

BRB No. 05-0295 BLA

EDWARD MULLINS)	
)	
Claimant-Petitioner)	
)	DATE ISSUED: 07/27/2005
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2003-BLA-5747) of Administrative Law Judge Thomas F. Phalen, Jr., 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 credited claimant with twenty seven years of coal mine employment and noted that the claim before him was a subsequent claim pursuant to 20 C.F.R. §725.309(d). The administrative law judge determined that because the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) as the parties had stipulated, an applicable condition of entitlement had changed and claimant was entitled to consideration of the merits of the claim filed on

February 27, 2001.¹ The administrative law judge found that the evidence of record as a whole did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of Dr. Baker's opinion pursuant to Section 718.204(b)(2)(iv) and asserts that the Department of Labor did not provide him with a complete and credible pulmonary evaluation as is required under the Act. In response, the Director, Office of Workers' Compensation Programs (the Director), asserts that the administrative law judge acted rationally in discrediting Dr. Baker's opinion on the issue of total disability, but agrees that remand to the district director is necessary, as the Department of Labor did not satisfy its obligation to provide claimant with an opportunity to substantiate his claim with a complete pulmonary evaluation.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding the issue of total disability pursuant to Section 718.204(b)(2)(iv), the only medical opinion proffered in conjunction with claimant's most recent application for benefits was written by Dr. Baker and reported the results of the July 21, 2001 examination he performed, at the request of the Department of Labor. Director's Exhibit 9. Dr. Baker obtained claimant's work, medical, and smoking histories and performed a chest x-ray, pulmonary function study, blood gas study, and EKG. Dr. Baker diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease with a moderate obstructive defect, and chronic bronchitis. Dr. Baker identified coal dust exposure as the cause of all three conditions and indicated that claimant was totally disabled from

¹ Claimant's first claim, filed on June 27, 1973, was denied by the Department of Labor, as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a subsequent claim on October 13, 1992, which was denied in a Decision and Order issued by Administrative Law Judge Michael O'Neill on October 24, 1996. *Id.* Judge O'Neill determined that claimant did not prove any of the requisite elements of entitlement and denied benefits accordingly. *Id.* Claimant filed his third claim on February 27, 2001. Director's Exhibit 2.

² We affirm, as unchallenged, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2)(i)-(iii) and 725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

performing his usual coal mine work because his FEV1 value was less than sixty percent of predicted. *Id.*

Dr. Burki reviewed the July 21, 2001 pulmonary function study and determined that it was not valid because claimant's effort, cooperation, and comprehension were less than optimal. Director's Exhibit 12. The Department of Labor arranged for claimant to obtain another pulmonary function study on September 21, 2001. The results of this study were nonqualifying. Director's Exhibit 13. Dr. Baker reviewed the test and determined that the values were consistent with a mild obstructive defect, as claimant's FEV1 result was sixty percent of predicted. Dr. Baker did not, however, revise his July 21, 2001 report nor did he offer an opinion as to what the September 21, 2001 study revealed with respect to claimant's ability to perform his usual coal mine work. *Id.*

In his Decision and Order, the administrative law judge concluded that Dr. Baker's opinion did not support a finding of total disability, as Dr. Baker did not reconcile his opinion with the results of the valid non-qualifying pulmonary function study. Decision and Order at 11. Claimant argues that Dr. Baker's opinion is well reasoned and documented and is, therefore, sufficient to establish total disability. Claimant also contends that the non-qualifying nature of the pulmonary function studies relied upon by Dr. Baker does not establish the absence of a respiratory impairment. Finally, claimant argues that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work to Dr. Baker's assessment of the extent of claimant's pulmonary impairment. The Director maintains that the administrative law judge properly found that Dr. Baker's opinion was insufficient to satisfy claimant's burden under Section 718.204(b)(2)(iv).³

The Director is correct. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Baker's opinion regarding the issue of total disability was not adequately reasoned because the doctor's diagnosis of a totally disabling impairment "was based on the July 21, 2001 findings and he did not readdress

³ Claimant also cites *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), in asserting that the administrative law judge was required to consider claimant's age, education or work experience in determining whether he is totally disabled pursuant to Section 718.204(b)(2). Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are relevant only to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

this diagnosis after the September 21, 2001 study.” Decision and Order at 11; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 13 BLR 1-46 (1989); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986). See 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994).⁴ We affirm, therefore, the administrative law judge’s finding that Dr. Baker’s opinion is insufficient to establish the existence of total disability at Section 718.204(b)(2)(iv).

We also concur with the Director, however, that remand of this case to the district director is required. By virtue of the administrative law judge’s appropriate decision to discredit Dr. Baker’s opinion on the issue of total disability, the Department of Labor has not provided claimant with “an opportunity to substantiate his...claim by means of a complete pulmonary evaluation,” as is required under the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101(a), 725.406; *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); see also *Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant’s coal mine employment occurred in the Commonwealth of Kentucky. Director’s Exhibits 1, 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is vacated and in accordance with the Director's request, this case is remanded to the district director so that the Department of Labor can seek a supplemental report from Dr. Baker in which he will assess claimant's ability to perform his usual coal mine employment in light of the results of the September 21, 2001 pulmonary function study and Dr. Baker's prior examination.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge