BRB No. 09-0289 BLA

TERRY K. HODGES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEER RUN MINING, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 01/28/2010
	)	
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 Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

Rita Roppolo (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05326) of Administrative Law Judge Adele Higgins Odegard rendered on a subsequent claim filed on January 13, 2006, 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).[1] Director's Exhibit 3. The administrative law judge credited the parties' stipulation to 18.33 years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that claimant's previous claim was denied on the ground that the evidence was insufficient to establish the existence of pneumoconiosis. The administrative law judge found that the new evidence submitted was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that the weight of all of the relevant evidence considered together was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[2]

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[1] Claimant filed his initial claim on July 24, 1991. Director's Exhibit 1. Administrative Law Judge Edward Terhune Miller awarded benefits. *Id.* Upon considering employer's appeal, the Board vacated Judge Miller's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000) and remanded the case for him to weigh all of the evidence relevant to 20 C.F.R. §718.202(a) together and to reconsider his findings at 20 C.F.R. §§718.203 and 718.204(b)(2000). *Hodges v. W-P Coal Company,* BRB No. 99-0263 BLA (Aug. 31, 2000)(unpub.). The Board denied employer's subsequent motion for reconsideration. *Hodges v. W-P Coal Company,* BRB No. 99-0263 BLA (Dec. 20, 2000)(Order on Motion for Reconsideration *en banc*) (unpub.). Judge Miller denied benefits on remand, finding the evidence insufficient to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. The Board affirmed the denial of benefits. *Hodges v. W-P Coal Company,* BRB No. 02-0633 BLA (April 29, 2003)(unpub.). Claimant took no further action until he filed the current claim. Director's Exhibit 3.

[2] Pursuant to 20 C.F.R. §718.201(a)(1):

> Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

Accordingly, the administrative law judge determined that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge accepted employer's concession that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b) and found that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found, however, that the evidence was insufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and total disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the biopsy evidence did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). Claimant also challenges the administrative law judge's finding that the evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability causation at 20 C.F.R. §718.204(c).[3] Claimant further maintains that the administrative law judge did not properly consider the opinions of Drs. Ranavaya and Zaldivar and erred in failing to consider claimant's medical treatment records. Claimant contends that these records are entitled to greater weight, pursuant to 20 C.F.R. §718.104(d), because they were prepared by his treating physicians. Claimant further asserts that if Dr. Ranavaya's opinion is not sufficient to substantiate his claim, the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a letter brief and urges the Board to reject claimant's allegation that he did not receive a complete pulmonary evaluation, as the administrative law judge improperly discredited the report submitted by Dr. Ranavaya.[4]

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[3] Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[4] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination to accept the parties' stipulation to 18.33 years of coal mine employment and employer's concession that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3) and complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, but that claimant demonstrated the existence of clinical pneumoconiosis pursuant to 20

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.[5] 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, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that he is totally disabled by pneumoconiosis. 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered the opinions of Drs. Ranavaya and Zaldivar. Dr. Ranavaya examined claimant, at the request of the Department of Labor (DOL), on February 16, 2006 and obtained a chest x-ray, a pulmonary function study, a blood gas study and an EKG. Director's Exhibit 16. On DOL Form CM-988, Dr. Ranavaya recorded a smoking history of three packs per day for fifty-one years. *Id*. Dr. Ranavaya diagnosed complicated coal workers' pneumoconiosis, "based on a 18.75 long history of occupational exposure (all years spent underground) and radiological evidence of it." *Id*. Dr. Ranavaya identified coal dust exposure as the cause of the complicated pneumoconiosis and stated that claimant has a totally disabling pulmonary impairment to which the complicated pneumoconiosis contributes "to a major extent." *Id*. The district director subsequently asked Dr. Ranavaya to set forth his opinion regarding whether smoking or coal dust exposure was the more significant cause of claimant's total disability. *Id*. Dr. Ranavaya responded: "There is no <u>scientific</u> way to apportion it. It is a legal question, <u>not</u> medical. Both are risk factors [for] pulmonary disability. Which of the two caused [the] most damage, it's nearly impossible to determine." *Id*. (emphasis in original).

Dr. Zaldivar examined claimant on July 22, 2006 and obtained a chest x-ray, a pulmonary function study, a blood gas study, an EKG and a cardiac stress test. Director's Exhibit 18. Dr. Zaldivar also reviewed the results of previous examinations he had

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C.F.R. §718.202(a) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack*, 6 BLR at 1-711.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mine industry in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

performed of claimant in 1990 and 1994. *Id*. Dr. Zaldivar determined that there was no x-ray evidence of pneumoconiosis, but that claimant has a totally disabling obstructive impairment caused by bullous emphysema. *Id*. Dr. Zaldivar stated that claimant's emphysema was caused by smoking, rather than coal dust exposure. *Id*.

The administrative law judge determined that Dr. Ranavaya's opinion regarding whether clinical or legal pneumoconiosis was a contributing cause of claimant's totally disabling obstructive impairment was entitled to little weight on the ground that Dr. Ranavaya's comments on this issue were conclusory and equivocal. Decision and Order at 19. Regarding Dr. Zaldivar's opinion, the administrative law judge found that it was "not helpful" in assessing whether claimant met his burden of proof under 20 C.F.R. §718.204(c), as he did not diagnose clinical pneumoconiosis, but rather indicated that claimant's totally disabling impairment was caused by emphysema related to smoking. *Id*. at 19-20.

Claimant argues that the administrative law judge erred in discrediting Dr. Ranavaya's opinion, that pneumoconiosis is a contributing cause of claimant's totally disabling pulmonary impairment.[6] Claimant also challenges the administrative law judge's crediting of Dr. Zaldivar's diagnosis of bullous emphysema caused solely by cigarette smoking. Claimant further alleges that the administrative law judge erred in omitting his treatment records from consideration.

Claimant's contentions are without merit. The administrative law judge rationally found that Dr. Ranavaya's statements, that coal dust exposure was responsible, "to a major extent," for claimant's totally disabling pulmonary impairment and that coal dust exposure was "a risk factor [for] pulmonary disability," were conclusory, as Dr. Ranavaya did not explain "how, in consideration of all the evidence (including evidence of a 150+ pack year smoking history), [he] arrived at the judgment that coal mine employment played a major role in the claimant's pulmonary impairment." Decision and Order at 19; Director's Exhibit 16. The administrative law judge acted within her discretion as fact-finder, therefore, in determining that Dr. Ranavaya's opinion was insufficient to establish total disability due to either clinical or legal pneumoconiosis under 20 C.F.R. §718.204(c).[7] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21

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[6] Claimant raises similar arguments regarding the administrative law judge's finding, at 20 C.F.R. §718.202(a)(4), that the record did not contain an opinion diagnosing legal pneumoconiosis. Claimant's Brief at 13-15; *see* Decision and Order at 16. We will address claimant's allegations at 20 C.F.R. 718.204(c), however, as the issue of whether claimant has legal pneumoconiosis is subsumed in the administrative law judge's consideration of total disability causation under 20 C.F.R. §718.204(c).

[7] Claimant also asserts that the administrative law judge erred in finding that Dr. Ranavaya's causation opinion was equivocal because he indicated that he was "uncertain

BLR 2-323, 2-340 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge also rationally found that Dr. Zaldivar's opinion did not support claimant's burden at 20 C.F.R. §718.204(c), as he did not offer a judgment as to whether clinical pneumoconiosis played a role in claimant's totally disabling impairment and he attributed claimant's impairment to emphysema caused solely by cigarette smoking. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

Moreover, contrary to claimant's contention, the administrative law judge considered the hospital and treatment records and accurately found that they describe claimant's hospitalization for acute respiratory failure and pneumonia, a lung biopsy and outpatient treatment, on a regular basis, for coal workers' pneumoconiosis (CWP) and chronic obstructive pulmonary disease (COPD). Decision and Order at 3-4, 8; Director's Exhibit 17; Claimant's Exhibits 3-5. While CWP was frequently noted as part of claimant's medical or social history, the records do not contain an independent diagnosis of total disability due to CWP.[8] Similarly, although COPD appears consistently as a diagnosis in the treatment records, no physician specified that claimant's COPD was related to clinical pneumoconiosis or coal dust exposure. The administrative law judge's omission of an explicit discussion of claimant's hospital and treatment records under 20 C.F.R. §718.204(c) does not, therefore, constitute an error requiring remand. *See Clinchfield Coal Co. v. Fuller*, 1880 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999);

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as to whether smoking or coal dust exposure played a bigger role" in claimant's impairment. Decision and Order at 19; Director's Exhibit 16. Although claimant is correct in maintaining that a physician is not required to apportion the cause of a miner's lung impairment between smoking and coal dust exposure, remand is not required in light of the administrative law judge's permissible determination that Dr. Ranavaya's causation opinion was entitled to little weight, as he did not adequately explain his conclusions. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524 21 BLR 2-323 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

[8] In a hospital record dated February 10, 1998, Dr. Kayi reported under "Social History," that claimant is "100% disabled because of coal workers' pneumoconiosis." Claimant's Exhibit 5. There is no indication, however, that this represented Dr. Kayi's own diagnosis, nor did Dr. Kayi identify any documentation in the hospital record supporting such a diagnosis. *Id.*

Johnson v. Jeddo-Highland Coal Co., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Lastly, we must address claimant's allegation that, because the administrative law judge found Dr. Ranavaya's opinion to be "equivocal and conclusory" on the issue of disability causation, the Director "has not met his burden of providing claimant with a complete and credible pulmonary evaluation which is sufficient to substantiate all of the medical entitlement issues in this claim." Claimant's Brief at 18. The Director maintains that the administrative law judge erred in discrediting Dr. Ranavaya's opinion at 20 C.F.R. §718.204(c) and that he met his statutory obligation, as Dr. Ranavaya addressed all of the elements of entitlement and "used his expertise to determine whether pneumoconiosis was a likely cause [of claimant's totally disabling impairment] based upon the facts of this case." Director's Letter Brief at 2.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. In order for the Director to satisfy his statutory obligation, a physician must conduct a physical examination, and the full range of testing required by the regulations, and set forth a conclusion as to each element of entitlement. 20 C.F.R. § 725.406(a); *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984); *see also Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2- (6th Cir. 2009).

In the present case, the record reflects that Dr. Ranavaya conducted a physical examination, including the tests required by the regulations, and addressed each element of entitlement on the DOL examination form. Director's Exhibit 16; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Moreover, as indicated above, the administrative law judge did not find Dr. Ranavaya's opinion to be undocumented or unreasoned. Rather, contrary to the position urged by claimant and the Director, the administrative law judge acted within her discretion in finding Dr. Ranavaya's opinion to be unpersuasive because he did not provide an explanation of his conclusions regarding the cause of claimant's totally disabling impairment. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Decision and Order at 19. The administrative law judge's desire for a more detailed explanation, however, does not establish that Dr. Ranavaya's report was insufficient to fulfill the Director's statutory obligation. *See Hodges*, 18 BLR at 1-93; *see also Greene*, 575 F.3d at 641-42, 24 BLR at 2- . Accordingly, we reject claimant's request that this case be remanded to the district director for a complete pulmonary evaluation.

Because we have affirmed the administrative law judge's determination that the evidence is insufficient to establish disability causation at 20 C.F.R. §718.204(c), an essential element of entitlement, we must also affirm the denial of benefits.[9] *See Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[9] We decline to address claimant's allegation that the administrative law judge erred in determining that the biopsy evidence was insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Error, if any, by the administrative law judge is harmless in light of our affirmance of his finding that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), based upon consideration of the x-ray evidence along with the other evidence relevant to the existence of clinical pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).