment with Cravat Coal Company;² and claimant's 1985 testimony that he worked with his father as a miner for four years at Copley's Coal Company, which was not reflected in the SSA records because claimant was underage and his earnings were not reported. Decision and Order at 5-6; *see generally* *Mills*, 23 BLR 2-12; *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985). The administrative law judge's findings regarding the length of claimant's coal mine employment are supported by substantial evidence and are affirmed.

With respect to exertional requirements of claimant's coal mine employment, the administrative law judge permissibly discounted claimant's 2004 testimony that his last coal mine employment entailed considerable heavy lifting of up to 100 pounds, breaking up coal with a 12-pound sledgehammer, and considerable walking, finding it unreliable because it conflicted with claimant's 1985 testimony that he used a sledgehammer to crush coal in his first coal mine job at Copley's, and that his last job at Cravat involved sweeping and shooting the coal. Decision and Order at 6; Director's Exhibit 1, 1985 Hearing Transcript at 9, 13. Moreover, the administrative law judge noted that Dr.

² While the Director, Office of Workers' Compensation Programs (the Director) maintains that the administrative law judge should have relied on Cravat Coal Company's reported employment rather than the Social Security Administration (SSA) records in crediting claimant with 6¾ years of covered employment, the Director notes that this conflict need not be resolved, as Dr. Gaziano found disease etiology established based on 6¼ years of coal mine employment, and the administrative law judge found that "the discrepancy between 6¼ years and 6¾ years of coal mine employment is inconsequential for the purpose of rendering this decision," Decision and Order at 5.

Zaldivar's 1983 report described claimant's last job as "Sweep Coal Shoot Coals." Decision and Order at 6; Director's Exhibit 1. The administrative law judge thus acted within his discretion in finding that claimant's usual duties were not the ones described in claimant's 2004 testimony, but primarily involved sweeping coal, as well as helping with the drilling and shooting of coal, consistent with claimant's 1985 testimony before Judge Dunau. Decision and Order at 6, 16-17; *see generally* *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209 (1984). The administrative law judge's findings and conclusions are supported by substantial evidence, and we may not substitute our judgment. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Claimant further contends that the administrative law judge erred in finding the opinion of Dr. Gaziano insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b)(2)(iv), (c). We disagree. The administrative law judge properly found that, on the issues of total disability and disability causation, Dr. Gaziano's opinion was not well reasoned and entitled to little weight, as the physician's April 10, 2001 report provided no rationale for his conclusion that claimant is "totally disabled for coal mining," *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); the May 7, 2004 questionnaire form reported a moderate lung impairment and a severe heart impairment based on pulmonary testing and history of advanced heart disease, and indicated that claimant lacked the respiratory capacity to perform the work of a coal miner or comparable work, but Dr. Gaziano failed to discuss the exertional requirements of claimant's usual coal mine employment as determined by the administrative law judge, *see Clark*, 12 BLR 1-149;³ and the two reports understated claimant's smoking history and inflated claimant's coal mine employment history, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).⁴ Decision and

³ While claimant asserts that the administrative law judge could have inferred total respiratory disability by comparing Dr. Gaziano's assessment of a moderate pulmonary impairment with the exertional requirements of a shooter helper as set forth in the *Dictionary of Occupational Titles*, *see* Claimant's Reply Brief at 3, *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), the administrative law judge provided multiple reasons for discounting Dr. Gaziano's opinion as unreasoned, as set forth above.

⁴ The administrative law judge found 6.75 years of coal mine employment, and credited claimant's testimony that he began smoking as a teenager and continued smoking about a pack a day until approximately December 2003, when he cut back to four or five cigarettes per day. Decision and Order at 7; Hearing Transcript at 22. Contrary to the administrative law judge's findings, Dr. Gaziano's April 3, 2001 report listed 15-16 years of coal mine employment and a smoking history of one-half pack per day beginning in 1960. Decision and Order at 9; Director's Exhibit 10. On the May 7,

Order at 9-11, 16-17. As the remaining medical opinions of record did not address the extent or cause of claimant's respiratory or pulmonary impairment, the administrative law judge reasonably concluded that there was insufficient reliable medical evidence in the record to establish total respiratory disability or disability causation. Decision and Order at 17, 18.

Since the administrative law judge has found that Dr. Gaziano's report failed to credibly address an essential element of entitlement, the Director argues that DOL's statutory obligation to provide claimant with a complete pulmonary evaluation has not been satisfied and urges remand for further development of the evidence. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). Consequently, we grant the Director's request to vacate the administrative law judge's denial of benefits and remand this case to the district director for further development of the evidence.

2004 questionnaire form, Dr. Gaziano listed 15 years of coal mine employment but did not indicate the extent of claimant's smoking history. Decision and Order at 11; Claimant's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the district director for further evidentiary development consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge