BRB No. 04-0807 BLA

MERLE C. LONG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FLORENCE MINING COMPANY	)	
	)	DATE ISSUED: 07/29/2005
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Julie Ann Roland (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-5571) of Administrative Law Judge Michael P. Lesniak awarding 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). After crediting claimant with thirteen years of coal mine employment and noting that employer had stipulated that claimant suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge

also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board 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).

Employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In his consideration of whether the medical opinion evidence was sufficient to establish total disability, the administrative law judge accorded less weight to the opinions of Drs. Hanzel and Garrettson, finding, *inter alia*, that they were less probative than the more recent opinions of Drs. Malhotra, Schaaf and Pickerill. Decision and Order at 14-15; Director's Exhibit 13. The administrative law judge also accorded less weight to Dr. Malhotra's opinion, finding that it was not sufficiently reasoned. Decision and Order at 14; Director's Exhibit 16. Because no party challenges the administrative law judge's findings regarding the opinions of Drs. Hanzel, Garrettson and Malhotra, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge next considered the remaining medical opinions of Drs. Schaaf and Pickerill. The administrative law judge credited Dr. Schaaf's opinion that claimant suffered from a totally disabling pulmonary impairment, noting that it was "well-reasoned and documented and consistent with the evidence of record." Decision and Order at 14; Director's Exhibit 17; Claimant's Exhibit 1. The administrative law judge found that Dr. Pickerill's opinion was not convincing and, therefore, accorded it less weight.[1] Decision and Order at 15; Director's Exhibit17; Employer's Exhibit 4.

[1]During an August 11, 2003 deposition, Dr. Pickerill opined that claimant's five diagnoses (pulmonary emphysema, mild chronic obstructive pulmonary disease, obstructive sleep apnea, mild coal workers' pneumoconiosis and coronary artery disease), when put altogether, "would be sufficient to prevent him from doing his last job." Employer's Exhibit 4 at 28. Dr. Pickerill also opined that claimant's lung function revealed only a "mild obstructive defect and would not be severe enough in and of itself

Consequently, the administrative law judge found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 15.

Employer initially argues that the administrative law judge erred in finding that Dr. Schaaf's opinion was sufficiently reasoned. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Dr. Schaaf interpreted the results of claimant's September 24, 2001 pulmonary function study as revealing mild restrictive disease and mild obstructive disease. Claimant's Exhibit 1 at 16. Dr. Schaaf also reviewed the results of claimant's arterial blood gas studies, interpreting them as revealing hypoxemia at rest with further worsening of the hypoxemia during exercise. *Id.* at 17-19, 25. Based on these findings, Dr. Schaaf opined that claimant was not capable, from a pulmonary standpoint, of returning to his usual coal mine employment. *Id.* at 25-26. The administrative law judge found that Dr. Schaaf's opinion was consistent with the evidence of record, including the presence of a mild restrictive and obstructive impairment, moderate hypoxemia and complaints of dyspnea.[2] Decision and Order at 14. In light of the exertional requirements of claimant's most recent coal mine employment as a belt supervisor (sitting for one hour per day; standing for four hours per day; crawling 2000 feet for five hours per day; lifting sixty to seventy pounds three times per day; and carrying sixty to seventy pounds 300 to 400 feet three times per day), the administrative law judge found that Dr. Schaaf's opinion was sufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* Because Dr. Schaaf provided a basis for his conclusions, we reject employer's contention that Dr. Schaaf's opinion is not sufficiently reasoned.

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irregardless of the cause of it, of the obstructive lung disease, to prevent him from doing the physical performance of his last job." *Id.* at 29. However, on cross-examination, Dr. Pickerill was asked whether claimant, from a pulmonary standpoint, was capable of performing medium exertional duty in the coal mines. *Id.* at 31. Dr. Pickerill replied that claimant, at his current level of pulmonary function while on bronchodilator therapy, "would be able to do at least the majority of his work" as long as "he didn't have an exacerbation of a coughing spasm or lung disease." *Id.* at 31.

[2]Employer argues that Dr. Schaaf's opinion is not reasoned because he relied upon the results of non-qualifying pulmonary function and arterial blood gas studies. We disagree. Test results which exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985).

Employer also argues that the administrative law judge erred in his consideration of Dr. Pickerill's opinion. As previously noted, *see infra* p. 2 n.1, Dr. Pickerill opined that claimant, at his current level of pulmonary function while on bronchodilator therapy, "would be able to do at least the majority of his work" as long as "he didn't have an exacerbation of a coughing spasm or lung disease." *See* Employer's Exhibit 4 at 31. The administrative law judge properly noted that Dr. Pickerill's opinion was deficient because it does not address the relevant issue at 20 C.F.R. §718.204(b); *i.e.*, whether claimant suffers from a totally disabling respiratory or pulmonary impairment. Decision and Order at 15. While Dr. Pickerill's opinion supports a finding that claimant could perform over fifty percent of the work requirements of his usual coal mine employment, it does not support a finding that claimant is capable, from a pulmonary standpoint, of performing his usual coal mine employment. Moreover, Dr. Pickerill also qualified his opinion, noting that his assessment of claimant's work capabilities was contingent upon claimant not having an exacerbation of a coughing spasm or of his lung disease. As evidenced by claimant's "many hospital admissions," the administrative law judge found that claimant often suffered exacerbations of his pulmonary condition. *Id.* The administrative law judge, therefore, reasonably accorded less weight to Dr. Pickerill's opinion. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In weighing all of the relevant evidence, the administrative law judge found that it was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 15. Because it is not challenged on appeal, this finding is affirmed. *Skrack*, *supra*.

Employer next contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

In considering whether the evidence was sufficient to establish that claimant's total disability is due to pneumoconiosis, the administrative law judge stated:

> I accord greater weight, in particular, to the opinion of Dr. Schaaf who found the presence of pneumoconiosis and concluded that Claimant was totally disabled from performing his last coal mine employment due to a pulmonary impairment caused by coal mine dust exposure. I find Dr. Schaaf's opinion to be credible and highly persuasive. He acknowledged Claimant's history of cigarette smoking and the fact that it could cause a mild obstructive impairment but that in this case, pneumoconiosis and obesity were the causes of Claimant's shortness of breath. He based his opinion, that pneumoconiosis was a significant contributing factor, on evidence of coal dust exposure, multiple radiographic abnormalities on chest x-rays consistent with the disease process of CWP, and multiple physiologic abnormalities consistent with CWP including hypoxemia, small lung volumes, and mild airflow obstruction. For these reasons, I accord the opinion of Dr. Schaaf great weight.
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> I accord less weight to the opinions of Drs. Hanzel and Garrettson, who found, contrary to the findings in this opinion, that Claimant did not have pneumoconiosis and a disabling pulmonary impairment. In addition, I accord less weight to the opinions of Drs. Malhotra and Pickerill, who found, contrary to the findings in this opinion, that Claimant did not have a disabling pulmonary impairment. *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Decision and Order at 16.

The administrative law judge, therefore, found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer contends that the administrative law judge erred in finding that Dr. Schaaf's opinion was sufficient to support a finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In crediting Dr. Schaaf's opinion, the administrative law judge improperly focused upon the doctor's opinion

regarding the cause of claimant's shortness of breath and dyspnea,[3] rather than on the cause of his totally disabling pulmonary impairment. *See* Decision and Order at 7-8, 16. *See* Director's Exhibit 17; Claimant's Exhibit 1. The Board has recognized that a medical opinion of "shortness of breath" is not synonymous with a finding of total disability. *See Clay v. Director, OWCP*, 7 BLR 1-82 (1984); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and remand the case for further consideration. On remand, the administrative law judge is instructed to address whether Dr. Schaaf's opinion is sufficient to establish that claimant's *totally disabling pulmonary impairment* is due to pneumoconiosis.[4] 20 C.F.R. §718.204(c).

Employer also argues that the administrative law judge erred in his consideration of Dr. Pickerill's opinion. The administrative law judge's sole basis for discrediting Dr. Pickerill's opinion was the doctor's failure to find that claimant suffered from a totally disabling pulmonary impairment. In support of his finding, the administrative law judge cited to the Board's decision in *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). In *Trujillo*, the Board held that an administrative law judge could properly find that a physician's opinion on disability causation was entitled to no weight because its underlying premise, that the miner did not have pneumoconiosis, was inaccurate. However, in this case, Dr. Pickerill diagnosed the existence of pneumoconiosis. Moreover, Dr. Pickerill's opinion regarding the *extent* of claimant's disability does not undermine his conclusion regarding the *cause* of that disability. Consequently, the administrative law judge's basis for rejecting Dr. Pickerill's opinion as to the cause of claimant's pulmonary impairment cannot stand.

In light of the above-referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge is instructed to reconsider and reweigh the opinions of Drs. Schaaf and Pickerill and specifically address whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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[3]Dyspnea is defined as "difficult or labored breathing." Dorland's Illustrated Medical Dictionary 486 (25th ed. 1974).

[4]We also agree with employer that the administrative law judge failed to properly consider whether Dr. Schaaf's opinion is sufficiently reasoned. The administrative law judge did not address Dr. Schaaf's reasons for finding that claimant's pulmonary impairment was attributable to pneumoconiosis rather than other conditions. Consequently, the administrative law judge, on remand, is instructed to specifically address whether Dr. Schaaf's opinion regarding the etiology of claimant's disability is sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge