BRB No. 00-0104 BLA

PAUL E. LeMASTERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	DATE ISSUED:
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Perry D. McDaniel (Crandall, Pyles & Haviland, LLP), Charleston, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (1997-BLA-1752) of Administrative Law Judge Gerald M. Tierney awarding benefits 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 found that claimant[1] established twenty-four years and ten months of qualifying coal mine employment and that employer conceded that claimant has pneumoconiosis which arose from his coal mine employment pursuant to

[1]Claimant is Paul E. LeMasters, the miner, who filed a claim for benefits on December 18, 1996. Director's Exhibit 1.

20 C.F.R. §§718.202(a) and 718.203. The administrative law judge then found that claimant established he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c)(4). Accordingly, benefits were awarded with payment beginning December 1996, the month in which the claim was filed. On appeal, employer contends that the administrative law judge erred in his weighing of the evidence of record regarding the existence of a total respiratory disability pursuant to Section 718.204(c) and regarding the cause of claimant's total disability pursuant to Section 718.204(b). Claimant responds urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on appeal.[2]

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).

In considering the medical opinions pursuant to Section 718.204(c)(4), the administrative law judge properly noted that Dr. Gaziano found that claimant is severely disabled due to pneumoconiosis and heart disease, that Dr. Rasmussen opined that claimant is totally disabled due to pneumoconiosis and cigarette smoking, that Drs. Dahhan and Castle opined that claimant is totally disabled due to cigarette smoking, that Dr. Fino opined that claimant has no respiratory impairment and that Dr. Respher opined that claimant has a mild to moderate chronic obstructive pulmonary disease, but no pulmonary impairment due to pneumoconiosis. Decision and Order at 10; Director's Exhibit 15, Claimant's Exhibit 8; Employer's Exhibits 1, 3-7, 9, 10. The administrative law judge concluded that based on the preponderance of the evidence, claimant established that he is totally disabled pursuant to Section 718.204(c)(4).

[2]The administrative law judge's findings regarding the length of the miner's coal mine employment, that the evidence established the existence of pneumoconiosis arising out claimant's coal mine employment pursuant to 20 C.F.R.§§718.202(a) and 718.203 and that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer contends that the administrative law judge failed to properly consider the reasoning behind Dr. Fino's opinion that claimant does not have a respiratory impairment. Contrary to employer's contention, the administrative law judge noted that Dr. Fino opined that the pulmonary function studies were technically invalid and should not be used to assess claimant's respiratory status and then acted within his discretion in finding that, notwithstanding Dr. Fino's opinion, which is the only opinion to find no pulmonary impairment, the preponderance of the medical opinion evidence supports a finding of total respiratory disability pursuant to Section 718.204(c)(4).[3] Decision and Order at 10; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer also contends that the administrative law judge erred in finding that Dr. Repsher's opinion supports a finding of total disability pursuant to Section 718.204(c)(4) because Dr. Repsher specifically stated that claimant's respiratory impairment is not totally disabling. Employer's Brief at 6-7. The administrative law judge found that Dr. Repsher's opinion, that claimant has a mild to moderate pulmonary disease, when considered in conjunction with claimant's usual coal mine work as a shovel oiler, is supportive of a finding that claimant has a totally disabling respiratory impairment. Decision and Order at 10. Although Dr. Repsher, in his opinions and deposition, indicated that he considered claimant's usual coal mine duties and opined that claimant has no significant pulmonary impairment and that his mild to moderate pulmonary impairment is not disabling, the administrative law judge need not rely on Dr. Repsher's opinion that the pulmonary impairment is not totally disabling. Employer's Exhibits 6, 7, 10 at 23; *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986); *aff'd*, 9 BLR 1-104 (1986). Instead, the administrative law judge can compare Dr. Repsher's finding that claimant has a mild to moderate impairment with the physical requirements of claimant's usual coal mine employment to determine if claimant has a totally disabling respiratory impairment pursuant to Section 718.204(c)(4). *Id.*

In the instant Decision and Order, the administrative law judge compared claimant's usual duties as a shovel oiler to Dr. Respsher's finding that he has a mild to moderate impairment and found that he is totally disabled pursuant to Section 718.204(c)(4). Decision

[3]Employer does not challenge the administrative law judge's finding that Drs. Gaziano, Castle, Dahhan and Rasmussen diagnosed a totally disabling respiratory impairment. Decision and Order at 6-10; Employer's Brief at 5.

and Order at 10. However, the administrative law judge did not explain why Dr. Respsher's assessment of claimant's "mild to moderate impairment" is equivalent to finding of total disability or discuss the exertional requirements of claimant's duties as a shovel oiler. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 10. The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). The failure of the administrative law judge to address all relevant evidence, explain his rationale, or clearly indicate the specific statutory or regulatory provisions involved in his decision, requires remand. An administrative law judge must provide a sufficient rationale that explains the relationship between the findings and conclusions and independently evaluate the evidence of record. If there is no independent evaluation of the evidence, the parties are deprived of their rights. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *see Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). As a result, we vacate the administrative law judge's finding pursuant to Section 718.204(c)(4) and instruct the administrative law judge to provide further rationale for his finding on this issue.

Additionally, as employer contends, the administrative law judge did not weigh the evidence supportive of a finding of total respiratory disability against the contrary probative evidence of record pursuant to Section 718.204(c). Employer's Brief at 5-7. Pursuant to Section 718.204(c)(1) and (c)(2), the administrative law judge found that the pulmonary function studies are invalid and the arterial blood gas studies are non-qualifying for total respiratory disability. Decision and Order at 10. After discussing the medical opinion evidence pursuant to Section 718.204(c)(4), the administrative law judge found that claimant established total respiratory disability by a preponderance of that evidence. Decision and Order at 10. However, the administrative law judge does not discuss the medical opinion evidence in relation to the objective evidence, which he had previously found insufficient to support a finding of total disability. Inasmuch as the administrative law judge failed to assign the objective evidence probative weight and to weigh it against the evidence supportive of a finding of total respiratory disability, we vacate the administrative law judge's finding that claimant established total respiratory disability pursuant to Section 718.204(c) and remand the case for the administrative law judge to weigh the like and unlike evidence and determine whether claimant established total respiratory by a totality of the evidence. *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987).

Employer next contends that the administrative law judge's finding pursuant to Section 718.204(b) regarding the extent of claimant's smoking history is irrational and

speculative. Employer's Brief at 7-8. We agree. In making his finding regarding the length of claimant's smoking history, the administrative law judge stated that he placed the least weight on the hospital records, which indicate a 50 pack-year history, because

> in the scheme of a hospital admission which leads to heart surgery, an accurate smoking history is less likely to be properly noted and transcribed than in a medical examination undergone for purposes of federal black lung litigation, when the examining physicians are well aware of the importance of a smoking history.

Decision and Order at 11. The administrative law judge also assigned less weight to Dr. Gaziano's report which contained a smoking history in terms of 50 "pack years" because "it is possible that the miner told him he smoked under a pack a day but for more than 50 years." Decision and Order at 11; Director's Exhibit 15. While both of the reasons given by the administrative law judge for discrediting these smoking histories are speculative, they are also contradictory. In discrediting the hospital records, the administrative law judge states that the history taken by a physician performing an examination for black lung litigation purposes will be more accurate. However, the administrative law judge then discredits Dr. Gaziano's smoking history because he may have misstated what claimant told him. *Id.* Additionally, the administrative law judge does not consider the possibility that a claimant may have less incentive to underestimate his smoking history when being admitted to the hospital for a heart problem than he would when relating his smoking history to a physician who is examining him in regards to his black lung litigation. As a result, we vacate the administrative law judge's finding regarding the length of claimant's smoking history and instruct the administrative law judge on remand to make further findings regarding this issue. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981).

Additionally, because the administrative law judge relied upon the length of claimant's smoking history in weighing the medical opinion evidence pursuant to Section 718.204(b), we vacate the administrative law judge's weighing of that evidence and instruct the administrative law judge to reconsider all of the medical opinion evidence in light of his reconsideration of the evidence relevant to the extent of claimant's smoking history. Further, we instruct the administrative law judge to consider the rationale behind the medical opinions of record addressing the cause of claimant's totally disabling impairment and to provide specific explanations of his weighing of that evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-324 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part and the claim is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge