

BRB No. 07-0704 BLA

R.C. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 TRI-STATE BELTING, INCORPORATED<sup>1</sup> ) DATE ISSUED: 06/20/2008  
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 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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

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<sup>1</sup> At the September 26, 2006 hearing, Baumgardner, Inc., was dismissed as a party to the proceeding. It was officially removed from the caption by Order issued December 14, 2006. By Order issued November 27, 2006, Tri-State Belting, Inc., was named the putative responsible operator. Subsequent to the hearing, Tri-State Belting, Inc., was determined to be insolvent and employer's counsel withdrew from its representation. The Director, Office of Workers' Compensation Programs, was substituted as the responsible party in the event liability is established.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-06239) of Administrative Law Judge Janice K. Bullard (the administrative law judge) on a request for modification of the district director's denial of a claim<sup>2</sup> 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 at least 19.93 years of qualifying coal mine employment, and determined that the record supported the parties' stipulation that claimant has pneumoconiosis arising out of coal mine employment. However, upon review of the entire record, the administrative law judge found that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and thus, claimant had failed to demonstrate either a change in conditions or a mistake in a determination of fact in the district director's prior denial of benefits pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied.

On appeal, both claimant and the Director, Office of Workers' Compensation Programs (the Director), contend that the administrative law judge improperly weighed the medical opinion evidence at Section 718.204(b)(2)(iv).<sup>3</sup>

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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>2</sup> Claimant filed his claim for benefits on September 12, 2003. Director's Exhibit 2. The district director denied the claim on July 12, 2004, based on claimant's failure to establish total disability, Director's Exhibit 29, and claimant submitted additional medical evidence within one year of the denial. Director's Exhibit 31. The district director treated this evidence as a request for modification, but denied benefits on May 23, 2005. Director's Exhibit 34. Claimant requested a formal hearing on June 1, 2005. Director's Exhibit 36.

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence is insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3, 6-10.

Claimant and the Director contend that, in finding the weight of the evidence insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge provided three invalid reasons for discounting the opinions of Drs. Begley and Schaaf. First, the parties contend that the administrative law judge erroneously discounted the opinions of Drs. Begley and Schaaf for failing to consider the effect of claimant's arthritis on his disability. We agree. Section 718.204 provides, in pertinent part, that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, *shall not be considered* in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a) (emphasis added). While claimant testified that his arthritis made it difficult to walk, bend and hunt, Decision and Order at 11, Hearing Transcript at 54-55, there is no evidence that the arthritis affected claimant's breathing. Thus, the physicians were not required to address the effects of claimant's arthritis, as it is a nonpulmonary condition that is not relevant to the issue of whether claimant's chronic pulmonary impairment is totally disabling. *See* 20 C.F.R. §718.204(a); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Bonessa v. United States Steel Corp.*, 884 F.2d 725, 13 BLR 2-23 (3d Cir. 1989).

Secondly, claimant and the Director contend that the administrative law judge erred in finding that neither Dr. Begley nor Dr. Schaaf considered the effect of claimant's heart disease on his total disability. We agree. The administrative law judge's statement that "neither physician addressed [claimant's] coronary condition, and the role it may play, if any, in his ability to perform his past work" is factually incorrect. Decision and Order at 11. Both physicians addressed claimant's history of coronary artery disease in their deposition testimony, opining that claimant's coronary artery disease was too insignificant to have caused claimant's pulmonary disability and that the presence of the disease did not affect their opinions on claimant's pulmonary condition. Claimant's Exhibits 3 at 12, 4 at 22, 25; *Bonessa*, 884 F.2d at 734, 13 BLR at 2-37; *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997).

Lastly, claimant and the Director contend that the administrative law judge improperly found the opinions of Drs. Begley and Schaaf to be unreasoned and undocumented in light of the non-qualifying pulmonary function and blood gas study results of record and Dr. Zlupko's conclusion that claimant's pulmonary function study indicated only a mild impairment.<sup>5</sup> We agree. The administrative law judge found that

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<sup>5</sup> The record contains one pulmonary function study and one blood gas study, obtained by Dr. Zlupko on October 27, 2003. Neither test produced qualifying results, and Dr. Zlupko concluded that claimant had a very mild obstructive ventilatory impairment, but was not "impaired." Director's Exhibit 18. The administrative law

the opinions of Drs. Begley and Schaaf were inadequately explained because they relied on the “abnormal,” but non-qualifying, results of the pulmonary function study and blood gas study conducted by Dr. Zlupko, and were inconsistent with Dr. Zlupko’s finding of only a mild impairment based on the pulmonary function study results. Decision and Order at 11. However, neither Dr. Begley nor Dr. Schaaf opined that Dr. Zlupko’s pulmonary function study results demonstrated that claimant was totally disabled. In fact, Dr. Schaaf agreed that the pulmonary function study results showed only a very mild impairment, but explained that the blood gas study results, which Dr. Zlupko did not address, demonstrated a degree of impairment that would prevent claimant from performing his usual coal mine work from a respiratory standpoint. Additionally, Dr. Begley cited oxygen desaturation shown on claimant’s blood gas study to support his disability assessment. Director’s Exhibit 31. As even a mild impairment can be totally disabling, and both physicians demonstrated knowledge of claimant’s coal mine employment duties involving moderate to heavy exertion, the administrative law judge should have compared the physicians’ assessment with the exertional requirements of claimant’s usual coal mine employment in determining whether claimant’s pulmonary impairment was totally disabling, despite the non-qualifying objective test results. Claimant’s Exhibits 3 at 13, 4 at 17-20; *see generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Because the administrative law judge has provided invalid reasons for discounting the opinions of Drs. Begley and Schaaf, we vacate her findings at Section 718.204(b)(2)(iv), and remand this case for the administrative law judge to reevaluate the conflicting medical opinions thereunder. Additionally, the administrative law judge must reconsider the factors set forth at 20 C.F.R. §718.104(d) in determining whether Dr. Begley’s opinion is entitled to controlling weight based on his status as claimant’s treating physician. If, on remand, the administrative law judge finds that total respiratory disability is established at Section 718.204(b)(2), she must determine whether the weight of the evidence is sufficient to establish that pneumoconiosis is a substantially contributing cause of the disability at Section 718.204(c).

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judge found that Dr. Zlupko’s opinion was the best reasoned because it was better supported by the objective data of record. Decision and Order at 12.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and this 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