

BRB No. 05-0729 BLA

JAMES HENSLEY)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 03/31/2006
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 LESLIE RESOURCES)
)
 and)
)
 SECURITY INSURANCE OF HARTFORD,)
 INCORPORATED)
)
 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 – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5491) of Administrative Law Judge Joseph E. Kane 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). Based on claimant’s September 3, 2002 filing date, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. After crediting claimant with twenty-one years of coal mine employment, the administrative law judge found that the x-ray evidence of record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the medical evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). However, he found the medical evidence insufficient to establish that claimant’s total respiratory disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish that his total respiratory disability is due to pneumoconiosis. Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), in a limited response, states that there is no need to remand this case for a new pulmonary evaluation. However, the Director concurs with claimant that the case should be remanded because the administrative law judge failed to consider the medical opinion of Dr. Simpao at Section 718.204(c).

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. 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. 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 of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.204, the administrative law judge found the medical

evidence sufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2). In particular, the administrative law judge found that the weight of the pulmonary function study evidence established total disability pursuant to Section 718.204(b)(2)(i). Decision and Order at 10; Director's Exhibits 11, 12, 13, 14, 16; Claimant's Exhibit 4. The administrative law judge further found that the weight of the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 12; Director's Exhibits 11, 12, 13, 16, 37; Claimant's Exhibit 6. Consequently, the administrative law judge found that the weight of the medical evidence established the existence of a total respiratory disability. Decision and Order at 12. However, he further found that the medical opinion evidence was insufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c), based on his determination that the only relevant medical opinion, that of Dr. Baker, was entitled to little weight. Decision and Order at 13.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in weighing the medical opinion evidence of record. In particular, claimant argues that the administrative law judge erred in failing to consider the medical opinion of Dr. Simpao, which states that claimant's moderate pulmonary impairment was due to coal workers' pneumoconiosis, pursuant to Section 718.204(c). Claimant also contends that the administrative law judge erred in not crediting the medical opinion of Dr. Baker, arguing that his medical opinion is well reasoned and documented. Claimant further contends that because the administrative law judge accorded less weight to the medical opinion of Dr. Simpao, concerning whether claimant is totally disabled, the Director has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim.

We reject claimant's contention that, because the administrative law judge accorded Dr. Simpao's less weight at Section 718.204(b)(2)(iv), the Director has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim. Claimant's Brief at 6. As the Director contends, notwithstanding the diminished weight the administrative law judge accorded Dr. Simpao's opinion, the administrative law judge concluded that claimant established total disability based on the qualifying pulmonary function studies as well as the other medical opinions. Therefore, any flaw in Dr. Simpao's opinion with regard to the issue of total disability is harmless and the case does not need to be remanded on that basis. Director's Brief at 2; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

However, we must vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge for further consideration of the relevant evidence of record on the issue of disability causation pursuant to Section 718.204(c). Initially, we reject claimant's contention that the administrative law judge erred in not

crediting the medical opinion of Dr. Baker. Claimant's Brief at 4. Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in according Dr. Baker's opinion little weight based on his reliance on an inaccurate smoking history, finding that Dr. Baker relied on a smoking history that claimant quit smoking fifteen years prior to Dr. Baker's examination, whereas the administrative law judge found that claimant quit smoking in 2001. Decision and Order at 4, 13; Director's Exhibit 13; Claimant's Exhibit 6; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

However, as claimant and the Director correctly contend, the administrative law judge failed to consider the opinion of Dr. Simpao, which stated that claimant's moderate pulmonary impairment was due to coal dust exposure, under Section 718.204(c). Director's Exhibits 11, 37. Contrary to the administrative law judge's finding that only Dr. Baker's opinion remained as a diagnosis relevant to disability causation, Decision and Order at 13, Dr. Simpao's diagnosis of a moderate pulmonary impairment due to coal dust exposure is relevant at Section 718.204(c). Because the administrative law judge found the evidence sufficient to establish a totally disabling respiratory impairment, the issue was no longer the extent of the disability but rather the cause of the total respiratory disability. 20 C.F.R. §718.204(c); *Smith v. Martin County Coal Co.*, 23 BLR 1-71, 1-75 (2003); *see generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Thus, the administrative law judge erred in finding that only Dr. Baker's opinion was relevant to the issue of disability causation at Section 718.204(c). Consequently, we vacate the administrative law judge's Section 718.204(c) findings and remand the case for consideration of Dr. Simpao's medical opinion.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge