BRB No. 10-0573 BLA

WILLIAM S. GARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRANHAM & BAKER COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/27/2011
	)	
Employer-Respondent	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-5459) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed on December 20, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge found that claimant established 9.81 years of coal mine employment and adjudicated this case

pursuant to the regulations at 20 C.F.R. Part 718.[1] The administrative law judge found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(c), but did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further determined that claimant did not prove that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2)(iv), (c). Claimant also asserts that if the Board affirms the administrative law judge's determinations under 20 C.F.R. §§718.204(b)(2)(ii), (iv), this case must be remanded to the district director, as the Department of Labor (DOL) failed to provide him with a credible pulmonary evaluation to substantiate his claim, as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to submit a response brief, unless requested to do so by the Board.[2]

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.[3] 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co.*

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[1] Because claimant established fewer than fifteen years of coal mine employment, the recent amendments to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932 (*l*)), which became effective on March 23, 2010, are not applicable to this claim.

[2] We affirm the administrative law judge's findings that claimant had 9.81 years of coal mine employment and that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), as these findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 3.

v. Hill, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

We will first address the administrative law judge's determination that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Claimant challenges the administrative law judge's consideration of the blood gas study evidence in the context of his assertion that the Director did not provide him with a complete pulmonary evaluation at 20 C.F.R. §725.406. The administrative law judge determined correctly that the resting blood gas study performed by Dr. Rasmussen on April 2, 2007, produced non-qualifying values, and that the resting and exercise blood gas studies obtained by Dr. Dahhan on October 24, 2007, were also nonqualifying. Decision and Order at 18; Director's Exhibits 11, 14; *see* 20 C.F.R. §718.204(b)(2)(ii); Appendix C to 20 C.F.R. Part 718. The administrative law judge also accurately found that Dr. Rasmussen's April 2, 2007 exercise blood gas study produced qualifying values, but found that it was "unreliable," because "the validity of the study has been called into question by Drs. Rasmussen and Vuskovich." Decision and Order at 18. Thus, the administrative law judge concluded that the blood gas study evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*.

The administrative law judge's determination that Drs. Rasmussen and Vuskovich raised concerns about the validity of the qualifying exercise blood gas study obtained on April 2, 2007, is supported by substantial evidence. Dr. Rasmussen observed that the presence of "a diphasic shift in arterial saturation at the same time there was a distinct increase in respiratory frequency, minute volume and oxygen consumption[,] indicating periods of hypoventilation . . . . raises a question about the validity of the study." Director's Exhibit 11. Similarly, Dr. Vuskovich stated: "At about 6.7 minutes into the [exercise] test, [the miner's] oxygen pulse dropped to 7.1 but a few seconds later[,] it was back up to 14.3[,] then climbed to 16.7. This outlier value was probably caused by a brief technical malfunction." Employer's Exhibit 1. Dr. Vuskovich determined that, excluding the anomalous values, claimant's response to exercise "was normal" and "[t]he generated values were all normal." *Id*. Employer's Exhibit 1.

However, the record also contains a form, prepared by Dr. Ranavaya at the request of DOL, on which he check-marked a box indicating that the April 2, 2007 blood gas study was "technically acceptable." Director's Exhibit 11-18. The administrative law judge's only reference to Dr. Ranavaya's validation appears in the portion of his Decision and Order in which he summarized Dr. Rasmussen's medical report. Decision and Order at 6 n.4. Because the administrative law judge did not address Dr. Ranavaya's validation of the April 2, 2007 blood gas study, we must vacate his finding pursuant to 20 C.F.R. §718.204(b)(2)(ii) and his conclusion, based on a consideration of all of the relevant evidence, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988

(1984). Furthermore, to the extent that the administrative law judge's consideration of the blood gas study evidence influenced his determination that claimant failed to establish the existence of legal pneumoconiosis and total disability due to pneumoconiosis, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c).

We will now turn to the administrative law judge's consideration of the medical opinions of record under 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that claimant failed to satisfy his burden of proof at 20 C.F.R. §718.204(b)(2)(iv), as neither Dr. Rasmussen nor Dr. Dahhan addressed the issue of total disability, and Dr. Vuskovich specifically opined that claimant is not totally disabled. Decision and Order at 19-20. Claimant argues that the administrative law judge erred in determining that Dr. Rasmussen's opinion was insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). Claimant further maintains that, if the Board affirms the administrative law judge's discrediting of Dr. Rasmussen's opinion, the Director has failed to provide him with a complete pulmonary evaluation in accordance with 20 C.F.R. §725.406.

Dr. Rasmussen examined claimant on April 2, 2007, at the request of the DOL. Director's Exhibit 11. Dr. Rasmussen reported an occupational history of eighteen years of coal mine employment and indicated that claimant was a non-smoker. *Id*. He interpreted a chest x-ray as negative for pneumoconiosis, and found claimant's electrocardiogram and pulmonary function testing to be normal. With regard to the arterial blood gas study he obtained, Dr. Rasmussen noted "minimal impairment in oxygen transfer during moderate exercise." *Id*. On the section of DOL Form CM-988 that asks the physician to describe "the severity of the impairment related to a chronic respiratory or pulmonary disease" and also address whether the impairment would preclude the miner from performing his or her usual coal mine work, Dr. Rasmussen stated that claimant's blood gas studies showed "mild resting hypoxemia, which improved to normal while claimant was standing on the treadmill." *Id*. Dr. Rasmussen opined that while "it is possible that [claimant's] obesity could be related to his hypoventilation," because "[o]besity does not cause an increase in p(A-a)O2 . . . [t]his change indicates primary lung disease, the only known cause of which is his coal mine dust exposure." *Id*. Dr. Rasmussen concluded that there was insufficient evidence to justify a diagnosis of clinical pneumoconiosis, but that claimant's "impairment in oxygen transfer is consistent with legal pneumoconiosis." *Id*.

In a letter dated November 26, 2007, Dr. Rasmussen indicated that he had been given a corrected employment history of nine years and stated:

> Nine years of coal mine dust exposure is certainly sufficient in a susceptible individual to acquire pneumoconiosis. However, in my opinion it is quite

> doubtful that this is sufficient employment to cause such blood gas abnormalities in an individual.
>
> I had previously expressed doubt concerning the relationship between mine employment and his impairment[,] pointing out that he does suffer from very pronounced obesity, although his obesity [has] not likely caused his abnormalities. Nonetheless, I believe there is overall insufficient evidence to justify [a diagnosis of] either legal or clinical pneumoconiosis.

Director's Exhibit 17.

Contrary to claimant's argument, the administrative law judge rationally determined that Dr. Rasmussen's opinion did not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Although Dr. Rasmussen indicated that the exercise blood gas study was qualifying, he did not answer the question on DOL Form CM-988, as to whether claimant was totally disabled from performing his usual coal mine work. Director's Exhibit 11. Thus, the administrative law judge correctly characterized Dr. Rasmussen's opinion as failing to address the issue of total disability. *See Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon*., 9 BLR 1-104 (1986) (*en banc*); *Mazgaj v. Valley Camp Coal Corp*., 9 BLR 1-201 (1986).

Based upon our affirmance of the administrative law judge's finding with respect to Dr. Rasmussen's opinion, however, we agree with claimant's alternative contention that DOL did not provide him with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406. 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), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1984). The regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a). Further, 20 C.F.R. §725.406(c) mandates that "[i]f any medical examination or test conducted under paragraph (a) of this section is not administered or reported in substantial compliance with the provisions of part 718 of this subchapter, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c).

The United States Court of Appeals for the Sixth Circuit also recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In

> some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, 24 BLR 2-202, 2-221 (6th Cir. 2009).

In this case, because Dr. Rasmussen did not offer an opinion on the issue of total disability, which is a requisite element of entitlement, we conclude, as a matter of law, that claimant has not received a complete pulmonary evaluation, as required by the Act. *See Greene*, 575 F.3d at 641-42, 24 BLR at 2-221; *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-146 (*en banc*). We, therefore, vacate the denial of benefits and remand this case to the district director for the evidentiary development necessary to cure the defect in Dr. Rasmussen's opinion on the issue of total disability.[4]

Once the case is returned to the administrative law judge, he must reconsider whether the qualifying exercise study performed by Dr. Rasmussen on April 2, 2007, is valid. The administrative law judge must then reconsider whether claimant has established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and total disability causation pursuant to 20 C.F.R. §718.204(c). The administrative law judge's findings on remand must be based on a weighing of all relevant evidence, including any new evidence developed before the district director.

[4] In addition, further testing may be required pursuant to 20 C.F.R. §725.406(a), (c), as it is not clear that Dr. Rasmussen's examination included a valid exercise blood gas study, in light of the comments in which Drs. Rasmussen and Vuskovich questioned the reliability of the April 2, 2007 study. *See* discussion, *supra*, at 3. In the interest of judicial economy, we also note that Dr. Rasmussen's supplemental opinion needs clarification on the issue of total disability causation under 20 C.F.R. §718.204(c), as it appears to be contradictory on the role played by obesity in causing claimant's hypoxemia. Director's Exhibit 17.

Accordingly, the Decision and Order Denying 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge