BRB No. 00-0776 BLA

LANDRY COLLETT)
)
Claimant-Petitioner)
)
v.)
)
MOUNTAIN CLAY, INCORPORATED)
)
and)
)
TRANSCO ENERGY COMPANY)
)
Employer/Carrier-Respondents)
) DATE ISSUED:________________
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)
) DECISION and ORDER
Party-in-Interest)

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Law Office of Edmond Collett), Hyden, Kentucky, for claimant.

Paul E. Jones and Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (99-BLA-1213) of Administrative Law Judge Joseph E. Kane denying benefits on a miner=s 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).[2] The administrative law judge credited the miner with seventeen years of coal mine employment pursuant to the parties= stipulation, Hearing Transcript at 8. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. '718.204(c) (2000). Decision and Order at 7-10. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) (2000) and Section 718.202(a)(4) (2000). Claimant=s Brief at 3-4. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability based on the medical opinion evidence. Claimant=s Brief at 4-6. Claimant also asserts that a remand is required inasmuch as the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete, credible pulmonary evaluation as required by the Act. Claimant=s Brief at 6. Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response brief, asserting that Dr. Baker=s opinion fulfills his obligation of providing claimant with a complete, credible pulmonary evaluation.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect

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[1]Claimant is Landry Collett, the miner, who filed his claim for benefits on October 28, 1998. Director's Exhibit 1.

[2]The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]We affirm the administrative law judge=s findings pursuant to Section 718.204(c)(1)-(c)(3) (2000) as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the outcome of the case. *National Mining Ass=n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which employer and the Director have responded.[4] Claimant has not filed a response.[5] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. '921(b)(3), as incorporated into the Act by 30 U.S.C. '932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding the issue of total respiratory disability, the record contains the medical reports of Drs. Baker, Lockey, Rosenberg, Wise, and Muckenhausen. Drs. Baker, Lockey, Rosenberg, and Wise found that claimant has the respiratory capacity to perform his usual coal mine employment or comparable work. Director=s Exhibits 7, 18; Employer=s Exhibits 2 at 18, 6, 7 at 7. In accordance with *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, BLR
(6th Cir. 2000), the record reflects that these physicians had knowledge of claimant=s usual

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[4]The Director, Office of Workers' Compensation Programs, asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer objects to the application of 20 C.F.R. ''718.104(d), 718.201(a)(2), (c), 718.204(a) to this case. Employer=s Brief in Response to March 2, 2001 Order at 2-3. However, Section 718.104(d), requiring that special consideration be accorded the opinion of a treating physician, only applies to evidence developed after January 19, 2001. The revised provisions of Sections 718.201(a)(2), 718.201(c), and 718.204(a) have not become relevant to the Board=s disposition of this case. Additionally, employer asserts that evidence needs to be developed in accordance with 20 C.F.R. ''725.366(b), (c), 725.418, 725.502, 725.503, 725.607, 725.608, 725.701, 726.8(d), 726.203(a), Ain the event that these provisions are applied to this claim.@ Employer=s Brief in Response to March 2, 2001 Order at 3-4. The Board=s disposition of this case does not implicate any of the aforementioned regulations.

[5]Pursuant to the Board=s instructions, the failure of a party to submit a brief within 20 days following receipt of the Board=s Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

coal mine employment.[6] Dr. Baker noted that claimant last worked as a heavy equipment operator. Director=s Exhibit 7. Drs. Lockey and Rosenberg noted that claimant last worked as an end loader, rock truck driver, and dozer operator. Director=s Exhibit 18; Employer=s Exhibit 6. At their depositions, Drs. Wise and Rosenberg were asked to assume that the miner=s usual coal mine employment required repetitive bending, lifting, stooping, pushing and pulling on an eight to ten hour basis. Employer=s Exhibits 2 at 18, 7 at 7.

Claimant contends that the administrative law judge erred in failing to compare Dr. Baker=s assessment of the miner=s pulmonary condition with the exertional requirements of his usual coal mine employment.[7] Claimant=s Brief at 5-6. The administrative law judge found that Anone of the physicians of record have [sic] opined [that claimant] suffers from a totally disabling respiratory impairment.@ Decision and Order at 9. The administrative law judge accorded Ano evidentiary weight to Dr. Muckenhausen=s report because it is not probative of the existence of a totally disabling respiratory impairment.@ Decision and Order at 9. Dr. Muckenhausen opined that claimant has a 9-12% impairment due to spinal injuries and a 3-4% impairment due to anxiety, depression, and sleep disturbance. Director=s Exhibit 17. As the administrative law judge stated, Dr. Muckenhausen Adid not address the level of respiratory impairment from which the miner may suffer.@ *Id.* Therefore, the administrative law judge properly found that Dr. Muckenhausen=s opinion is not probative in determining whether claimant has a total respiratory impairment. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994), *modified on recon.*, 20 BLR 1-64 (1996); *see also Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

Contrary to claimant=s contention, the administrative law judge did not err by failing to infer a finding of total respiratory disability from Dr. Baker=s opinion. In this case, it was unnecessary for the administrative law judge to compare Dr. Baker=s findings with the

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[6]Claimant testified that when he last worked for Mountain Clay, his duties included Arunning [an] endloader or high lift.@ Hearing Transcript at 11-12. The administrative law judge noted that claimant=s usual coal mine employment was Aas a heavy equipment operator.@ Decision and Order at 3.

[7]Citing *Bentley v. Director, OWCP*, claimant asserts that the administrative law judge erred in failing to mention his Aage, education or work experience in conjunction with [the administrative law judge=s] assessment that the claimant was not totally disabled.@ Claimant=s Brief at 5-6. Contrary to claimant=s contention, his age, education, and work experience are not relevant to establishing total respiratory disability at 20 C.F.R. Part 718.

exertional requirements of the miner=s usual coal mine employment inasmuch as Dr. Baker, who had knowledge of the miner=s usual coal mine employment, *see* discussion, *supra*, ultimately concluded that claimant has the respiratory capacity to perform his previous coal mine employment. Director=s Exhibit 7; *see Cornett*, *supra*; *see generally Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986). Accordingly, we affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability by the medical opinion evidence. *See* 20 C.F.R. '718.204(b)(iv); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability, *see* 20 C.F.R. '718.204(b),[8] a requisite element of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we also affirm his denial of benefits on the miner=s claim.

Additionally, claimant asserts that a remand is required inasmuch as the Director has failed to provide claimant with a complete, credible pulmonary evaluation because Dr. Baker Amade no statement, either positive or negative, concerning claimant=s ability to do manual labor.@ Claimant=s Brief at 6. However, as noted above, Dr. Baker expressed an opinion regarding claimant=s ability to perform manual labor by stating that claimant has the respiratory capacity to perform his coal mine employment, Director=s Exhibit 7. Thus, contrary to claimant=s contention, the Director has fulfilled his obligation to provide claimant with a complete, credible pulmonary evaluation as required by the Act. *See* 20 C.F.R. '725.406 (2000); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-54 (1990)(*en banc*); *see also Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *see generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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[8]In the amended regulations, 20 C.F.R. '718.204 has been renumbered. The regulation at 20 C.F.R. '718.204(c)(1)-(c)(4) (2000), which discusses the methods for establishing total respiratory disability, is found at 20 C.F.R. '718.204(b)(2)(i)-(b)(2)(iv) of the amended regulations. The regulation at 20 C.F.R. '718.204(b) (2000), which discusses total disability due to pneumoconiosis, is found at 20 C.F.R. '718.204(c) of the amended regulations.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge