BRB No. 07-0481 BLA

D.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COSTAIN COAL COMPANY	)	DATE ISSUED: 02/29/2008
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Denial of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

D. H., Daniels, West Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer and carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant, representing himself, appeals the Decision and Order Denial of Benefits (2005-BLA-05714) of Administrative Law Judge Daniel F. Solomon 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

considered the instant claim, which was filed on April 5, 2004, pursuant to the applicable regulations at 20 C.F.R. Part 718. After crediting claimant with seventeen and one-half years of qualifying coal mine employment, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further determined, however, that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), and insufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer and carrier respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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).

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 (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*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In determining that claimant failed to establish total respiratory disability under 20 C.F.R. §718.204(b), the administrative law judge initially determined that the record contained no evidence of complicated pneumoconiosis, thus the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 was not applicable. Decision and Order at 5. The administrative law judge next accurately determined that only one out of the three pulmonary function studies of record produced qualifying values at Section 718.204(b)(2)(i), and acted within his discretion as trier-of-fact in finding the single qualifying pulmonary function study less probative than the two more recent non-

qualifying pulmonary function studies.[1] Decision and Order at 8; *see generally Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). The administrative law judge further accurately noted that the two blood gas studies of record produced non-qualifying values and that the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Thus, the administrative law judge reasonably concluded that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(ii)-(iii). Decision and Order at 8. Lastly, in weighing the three medical opinions of record pursuant to Section 718.204(b)(2)(iv), the administrative law judge determined correctly that Dr. Zaldivar found claimant capable of returning to his last coal mine employment; Dr. Gaziano diagnosed claimant with only a mild pulmonary impairment and did not assess whether claimant was totally disabled; and, that although Dr. Mullins initially diagnosed claimant with a totally disabling pulmonary impairment, she subsequently changed her diagnosis to a mild and non-disabling impairment, in light of the significant improvement seen on claimant's later pulmonary function studies. Decision and Order at 8; *see generally Gee*, 9 BLR at 1-6. The administrative law judge then reasonably assigned little weight to Dr. Mullins's report because it was inconsistent with her subsequent deposition testimony, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc* on recon.); and rationally determined that the mild respiratory impairment diagnosed by Dr. Gaziano was insufficient to establish total disability in light of the contrary medical opinions of record. Decision and Order at 9; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv) as supported by substantial evidence.

As claimant has failed to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27.

[1] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Accordingly, the administrative law judge's Decision and Order Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, J., dissenting:

I respectfully dissent from my colleagues' determination to affirm the administrative law judge's decision denying benefits. I would remand the case for the administrative law judge to reconsider the issue of total disability and if he were to find total disability established, to reconsider the issue of total disability due to pneumoconiosis. I believe the administrative law judge's failure both to consider all relevant evidence and to apply the pertinent law should not be overlooked in this case in which claimant is not represented by counsel.

The administrative law judge's analysis of the medical opinion evidence regarding a totally disabling respiratory impairment is set forth, *in toto*, in the following paragraph:

> In this case, while Dr. Mullins initially found Claimant to be disabled from a pulmonary impairment, she subsequently changed her opinion. A report may be given little weight where it is internally inconsistent and inadequately reasoned. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). *See also Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc* on recon.). Dr. Zaldivar found Claimant to be capable of returning to his last coal mine employment. Dr. Gaziano made no assessment regarding disability. While he did find a mild impairment, I do not find this sufficient to establish total disability, particularly in light of the contrary medical opinions of record.

> Accordingly, I find that total disability has not been established pursuant to Section 718.204(b)(2)(iv).

Decision and Order at 8-9.

Although the administrative law judge properly discredited Dr. Mullins's opinion on total disability, which had been provided by the Department of Labor, he erred in his consideration of the opinions of Drs. Zaldivar and Gaziano, and in rejecting altogether the disability opinion of Mr. Williams, a licensed professional counselor. The administrative law judge's errors reflect a failure to recognize both relevant facts and applicable law.

With regard to Dr. Zaldivar's opinion the administrative law judge made several errors. First, in this analysis he overlooked Dr. Zaldivar's finding of a mild respiratory impairment. This is important because "even a 'mild' respiratory impairment may preclude the performance of the miner's usual coal mine employment." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *see Buffalo Mining Co. v. Copley*, 66 F.3d 331, 1998 WL 879699 (4th Cir. 1998)(employer conceded that the miner's mild respiratory impairment was totally disabling). Second, because the doctor had diagnosed a respiratory impairment, albeit mild, the administrative law judge erred in taking at face value the doctor's opinion that claimant was able to perform his usual coal mine work. Such an opinion cannot be credited unless the administrative law judge determines that the doctor knows the nature of claimant's last job and its exertional requirements. *Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-260 (7th Cir. 2005); *accord Walker v. Director, OWCP*, 927 F.2d 181, 184, 15 BLR 2-16 (4th Cir. 1991).

Of course, the administrative law judge could not determine that the doctor's opinion reflected a correct understanding of its demands unless the administrative law judge had made a finding of claimant's last coal mine employment and its exertional requirements. In the case at bar, the administrative law judge stated: "[c]laimant testified that his last coal mine employment was as an operator of surface equipment." Decision and Order at 3. It is true that claimant testified that he had been an equipment operator, operating bulldozers, trucks, and loaders. H. Tr. at 20-21. However, the administrative law judge appears to have overlooked both claimant's statement on his application for benefits that his last job was "drilling and blasting operator", and his testimony that he had done all of the mining jobs: when he was not operating equipment he was doing whatever other jobs needed to be done. Director's Exhibit 1; H. Tr. at 20, 22. In particular, claimant described his work loading holes which was a frequent assignment.

H. Tr. at 21. This entailed moving 50 pound bags of ammonia nitrate.[2] *Id*. The administrative law judge's failure to consider this evidence is error. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 512, 15 BLR 2-201, 2-205 (4th Cir. 1991). Hence, it was error for the administrative law judge to credit Dr. Zaldivar's nondisability opinion without first, considering all the evidence relevant to a determination of claimant's last employment; second, determining the exertional requirements of that employment; and third, determining that Dr. Zaldivar correctly understood the exertional requirements of claimant's last coal mine employment.

Perhaps the administrative law judge mistakenly believed it was unnecessary for him to determine whether Dr. Zaldivar understood the exertional requirements of claimant's last coal mine job because he also stated that claimant is capable of performing heavy manual labor:

> [f]rom the pulmonary standpoint, [claimant] is fully capable of performing his usual coal mining work or work requiring similar exertion. In fact, from the pulmonary standpoint he is capable of performing heavy manual labor, as long as he continues to be treated with bronchodilators for the asthma from which he suffers.

Employer's Exhibit 1 at 2. It was error for the administrative law judge to credit this opinion without first determining Dr. Zaldivar's understanding of heavy manual labor. *See Eagle*, 943 F.2d at 512, 15 BLR at 2-205 (statement of generality is insufficient to support a finding of nondisability which requires actual knowledge of claimant's actual mine work). Second, it was error for the administrative law judge to credit the opinion without considering claimant's testimony about his ability to perform his past work. *See Ratliff v. Benefits Board*, 816 F.2d 1121, 1123, 10 BLR 2-76, 2-82, (6th Cir. 1987) (disability was established where miner testified that he had much more difficulty performing usual coal mine work than in past). Claimant, who had been using bronchodilators for a year prior to Dr. Zaldivar's report in 2005, testified in 2006 that he was completely unable to do his old job:

> Q. Now do you think that you are able to perform the job that you had when you worked in the mines for Lodestar:
>
> A. No way I could lift bags and shovel holes.

[2] The work which claimant described is sufficient to satisfy the definition of Heavy Work in the *Dictionary of Occupational Titles*, which states in relevant part: "Heavy Work-Exerting 50 to 100 pounds of force occasionally. . . ." U.S. Dept. of Labor, *Dictionary of Occupational Titles* at 102 (4th ed. 1986).

Q. Why is it that you couldn't do that work now?

A. Because my breathing won't let me. I get, I burn some wood in the house in winter and my woodpile is about 15 yards from my porch. I can't carry, I carry maybe two pieces of wood and it's cold and I get completely out of breath and I can't, I have to wait before I can carry any more. I'm not able to pick up heavy stuff and carry.

H. Tr. at 22. Claimant's testimony that he cannot do the work, that he gets out of breath carrying only two pieces of wood a distance of fifteen yards, conflicts with Dr. Zaldivar's opinion, inferentially, that claimant could move 50 pound bags with the help of an occasional press on a bronchodilator. The administrative law judge should have considered Dr. Zaldivar's opinion in light of claimant's uncontradicted testimony. *See Killman*, 415 F.3d at 722, 23 BLR at 2-260.

Hence, I would remand the case for the administrative law judge to reconsider Dr. Zaldivar's opinion. The administrative law judge should determine: claimant's usual coal mine employment; the exertional requirement's of that employment; Dr. Zaldivar's understanding of these exertional requirements; and the credibility of the doctor's opinion as disputed by claimant.

I believe errors in the administrative law judge's analysis of Dr. Gaziano's opinion also require remand. After observing that Dr. Gaziano did not provide a disability opinion, the administrative law judge stated: "while he did find a mild impairment, I do not find this sufficient to establish total disability particularly in light of the contrary medical opinions of record." Decision and Order at 8-9. This statement does not make sense. If the administrative law judge is saying that Dr. Gaziano's diagnosis of a mild impairment conflicts with the diagnoses of Drs. Zaldivar and Mullins, that is wrong: Dr. Zaldivar diagnosed a mild impairment, which was also Dr. Mullins's ultimate diagnosis; she had originally diagnosed a moderate to severe impairment. Employer's Exhibit 8 at 15; Director's Exhibit 14. If the administrative law judge is saying that Dr. Gaziano's diagnosis of a mild impairment should be considered an opinion of total disability and it is outweighed by the opinions of Drs. Mullins and Zaldivar of no total disability, he forgets that he previously discredited Dr. Mullins's opinion of no total disability. Moreover, as discussed above, his crediting of Dr. Zaldivar's opinion was erroneous in several respects.

Finally, it was error for the administrative law judge to exclude from consideration on the issue of total disability the opinion of the licensed vocational counselor, Mr. Williams. He premised his opinion on his knowledge of the coal mine industry, in which small, strip mine employers use equipment operators wherever they are needed. He

stated that as a result, they "generally have to perform manual labor. . . ." Claimant's Exhibit 5. After reviewing claimant's breathing capacity medical records, Mr. Williams opined that claimant's respiratory impairment would render him unable to perform his usual coal mine employment. *Id*. The administrative law judge excluded it from consideration because 20 C.F.R. §718.204(b)(4) authorizes him to find total disability based on a physician's opinion and Mr. Williams is not a doctor. Decision and Order at 6. The administrative law judge's decision to reject Mr. Williams's opinion was based on a misunderstanding of the law. It is not necessary for a doctor to opine expressly on whether claimant is able to perform his usual coal mine employment. The law is clear that "[i]t is not essential for a physician to state specifically that an individual is totally impaired. . . ." *Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 507, 15 BLR 2-116, 2-119 (7th Cir. 1991). Medical opinion evidence can support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that claimant is unable to do his old job. *Poole v. Freeman Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990). The administrative law judge can infer disability by considering together the doctor's description of claimant's condition, claimant's testimony, and all of the exertional requirements of claimant's former employment. Use of a non-medical term such as "mild" is not insufficient as a matter of law to allow the administrative law judge to compare claimant's specific exertional requirements to his pulmonary condition, *see Id*., since it is well established that even a mild impairment may be totally disabling. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. Certainly, the expertise of a vocational counselor could provide valuable assistance to the administrative law judge in drawing a reasonable inference from the available evidence. It is therefore relevant evidence which must be considered. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 139 (1987). The administrative law judge's rejection of Mr. Williams's opinion was error. *See Walker*, 927 F.2d at 184-185, 15 BLR at 2-24.

In sum, I would vacate the administrative law judge's decision denying benefits and remand the case for the administrative law judge to reconsider the issue of whether claimant's respiratory impairment prevents him from performing his last coal mine job, pursuant to 20 C.F.R. §718.204(b)(iv), and, if reached, to determine whether the disabling impairment is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). I believe this is necessary because the administrative law judge arrived at his conclusion that claimant was not totally disabled by skipping over significant steps in the requisite analysis: he did not recognize that a mild impairment may be totally disabling; he did not consider all of the evidence relevant to a determination of claimant's last coal mine employment; he did not determine the exertional requirements of that employment; he did not determine whether Dr. Zaldivar understood the specific requirements of claimant's last coal mine employment; he did not consider claimant's testimony and the vocational counselor's opinion regarding claimant's ability to perform his last coal mine employment. The administrative law judge should reconsider all relevant evidence to determine whether it supports the inference that claimant's mild impairment renders him

unable to perform his usual coal mine employment. *See Mullins*, 484 U.S. at 139; *Poole*, F.2d at 894, 13 BLR at 2-356; *Manning*, 2007 WL 2088862 at 5.

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REGINA C. McGRANERY
Administrative Appeals Judge