BRB No. 07-0247 BLA

C.M.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEDDO HIGHLAND COAL COMPANY	)	DATE ISSUED: 11/30/2007
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
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 on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

C.M.C., Beaver Meadows, Pennsylvania, *pro se*.

Maureen E. Herron, Wilkes-Barre, Pennsylvania, for employer/carrier.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of legal counsel, the Decision and Order on Remand (2005-BLA-06316) of Administrative Law Judge Janice K. Bullard (the administrative law judge) 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).[1] In her initial Decision and Order, the administrative law judge considered claimant's request for modification of a denial of benefits. Based upon the parties' stipulation, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) and, thus, that claimant established a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[2] After reviewing all of the evidence of record, however, the administrative law judge found that claimant failed to establish total disability under 20 C.F.R. §718.204(c) (2000), and denied benefits accordingly.

Claimant appealed to the Board, which affirmed the administrative law judge's findings pursuant to Sections 725.310, 718.202(a), and 718.204(c)(1), (3) (2000), but vacated her determination that the medical opinion evidence was insufficient to establish total disability under Section 718.204(c)(4) (2000). *[C.M.C.] v. Jeddo Highland Coal Co.*, BRB No. 04-0253 BLA (Oct. 29, 2004)(unpub.). The case was remanded to the administrative law judge who, at the request of the Director, Office of Workers' Compensation Programs (the Director), remanded the case to the district director so that claimant could be provided with a complete pulmonary evaluation. Dr. Talati performed an examination of claimant at the request of the Department of Labor and his report was

[1] Claimant filed an application for benefits on January 10, 2001. Director's Exhibit 1. The district director issued a determination, dated May 24, 2001, in which claimant was informed that the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 19. Claimant filed a timely petition for modification on November 2, 2001. *Id.* The district director issued a proposed decision granting the petition for modification. Director's Exhibit 35. Employer challenged the district director's decision and requested a formal hearing. Director's Exhibit 35. The case was subsequently assigned to the administrative law judge and a hearing was held on April 9, 2003.

[2] 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). The amended version of 20 C.F.R. §725.310 does not apply to a request for modification filed with respect to a claim pending on January 19, 2001. 20 C.F.R. §725.2.

made part of the record. Remand Exhibits 19, 21, 23. Claimant also submitted the report of Dr. Cali and employer proffered the reports of Drs. Kaplan and Levinson. Remand Exhibits 27, 30; Employer's Exhibits 28, 29.

In her Decision and Order on Remand, the administrative law judge excluded the reports of Drs. Cali and Kaplan on the ground that they exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414. Upon considering the remaining evidence of record relevant to the issue of total disability, the administrative law judge found that claimant failed to establish that he is suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director has also responded and contends that the administrative law judge erred in excluding the medical opinions of Drs. Cali and Kaplan under Section 725.414.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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 will first address the administrative law judge's evidentiary rulings. The administrative law judge issued an Order on January 13, 2006, in which she indicated that the parties could "submit a statement of rehabilitation or comment from each of its experts of record." Unmarked Administrative Law Judge Exhibit. In response, claimant submitted Dr. Cali's medical report and employer proffered a supplemental report by Dr. Levinson and a report by Dr. Kaplan.[3] In an Order dated June 22, 2006, the administrative law judge stated that "if Dr. Cali had not already submitted a medical report, then his report is totally excluded," as it exceeded the limitations set forth in Section 725.414(a)(2)(i). Unmarked Administrative Law Judge's Exhibit. In her

[3] Dr. Cali performed a review of a portion of claimant's medical records and stated that claimant was totally disabled by significant obstructive airways disease and oxygen desaturation. Remand Exhibits 27, 30. Dr. Kaplan also performed a record review and opined that claimant does not have a totally disabling respiratory or pulmonary impairment. Remand Exhibit 28.

Decision and Order on Remand, the administrative law judge found that neither Dr. Cali nor Dr. Kaplan was previously a physician of record. Decision and Order on Remand at 10. The administrative law judge also stated that:

> [T]he opinions stressed in both of their reports are based upon consideration of the record as a whole. The reports therefore do not comport with my two Orders…Accordingly, I am excluding the reports of Dr. Cali and Dr. Kaplan from consideration of the claim, although they have been admitted to the record.

Id.

Pursuant to 20 C.F.R. §725.2(c), evidence developed and submitted in claims filed after January 19, 2001 must comply with the evidentiary limitations set forth in Section 725.414. 20 C.F.R. §725.2(c). However, as claimant filed his application for benefits on January 10, 2001, the limitations do not apply in this case. Director's Exhibit 1. Although the administrative law judge indicated that, in addition to running afoul of Section 725.414, the reports did not satisfy the prerequisites set forth in her January 13, 2006 Order, *i.e.*, the reports were to be rehabilitative in nature and submitted by a physician previously of record, it appears that she was applying the revised regulations because these prerequisites mirror the terms of Section 725.414(a)(2), (3). Accordingly, we must vacate the administrative law judge's exclusion of the reports of Drs. Cali and Kaplan and remand this case to the administrative law judge for reconsideration of the admissibility of this evidence.

In light of this holding, we must also vacate the administrative law judge's determination that claimant failed to establish that he is totally disabled pursuant to Section 718.204(c) (2000), as Dr. Cali's opinion, if admitted and fully credited, could support a finding of total respiratory disability. To promote administrative efficiency and avoid the repetition of error on remand, we will now review the administrative law judge's evidentiary determinations relevant to total disability.

As an initial matter, we note that the administrative law judge should have considered whether claimant established total respiratory or pulmonary disability in accordance with the amended regulation set forth in 20 C.F.R. 718.204(b)(2), which applies to claims, like the present one, that were pending on January 19, 2001, rather than applying Section 718.204(c) (2000). 20 C.F.R. §§718.2, 718.204(b)(2), 725.2. We affirm the administrative law judge's finding on remand that total disability was not established by the pulmonary function study or blood gas study evidence, as the

preponderance of the tests did not produce qualifying values.[4] Decision and Order on Remand at 5-6. We also affirm the administrative law judge's determination that the evidence of record does not support a finding of total disability based upon the presence of cor pulmonale with right-sided congestive heart failure. *Id*. at 7.

With respect to the medical opinions relevant to whether claimant is suffering from a totally disabling respiratory or pulmonary impairment, on remand, the administrative law judge weighed the opinions of Drs. Corazza, Mariglio, Levinson, and Talati.[5] The administrative law judge rationally found that Dr. Corazza's opinion was insufficient to satisfy claimant's burden of proof, as the doctor did not explicitly state that claimant suffered from a totally disabling respiratory or pulmonary impairment.[6] Decision and Order on Remand at 7; Director's Exhibit 9; *see Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc). Regarding Dr. Mariglio's opinion, that claimant suffers from a "moderate limitation" due to obstructive airways disease and significant oxygen desaturation, the administrative law judge rationally found that it was insufficient to establish total disability, as the doctor did not adequately identify the physical restrictions caused by claimant's "moderate limitation." Decision and Order on Remand at 7; Director's Exhibit 25; *Beatty v. Danri Corp.*, 49

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] Regarding the opinions of Drs. Dittman, Hertz, and Simelaro, the administrative law judge indicated correctly that the Board had affirmed her determination that they were insufficient to establish total respiratory or pulmonary disability. Decision and Order on Remand at 7-8.

[6] Dr. Corazza performed an examination of claimant on behalf of the Department of Labor on February 19, 2001, and stated, "the combination of systolic hypertension, pneumoconiosis, and deafness would make coal mine employment not suitable for this patient." Director's Exhibit 9. In response to a motion filed by the Director, Office of Workers' Compensation Programs, on remand, the administrative law judge issued an Order in which she determined that Dr. Carrozza did not provide a complete pulmonary evaluation. Accordingly, the administrative law judge returned this case to the district director so that claimant could be given a complete pulmonary evaluation. Dr. Talati subsequently examined claimant at the request of the Department of Labor. Remand Exhibit 19.

F.3d 993, 19 BLR 2-136 (3d Cir. 1995).[7] The administrative law judge also acted within her discretion as fact-finder in determining that Dr. Levinson's opinion, that claimant is not impaired or disabled by coal workers' pneumoconiosis, was of limited probative value because Dr. Levinson did not explicitly indicate whether claimant was totally disabled by a respiratory or pulmonary impairment. Decision and Order on Remand at 9; Employer's Exhibits 1-4; *see Taylor*, 12 BLR at 1-85; *Budash*, 9 BLR at 1-51, 13 BLR at 1-48. With respect to Dr. Talati's opinion, that claimant has a mild respiratory impairment that renders him incapable of performing his usual coal mine employment, the administrative law judge rationally accorded it little weight, as the doctor misstated the results of claimant's blood gas study and did not adequately explain his opinion. Decision and Order on Remand at 11; Remand Exhibits 19, 21, 23; *see Taylor*, 12 BLR at 1-85; *Budash*, 9 BLR at 1-51, 13 BLR at 1-48. We affirm, therefore, the administrative law judge's weighing of the reports of Drs. Corazza, Mariglio, Levinson, and Talati, but vacate the administrative law judge's finding that claimant did not establish that he is totally disabled. This case is remanded to the administrative law judge to reconsider this issue, pursuant to Section 718.204(b)(2), and to consider the reports of Drs. Cali and Kaplan.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. Director's Exhibits 2, 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge