BRB No. 05-0403 BLA

PAUL JOSEPH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 11/30/2005
	)	
Respondent	)	DECISION and ORDER

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

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

Sarah M. Hurley (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order–Denying Benefits (03-BLA-5743) 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). The administrative law judge noted that this case is a subsequent claim,[1] and he noted that the parties stipulated that claimant has twenty-five and one-

[1] Claimant's initial application for benefits was denied by Administrative Law Judge J. Michael O'Neill on October 1, 1996 because claimant failed to establish total disability. The Board affirmed Judge O'Neill's denial of benefits on August 26, 1997. *Joseph v. Director, OWCP*, BRB No. 97-0118 BLA (Aug. 26, 1997)(unpub.). Claimant filed a claim for benefits on September 6, 2000. On May 15, 2001, claimant requested

quarter years of coal mine employment. The administrative law judge detailed the newly submitted medical evidence and found it insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore determined that claimant did not establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the evidence insufficient to establish total disability. Claimant further argues that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory duty to provide claimant with a complete, credible pulmonary evaluation. The Director responds, contending that claimant's latter argument has merit, and stating that he does not oppose claimant's request for remand on this basis.

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).

We first consider claimant's assertion that the Director has failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. Specifically, claimant alleges that since the administrative law judge found that Dr. Simpao's opinion is not well-reasoned, the Director has not fulfilled his statutory duty.[2] The Director responds, stating that claimant's argument has merit, and the Director "does not oppose claimant's request for a remand to allow Dr. Simpao to more fully explain his opinion, or to provide claimant with a new pulmonary examination under Section 413(b)

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that the claim be withdrawn. Administrative Law Judge Daniel J. Roketenetz granted claimant's request in an Order issued on May 29, 2001. Director's Exhibit 2. The administrative law judge noted that this claim was withdrawn without prejudice and is considered to not have been filed, pursuant to 20 C.F.R. §725.306. Decision and Order at 1-2. The instant claim was filed on January 30, 2002. Director's Exhibit 4.

[2] Dr. Simpao diagnosed coal workers' pneumoconiosis due to claimant's coal mine employment, and opined that claimant suffers from a "mild impairment." Director's Exhibit 12. The administrative law judge found that Dr. Simpao's opinion was well-documented, but not well-reasoned. The administrative law judge stated that "Although Dr. Simpao opined that the miner does not have the respiratory capacity to perform the work of a coal miner, he does not discuss his opinion in regard to the demands of Claimant's particular coal mine work." Decision and Order at 8-9.

of the Act." Director's Letter of April 4, 2005 at 4. Specifically, the Director states that the administrative law judge reasonably determined that Dr. Simpao's disability opinion is not credible "given that the doctor neglected to discuss the exertional demands of claimant's coal mine employment." Director's Letter of April 4, 2005 at 4. We defer to the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994). We, therefore, remand this case to the district director in order to provide claimant with a complete and credible pulmonary evaluation pursuant to 30 U.S.C. §923(b).

Notwithstanding our holding above, in the interest of judicial economy we will consider the specific issues raised on appeal by claimant. Since this claim involves a subsequent claim pursuant to 20 C.F.R. §725.309, it is necessary to consider the basis for the denial of the prior claim. Judge O'Neill denied benefits because claimant did not establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).[3] Claimant asserts that the administrative law judge erred in finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant cites *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), and asserts that the Board has held that a single medical opinion may be sufficient to invoke the presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even if the Part 727 regulations were applicable, the United States Supreme Court has determined that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method. *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

Claimant argues that the administrative law judge erred in rejecting Dr. Baker's opinion. Dr. Baker opined that claimant:

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[3] The Department of Labor has 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

> has a Class 1 impairment with the FEV1 and vital capacity both being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition….Patient has a second impairment with the presence of pneumoconiosis based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in coal mining industry or similar dusty occupations.

Director's Exhibit 16. Because Dr. Baker did not explain the severity of such a diagnosis or address whether such an impairment would prevent claimant from performing his usual coal mine employment, his diagnosis of a Class 1 impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Moreover, since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), this portion of Dr. Baker's opinion is insufficient to support a finding of total disability. Further, in view of our holding that Dr. Baker's opinion is insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

Claimant further contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 5. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). In addition, claimant argues that inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 5. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and progressive disease. Claimant's assertion that he has pneumoconiosis that has worsened over time, however, is unsupported by the evidence, and we decline to address it further. Consequently, we reject claimant's specific challenges to the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv).

Accordingly, although we reject claimant's specific allegations of error at 20 C.F.R. §718.204(b)(2)(iv), we vacate the administrative law judge's Decision and Order-Denying Benefits, and remand this case to the district director for further proceedings 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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REGINA C. McGRANERY
Administrative Appeals Judge