BRB No. 08-0819 BLA

C.M.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEDDO HIGHLAND COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	DATE ISSUED: 07/10/2009
	)	
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 on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

C.M.C., Beaver Meadows, Pennsylvania, *pro se*.

Maureen E. Herron, Wilkes-Barre, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (05-BLA-6316) of Administrative Law Judge Janice K. Bullard (the administrative law judge) denying benefits on a claim filed on January 10, 2001, 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). This case is before the Board for the third

time.[1] Pursuant to claimant's most recent prior appeal,[2] the Board vacated the administrative law judge's exclusion of the reports of Drs. Cali and Kaplan as violative of the evidentiary limitations set forth in 20 C.F.R. §725.414. The Board held that because this claim was filed prior to the effective date of the amended regulations,[3] the evidentiary limits at Section 725.414 were not applicable. The Board, therefore, remanded the case to the administrative law judge for her to reconsider the admissibility of these reports. The Board also vacated the administrative law judge's determination that claimant failed to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000)[4] because the opinion of Dr. Cali, if admitted and fully credited, could support a finding of total respiratory disability. In the interest of administrative efficiency and to avoid repetition of error on remand, the Board reviewed the administrative law judge's credibility determinations on the evidence of total disability before her. The Board affirmed the administrative law judge's finding that total respiratory disability was not demonstrated under the regulatory provisions relating to pulmonary function and blood gas studies, and cor pulmonale with right-sided congestive heart failure, because the preponderance of the pulmonary function studies and blood gas studies of record were non-qualifying,[5] and the record contained no evidence of cor

[1] The lengthy procedural history of this case is set forth in the Board's prior decision. [*C.M.C.*] *v. Jeddo Highland Coal Co.*, BRB No. 07-0247 BLA (Nov. 30, 2007) (unpub.).

[2] The administrative law judge's findings that claimant established pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b) and that a change in conditions was, therefore, established at 20 C.F.R. §725.310 (2000) were previously affirmed.

[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002).

[4] The Board noted that the administrative law judge erred in applying 20 C.F.R. §718.204(c) (2000) to this claim instead of the amended regulation at 20 C.F.R. §718.204(b)(2), since the amended regulation set forth therein applies to claims that were pending on January 19, 2001. Board's 2007 Decision and Order.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C. Such a study is evidence of a totally disabling respiratory condition. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

pulmonale with right-sided congestive heart failure. In addition, the Board affirmed the administrative law judge's weighing of the reports of Drs. Corazza, Marioglio, Levinson, and Talati, and her finding that these opinions did not establish total respiratory disability. [*C.M.C.*] *v. Jeddo Highland Coal Co.*, BRB No. 07-0247 BLA (Nov. 30, 2007) (unpub.).

Pursuant to the Board's remand instructions, the administrative law judge noted that the Board had previously affirmed her determinations that the evidence she considered was insufficient to establish total respiratory disability, *see* 20 C.F.R. §718.204(b)(2)(1)-(iv). Considering the opinions of Drs. Cali and Kaplan, the administrative law judge found that they did not establish total respiratory disability at Section 718.204(b)(2)(iv). Further, considering all of the evidence of record together, the administrative law judge found that total respiratory disability was not established at Section 718.204(b). Additionally, the administrative law judge found that, because total respiratory disability was not established, disability causation could not be established at Section 718.204(c). Benefits were, therefore, denied.

On appeal, claimant generally challenges the administrative law judge's Decision and Order on Remand denying benefits. In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[6] 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).

A review of the two opinions that the administrative law judge was instructed to consider on remand reveals that each physician rendered a consulting opinion, based on a review of claimant's medical records and tests. In a report dated March 30, 2006, Dr. Cali opined that claimant was totally disabled and that coal workers' pneumoconiosis was a substantial contributing factor to his disability. Claimant's Exhibit 12. In a report dated March 24, 2006, Dr. Kaplan opined that the objective evidence did not support a

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mining employment was in Pennsylvania. Director's Exhibits 2, 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

determination that claimant was disabled and unable to perform his previous coal mine work. Employer's Exhibit 5.

In assessing the probative value of Dr. Cali's opinion, that claimant was totally disabled, the administrative law judge found it entitled to no weight because it lacked any reference to, or indication of, the physician's knowledge of the exertional requirements of claimant's usual coal mine work. The administrative law judge also found Dr. Cali's opinion insufficient to establish total respiratory disability because it was based on the doctor's recommendation that claimant not return to a dusty environment to preclude further exacerbation of his pneumoconiosis. Decision and Order on Remand at 4.

The administrative law judge properly found that Dr. Cali's opinion recommending against further coal dust exposure was insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). *See Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296-1297, 13 BLR 2-418, 2-425 (7th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Bentley v. Director, OWCP*, 7 BLR 1-612, 614 (1984); *New v. Director, OWCP*, 6 BLR 1-597 (1983); Decision and Order at 4-5. For this reason, we affirm the administrative law judge's finding that Dr. Cali's opinion did not establish total respiratory disability at Section 718.204(b)(2)(iv).[7]

As the administrative law judge properly found that the opinion of Dr. Cali, the only remaining opinion of record that could establish total respiratory disability, failed to do so, and the Board previously affirmed the administrative law judge's findings that the other relevant evidence of record did not establish total disability, the administrative law judge properly found that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2). *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Accordingly, we affirm that determination.

Because the administrative law judge's determination that claimant failed to establish total respiratory disability pursuant to Section 718.204(b) is rational, contains no reversible error, and is supported by substantial evidence, we affirm her determination that claimant failed to satisfy his burden of establishing this requisite element of entitlement under Part 718. *See* 20 C.F.R. §718.204(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Hence, we

[7] We need not address the administrative law judge's findings regarding Dr. Kaplan's opinion, as Dr. Kaplan stated that there was no evidence of total respiratory disability. Employer's Exhibit 5; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

affirm the administrative law judge's determination that entitlement to benefits is precluded.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

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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JUDITH S. BOGGS
Administrative Appeals Judge