BRB No. 09-0418 BLA

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| CHRIS NEWSOME | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 03/18/2010 |
| | ) | |
| EXCEL MINING, LIMITED LIABILITY CORPORATION | ) | |
| | ) | |
| | ) | |
| 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-5684) of Administrative Law Judge Richard A. Morgan, with respect to a miner's claim filed on August 20, 2007, 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). After crediting claimant with at least thirty years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge concluded that while claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), he failed to establish that he was totally disabled due to the disease at 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in discrediting Dr. Ranavaya's opinion, that claimant is totally disabled, at 20 C.F.R. §718.204(b)(2)(iv). In the alternative, claimant asserts that if the Board affirms the administrative law judge's discrediting of Dr. Ranavaya's opinion, then the Director, Office of Workers' Compensation Programs (the Director), failed to provide a complete pulmonary evaluation as required by 30 U.S.C. §923(b), implemented by 20 C.F.R. §§ 718.101(a), 725.406. Employer responds, urging affirmance of the administrative law judge's denial of benefits and asserting that Dr. Ranavaya's report, even if properly discredited, is complete. The Director has filed a response brief, concurring with claimant's assertions.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[2] 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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3) and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In evaluating whether claimant established the existence of total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Broudy, Dahhan and Ranavaya. The administrative law judge gave diminished weight to the opinions of Drs. Broudy and Dahhan, that claimant has a mild pulmonary impairment but is not totally disabled, because he found that "neither physician has demonstrated knowledge or consideration of the exertional requirements of the miner's work." Decision and Order at 20, citing *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578, 22 BLR 2-107, 2-123-24 (6th Cir. 2000); *see* Director's Exhibit 11; Employer's Exhibits 1-2. Similarly, the administrative law judge gave "diminished weight" to Dr. Ranavaya's opinion, that claimant has a moderate impairment that would prevent him from performing his previous coal mine employment, on the ground that it was not well-reasoned.[3] Decision and Order at 20. The administrative law judge based his finding on Dr. Ranavaya's absence of knowledge regarding the exertional requirements of claimant's usual coal mine employment and Dr. Ranavaya's accompanying failure to compare the moderate pulmonary impairment that he diagnosed to those requirements. Decision and Order at 21; *see* Director's Exhibit 10. In addition, the administrative law judge found that Dr. Ranavaya did not explain how claimant's non-qualifying pulmonary function study results, or any other evidence, supported a finding of total disability. *Id*. Accordingly, the administrative law judge determined that claimant did not meet his burden of establishing that he is suffering from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

On appeal, claimant argues that the administrative law judge erred in discrediting Dr. Ranavaya's opinion regarding total disability. Claimant maintains that, contrary to the administrative law judge's finding, Dr. Ranavaya was aware of the exertional requirements of claimant's usual coal mine work. In support of this argument, claimant asserts that Dr. Ranavaya correctly identified claimant's usual coal mine job as "electrician" and "maintenance."[4] Claimant's Brief at 8; Director's Exhibit 10. Claimant

[3] Dr. Ranavaya examined claimant at the request of the Department of Labor on November 13, 2007. Director's Exhibit 10. He diagnosed pneumoconiosis, hypertension and chronic bronchitis/chronic obstructive pulmonary disease. *Id*. Dr. Ranavaya further indicated that claimant has a moderate pulmonary impairment, "as documented by [the] ventilatory study," that is totally disabling. *Id*.

[4] On Form CM-911a, entitled "Coal Mine Employment History," which was attached to Dr. Ranavaya's report, claimant's usual coal mine jobs were identified as "electrician" and "maintenance." Director's Exhibit 10. There is no description of the exertional requirements of these jobs. *Id*.

further contends that because the exertional requirements of these positions are defined in the *Dictionary of Occupational Titles*, published by the Department of Labor (DOL), as requiring a medium level of exertion, Dr. Ranavaya knew that claimant's last coal mine employment was performed at least at a medium level of exertion. Lastly, claimant argues that the administrative law judge erroneously stated that there must be a qualifying pulmonary function study to establish disability, and, therefore, incorrectly gave less weight to Dr. Ranavaya's opinion on this basis.

In the alternative, claimant contends that, if the Board affirms the administrative law judge's discrediting of Dr. Ranavaya's opinion on the issue of total disability, the DOL has "failed to supply a credible pulmonary examination," as required by 20 C.F.R. §725.406. Claimant's Brief at 10. Claimant further maintains that "when, even unrebutted, a [DOL's] physician report is not sufficient to support a finding of entitlement under the Act, then the [d]istrict [d]irector has failed in [his] duty to provide a credible pulmonary examination." *Id*.

The Director concurs with claimant's argument that Dr. Ranavaya's opinion, that claimant is totally disabled, is documented by his diagnosis of a moderate pulmonary impairment, based on a pulmonary function study showing a moderately severe reduction in claimant's FEV1 and a moderate reduction in his FVC, and the classification of claimant's jobs as requiring medium effort. Further, the Director agrees that if the Board affirms the administrative law judge's determination that Dr. Ranavaya's opinion is not well-reasoned, then the case must be remanded to the district director to allow Dr. Ranavaya to submit a supplementary opinion.

Employer argues that the administrative law judge's denial of benefits should be affirmed. Employer also states that the administrative law judge did not accord proper weight to the opinions of Drs. Broudy and Dahhan regarding total disability. Further, employer contends that Dr. Ranavaya performed a complete pulmonary evaluation of claimant, regardless of the administrative law judge's discrediting of his report on the issue of total disability.

Upon consideration of the administrative law judge's Decision and Order, the arguments on appeal and the evidence of record, we affirm the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv), as they are rational and supported by substantial evidence. The United States Court of Appeals for the Sixth Circuit has held that a physician who has found some degree of impairment must demonstrate knowledge of the exertional requirements of claimant's particular job and consider those in relation to claimant's impairment. *Cornett*, 227 F.3d at 578, 22 BLR at 2-123-24, citing *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). In this case, Dr. Ranavaya did not indicate in any way that he knew the level of exertion required by claimant's usual coal mine job, nor did he describe the functional limitations that

accompany the moderate impairment that he diagnosed.[5] As a consequence, the comparison mandated by the Sixth Circuit could not be performed. *Id*. We affirm, therefore, the administrative law judge's decision to discredit Dr. Ranavaya's opinion regarding total disability under 20 C.F.R. §718.204(b)(2)(iv), as the administrative law judge acted within his discretion as fact-finder in rendering his credibility determination. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).

We also affirm the administrative law judge's finding that the opinions of Drs. Broudy and Dahhan were entitled to diminished weight at 20 C.F.R. §718.204(b)(2)(iv), as they diagnosed a mild pulmonary impairment but did not consider claimant's pulmonary capacity in relation to the exertional requirements of his previous coal mine employment. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Cornett*, 227 F.3d at 578, 22 BLR at 2-123-124. Accordingly, we affirm the administrative law judge's determination that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

We will now address the request by claimant, and the Director, that this case be remanded for a supplemental opinion from Dr. Ranavaya. 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), implemented by 20 C.F.R. §§718.101(a), 725.406. The DOL is not required, however, to provide an evaluation sufficient to establish claimant's entitlement to benefits. *Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). The Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, the 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

[5] We reject the contention by claimant and the Director, Office of Workers' Compensation Programs, that information from the *Dictionary of Occupational Titles* rendered Dr. Ranavaya's diagnosis of a totally disabling impairment documented and reasoned. The administrative law judge did not take judicial notice of this information and there is no indication that Dr. Ranavaya used the *Dictionary of Occupational Titles* to ascertain the exertional requirements of claimant's usual coal mine work.

> 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.*, 573 F.3d 628, 646, --- BLR --- (6th Cir. 2009).

In the present case, Dr. Ranavaya recorded the results of his physical examination of claimant on Form CM-988. Director's Exhibit 10. In Section 8, the physician is asked to itemize the miner's employment history. If the physician attaches Form CM-911a, rather than transcribing claimant's verbal recitation of his job history, he or she is instructed to "review the form and, with the miner's help, complete only blocks 1.a. below[.]" *Id*. Blocks 1.a. require the physician to identify the title of claimant's last coal mine job of at least one year's duration and the job's physical requirements. *Id*. Dr. Ranavaya merely noted "Please See Attached CM911A," in blocks 1.a. *Id*. As previously indicated, this form contained no information regarding the exertional requirements of claimant's usual coal mine work. *Id*., *supra* n.4.

Dr. Ranavaya's omission of the physical requirements of claimant's coal mine employment rendered his opinion on total disability incomplete. Without this information, Dr. Ranavaya did not effectively link his diagnosis of total disability to the objective evidence.[6] *Greene*, 573 F.3d at 646, --- BLR at ---. We also agree with the

[6] In his brief, the Director stated:

> [W]e interpret the [administrative law judge's] decision to have found that all three medical examinations were entitled to no weight, notwithstanding his statement that the three reports were entitled to "diminished" weight. If, however, the Board interprets the [administrative law judge's] decision as having found that each report is entitled to some weight, and that Dr. Ranavaya's opinion simply did not outweigh the contrary evidence, then there is no violation of . . . section 413(b).

Director's Brief at 5 n.3 (unpaginated). In light of our affirmance of the administrative law judge's finding that Dr. Ranavaya's opinion was essentially incomplete and his discrediting of the contrary opinions of Drs. Broudy and Dahhan, the terms used by the administrative law judge to describe his weighing of these opinions is immaterial. *See* 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *Greene v. King James Coal Mining, Inc.*, 573 F.3d 628, --- BLR --- (6th Cir. 2009).

Director that, in addition, Dr. Ranavaya failed to address whether the chronic bronchitis/chronic obstructive pulmonary disease that he diagnosed constituted legal pneumoconiosis. *Id*.; *see* Decision and Order at 11 n. 20. Whether claimant has legal pneumoconiosis, and is totally disabled by it, could become relevant issues if the administrative law judge determines on remand that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). We grant, therefore, the request for remand of this case to the district director for appropriate supplementation of Dr. Ranavaya's opinion.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and vacated in part, and the case is remanded to the district director for further evidentiary development consistent with this opinion and for reconsideration of the merits of this claim in light of any newly developed evidence.

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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REGINA C. McGRANERY
Administrative Appeals Judge