BRB No. 05-0640 BLA

RONALD D. OSBORNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PANTHER BRANCH	)	DATE ISSUED: 03/30/2006
d/b/a LONG BRANCH ENERGY	)	
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Anthony J. Cicconi and Bernard R. Cochran (Shaffer & Shaffer, PLLC), Charleston, West Virginia, for employer.

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

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (03-BLA-6560) of Administrative Law Judge Michael P. Lesniak denying 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). The administrative law judge credited claimant with at least twenty-seven years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)

and 718.203(b). However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[1]

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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The record consists of a decision of the State of West Virginia Workers' Compensation Office of Judges (WVWCOJ), as well as the reports of Drs. Crisalli, Zaldivar, and Rasmussen. In an April 12, 2000 decision, the WVWCOJ affirmed the West Virginia Occupational Pneumoconiosis Board's finding that claimant has a 10% impairment attributable to occupational pneumoconiosis. Director's Exhibit 7. Regarding the medical opinions, Dr. Crisalli, in a June 24, 2003 report, opined that claimant has minimal impairment in oxygen transfer that is secondary to obesity and obstructive sleep apnea. Employer's Exhibit 2. Dr. Crisalli also opined that claimant retains the pulmonary functional capacity to perform his previous job in the coal mines or a job requiring similar effort outside of the mines. *Id*. In a June 21, 2004 report, Dr. Zaldivar diagnosed a mild restrictive impairment strictly due to obesity accompanied by a sedentary lifestyle. Employer's Exhibit 1. However, Dr. Zaldivar opined that claimant's pulmonary capacity does not represent an impairment. Dr. Zaldivar additionally opined that, from a pulmonary standpoint, claimant is fully capable of performing his usual coal mine work or work requiring similar activity. *Id*. In contrast, Dr. Rasmussen, in a February 5, 2002 report, opined that claimant exhibits poor exercise tolerance, has minimal loss of lung function, and is not able to perform very heavy manual labor. Director's Exhibit 15. The administrative law judge found that the opinions of Drs.

[1]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Crisalli and Zaldivar outweighed Dr. Rasmussen's contrary opinion on the grounds that Drs. Crisalli and Zaldivar have a better understanding of claimant's last coal mine job as a continuous miner operator and they addressed claimant's nonpulmonary conditions in concluding that claimant does not have a pulmonary impairment. Decision and Order at 10. Further, the administrative law judge discounted the decision of the WVWCOJ because he found that it is not reasoned.[2] *Id*. at 9.

Claimant asserts that the administrative law judge erred in failing to evaluate claimant's capacity to perform his usual coal mine work. Contrary to claimant's assertion, the administrative law judge considered claimant's testimony[3] about his job duties and the coal mine work histories reported to Drs. Crisalli, Zaldivar, and Rasmussen in weighing the physicians' opinions with respect to claimant's capacity to perform his usual coal mine work. The administrative law judge specifically stated:

> Dr. Rasmussen noted that [c]laimant's last coal mine job was as a continuous mine operator, which involved "pull[ing] heavy cable, rock dust[ing], shovel[ing] ribs, [and] shovel[ing] belt." (DX 15, p.1)…. According to [c]laimant's testimony, he would only rock dust or clean the belts when the miner was "down." (TR 10). He testified that he would rock dust every two months and he would clean the belts every three to four

[2]In considering the decision of the State of West Virginia Workers' Compensation Office of Judges (WVWCOJ) with regard to the issue of pneumoconiosis at Section 718.202(a)(4), the administrative law judge noted that a state agency decision is relevant but not binding on him. Decision and Order at 7. The administrative law judge also noted that the decision of the WVWCOJ in this case did not state the criteria for finding an occupational pneumoconiosis. *Id*. Further, the administrative law judge noted that while the decision of the WVWCOJ identified the medical evidence it relied on, "none of the evidence is appended to the decision." *Id*. With regard to the issue of total disability at Section 718.204(b)(2)(iv), the administrative law judge stated, "[f]or the reasons stated before, I find that the WVWCOJ decision is poorly reasoned and accord it little weight." *Id*. at 9. No party has challenged the administrative law judge's basis for discounting the decision of the WVWCOJ.

[3]Claimant testified that his last coal mine job as a continuous miner operator required him to lift and carry miner cable that was about two inches in diameter and five hundred feet in length. Transcript at 8-9. Claimant also testified that when the continuous miner was down, he was required to rock dust and carry a fifty pound bag of rock dust every two months. *Id*. at 9-10. Further, claimant testified that he was required to clean the belts every three to four months. *Id*. at 10.

> months. (TR 10). Dr. Zaldivar reported that [c]laimant would have to clean the belts or rock dust when the miner was broken, which happened once or twice a month. (EX 1, p. 6). Claimant told Dr. Crisalli that his job required sitting for one hour a day and standing for seven hours a day. He also told Dr. Crisalli that he would lift sixty pounds of material a few times a week. (EX 2, p.7).

Decision and Order at 9-10. Based on the administrative law judge's reliance on claimant's testimony and the work histories reported to Drs. Crisalli and Zaldivar, the administrative law judge found that claimant's last coal mine job as a continuous miner operator required him to stand, pull miner cable, and occasionally rock dust and clean the belt. *Id*. at 10. Furthermore, the administrative law judge found that Dr. Rasmussen's opinion that claimant is totally disabled is not reasoned because it is not based on claimant's usual coal mine work. *Id*.

However, contrary to the administrative law judge's finding, Dr. Rasmussen's report indicates that Dr. Rasmussen had an understanding of the exertional requirements of claimant's last coal mine job. Director's Exhibit 15. In summarizing claimant's last coal mine job as a continuous miner operator, Dr. Rasmussen noted the specific duties of this job. *Id*. Like claimant's testimony and the reports of Drs. Crisalli and Zaldivar, Dr. Rasmussen noted that claimant's duties as a continuous miner operator included pulling heavy cable, rock dusting, shoveling ribs, and shoveling the belt. *Id*. Although Dr. Rasmussen, unlike Drs. Crisalli and Zaldivar,[4] did not note how often claimant's last coal mine job required him to rock dust and clean the belt, Dr. Rasmussen's knowledge of the frequency with which claimant's last coal mine job required him to perform heavy manual labor is not vital to the issue of whether Dr. Rasmussen had an understanding of claimant's last coal mine job. Rather, the crucial inquiry in this regard is whether Dr. Rasmussen had knowledge that claimant's last coal mine job required him to perform heavy manual labor. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984) (holding that the administrative law judge properly found a doctor's opinion that the miner has no difficulty with his particular job of running a motor unpersuasive because the doctor indicated no knowledge of the miner's laborious manual labor duties of re-tracking and sanding). Thus, since Dr. Rasmussen expressly noted the duties of claimant's last coal mine job as a continuous miner operator, we hold that the administrative law judge erred in finding that Dr. Rasmussen's opinion is not reasoned, on the basis that Dr. Rasmussen did not have an understanding of claimant's last coal

[4]Although the administrative law judge noted that Dr. Zaldivar stated that claimant would have to rock dust or clean the belt about once or twice a month when the continuous miner was broken, he did not mention that Dr. Zaldivar also noted that the repair time for a continuous miner usually takes one hour, but "[s]ometimes there is a major repair to be done lasting seven or eight hours." Director's Exhibit 15.

mine job as a continuous miner operator. *Cf. Markatan v. Jones & Laughlin Steel Corp.*, 6 BLR 1-940 (1984) (questioning a physician's ability to relate his pathological findings to decedent's work functions was reasonable where physician was unfamiliar with decedent's employment duties).

Claimant also asserts that the administrative law judge erred in accepting the opinions of employer's physicians, that claimant is not actually disabled, even though they admitted, without explanation, that claimant could not return to his usual coal mine employment. Contrary to claimant's assertion, the administrative law judge accurately stated that "Drs. Crisalli and Zaldivar concluded that [c]laimant is not totally disabled from a pulmonary standpoint," rather than stating that claimant could not return to his usual coal mine work. Decision and Order at 10. As discussed *supra*, Dr. Crisalli opined that claimant retains the pulmonary functional capacity to perform his previous job in the coal mines or a job requiring similar effort outside of the mines. Employer's Exhibit 2. Similarly, Dr. Zaldivar opined that, from a pulmonary standpoint, claimant is fully capable of performing his usual coal mine work or work requiring similar activity. Employer's Exhibit 1. Thus, since the administrative law judge accurately stated that Drs. Crisalli and Zaldivar opined that claimant does not have a disabling pulmonary impairment, we reject claimant's assertion that the administrative law judge erred in failing to explain why the opinions of Drs. Crisalli and Zaldivar are insufficient to establish total disability at Section 718.204(b)(2)(iv). *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Claimant further asserts that the administrative law judge erred in finding that the opinions of Drs. Crisalli and Zaldivar outweighed the contrary opinion of Dr. Rasmussen on the basis that Drs. Crisalli and Zaldivar, unlike Dr. Rasmussen, addressed claimant's nonpulmonary conditions in considering the issue of whether claimant has a disabling respiratory or pulmonary impairment. In considering the issue of total disability at Section 718.204(b)(2)(iv), the administrative law judge noted that "Dr. Crisalli found that [c]laimant has a minimal impairment in oxygen transfer secondary to obesity and obstructive sleep apnea," and "Dr. Zaldivar found that [c]laimant has a mild impairment due to obesity and a sedentary lifestyle." Decision and Order at 10. The administrative law judge found that the opinions of Drs. Crisalli and Zaldivar are well documented and supported by the objective medical evidence. *Id*. Further, the administrative law judge found that Dr. Zaldivar's opinion is well reasoned.[5] *Id*. In contrast, the administrative law judge found that Dr. Rasmussen's opinion is poorly reasoned because Dr. Rasmussen

[5]The administrative law judge stated that "Dr. Zaldivar explained that [c]laimant's minimal impairment in oxygen transfer is due to obesity because [c]laimant's blood gases after exercise were normal, demonstrating that [c]laimant does not have a pulmonary impairment." Decision and Order at 10.

did not address claimant's nonpulmonary conditions before he concluded that claimant is totally disabled from a pulmonary impairment. The administrative law judge specifically stated that "Dr. Rasmussen does not address whether [c]laimant's obesity and back injuries contribute to his poor exercise tolerance and inability to perform his last coal mine job." *Id.*

Pursuant to Section 718.204(b), total disability is established if a miner has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work or from engaging in gainful employment requiring the skills or abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity over a substantial period of time. 20 C.F.R. §718.204(b)(1)(i) and (ii). A finding of a pulmonary or respiratory impairment refers to a loss of function. *Clay v. Director, OWCP*, 7 BLR 1-82 (1984). Based on a physical examination, a pulmonary function study, a medical history, and a coal mine employment history, Dr. Rasmussen, in the section of his report that addresses the degree of severity of a pulmonary or respiratory impairment, opined that claimant has minimal loss of lung function and is not able to perform very heavy manual labor. Director's Exhibit 15. Further, Dr. Rasmussen noted, in his report and an attached examination summary, that claimant's height is 69 inches, his weight is 250 pounds, he injured his back on several occasions, and he has sleep apnea. *Id.* The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Thus, since Dr. Rasmussen appears to have considered claimant's obesity, sleep apnea, and back injuries in his report, we hold that the administrative law judge erred in failing to explain why he found that Dr. Rasmussen's disability opinion is not reasoned on the ground that Dr. Rasmussen did not consider those conditions before he concluded that claimant has a disabling pulmonary impairment. *Wojtowicz*, 12 BLR at 1-165.

In view of the forgoing, we vacate the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of the evidence.

In addition, on remand, if reached, the administrative law judge must again weigh together all of the contrary probative evidence of disability, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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*). Further, on remand, the administrative

law judge must determine whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), if reached. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n.8, 19 BLR 2-304, 2-320 n.8 (4th Cir. 1995); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-18 (2003).

In light of the foregoing, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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JUDITH S. BOGGS
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's denial of benefits, and remand the case for further consideration of the evidence. As I believe there is substantial evidence in the record to support the administrative law judge's finding, I would affirm the administrative law judge that the evidence of record is insufficient to establish total disability at Section 718.204(b)(2)(iv). *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). In weighing the conflicting disability opinions of Drs. Crisalli, Zaldivar, and Rasmussen, the administrative law judge considered the physicians' understanding of the exertional requirements of claimant's last coal mine job. Like claimant at the hearing, both Drs. Crisalli and Zaldivar noted the frequency with which claimant performed the duties of his last coal mine job. In contrast, Dr. Rasmussen merely noted the duties of claimant's last coal mine job as a continuous miner operator, without discussing the frequency with which claimant was required to perform them. The administrative law judge's finding that claimant only

occasionally rock dusted and cleaned the belt, based on claimant's testimony and the coal mine work histories reported to Drs. Crisalli and Zaldivar, is supported by the evidence of record. Thus, I would hold that the administrative law judge reasonably found that Dr. Rasmussen's opinion is not reasoned on the ground that Dr. Rasmussen did not have a complete understanding of claimant's last coal mine job as a continuous miner operator. *Markatan v. Jones & Laughlin Steel Corp.*, 6 BLR 1-940 (1984). Since the administrative law judge properly discounted Dr. Rasmussen's opinion, I would affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at Section 718.204(b)(2)(iv). *Markatan*, 6 BLR at 1-942. I would therefore affirm the administrative law judge's denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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NANCY S. DOLDER, Chief
Administrative Appeals Judge