BRB No. 02-0870 BLA

JOSEPH A. HOLT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/26/2003
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph A. Holt, Hartshorne, Oklahoma, *pro se*.

Barry H. Joyner (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, 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, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (02-BLA-0063) of Administrative Law Judge Edward Terhune Miller denying 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).[1] The administrative law judge credited

[1]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.

claimant with at least one year of coal mine employment and adjudicated this claim pursuant to the regulations contained in 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)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), contends, in a brief in support of his Motion to Remand, that he has not fulfilled his statutory obligation to provide a complete and credible pulmonary evaluation of claimant.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

Initially, we note that claimant appeared before the administrative law judge without the assistance of counsel. Based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing, *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 3, 5-9, 13-42.

We next address the Director's Motion to Remand. The Director contends that he has not fulfilled his statutory obligation to provide a complete and credible pulmonary evaluation of claimant. The Director's contention is based upon the premise that there is no credible medical opinion evidence addressing the issues of pneumoconiosis or total disability. The record contains no medical opinion submitted by the Director that satisfies his burden of providing the miner with a complete and credible pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b). *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Dr. Cotton diagnosed chronic bronchitis and possible obstructive lung disease, each of which he attributed to cigarette smoking and occupational exposure. Director's Exhibit 13. Similarly, Dr. Trent diagnosed chronic bronchitis and obstructive lung disease of moderate severity and opined that "[claimant's] medical condition would certainly be consistent with Pulmonary Anthrocosis (sic) otherwise known as 'Black Lung Disease.' " Director's Exhibit 17. However, the administrative law judge permissibly discredited the

opinions of Drs. Cotton and Trent based on his finding that they are not reasoned.[2] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

In addition, the administrative law judge correctly found that the opinions of Drs. Cotton and Trent did not adequately address the issue of total disability. Decision and Order at 9; 20 C.F.R. §718.204(b)(2)(iv). Although Dr. Cotton opined that claimant suffers from a moderate impairment, Dr. Cotton did not address whether claimant's impairment would prevent him from performing his usual coal mine employment. Director's Exhibit 13. Moreover, Dr. Trent did not render an opinion with regard to the issue of total disability. Director's Exhibit 17. Thus, since the Director has not fulfilled his statutory obligation to provide a complete and credible pulmonary examination of claimant, *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges*, 18 BLR at 1-89-90; *Pettry v. Director, OWCP*; 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990), we remand the case to the district director to develop evidence that will fulfill the Director's obligation in this regard. *See* 20 C.F.R. §725.405(b); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Eastern Associated Coal Corp.*, 12 BLR 1-49 (1988); *Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428 (1984); *see also* 20 C.F.R. §725.405(c); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Finally, the Director contends that the administrative law judge should reconsider his length of coal mine employment determination. The administrative law judge noted that "[c]laimant is alleging completion of eight years of coal mine employment from the periods of 1947 to 1953 and 1960 to 1962." Decision and Order at 2. Based upon the Social

[2]The administrative law judge found that "Dr. Cotton's opinion is entitled to little weight because it is unreasoned, undocumented and equivocal." Decision and Order at 7. The administrative law judge stated that "Dr. Cotton provided no explanations for his diagnoses of chronic bronchitis, possible obstructive lung disease, and coronary artery disease." *Id*. Further, the administrative law judge stated that "[n]ot only is Dr. Cotton's diagnosis of 'possible obstructive lung disease' equivocal, but it is also contrary to findings elsewhere in his report." *Id*. Similarly, the administrative law judge stated that "Dr. Trent provided no explanations for his diagnoses of chronic bronchitis and obstructive lung disease of moderate severity and for his conclusion that they are consistent with pulmonary anthracosis." *Id*.

Security Administration's Itemized Statement of Earnings, however, the administrative law judge credited claimant with at least one year of coal mine employment.[3]

In order to establish that claimant's work constitutes coal mine work, it must be established that claimant worked with coal that was still in the course of being processed, and not yet a finished product in the stream of commerce (status of the coal test); that claimant performed a function integral to the extraction or preparation of coal and not merely ancillary to the delivery and commercial use of processed coal (function test); and that claimant's work occurred in or around a coal mine or a coal preparation facility (situs test). *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985); *Slone v. Director, OWCP*, 12 BLR 1-92 (1988).

The administrative law judge concluded that claimant's work from 1947 to 1953 did not constitute coal mine employment because it did not meet the status requirement[4] of the three prong inquiry.[5] The administrative law judge stated, "[a]ccording to [c]laimant's hearing testimony and submitted affidavits from persons who observed him working with his father, [c]laimant and his father were engaged only in the hauling of prepared coal to ultimate consumers." Decision and Order at 3. Although claimant testified that the coal was loaded by employees of the coal company when he helped his father deliver coal, Hearing Transcript at 18, 20, he also testified that he loaded coal into his father's truck, Hearing Transcript at 17, 18. In addition, affidavits by Warren Dale Hollis and Donald Lee Cunningham indicate that claimant loaded coal into his father's truck from 1947 to 1953. Director's Exhibit 4. While the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has not enunciated a standard for determining whether a claimant's work constitutes

[3]The administrative law judge noted that claimant alleged that he completed two years of coal mine employment with Lone Star Steel Company from 1960 to 1962. However, the administrative law judge found that "[c]laimant's social security records indicate that [c]laimant completed one year of coal mine employment with Lone Star Steel [Company] in 1960 and earned $66.67 in the first quarter of 1961." Decision and Order at 4.

[4]In addressing the status prong, the administrative law judge stated that "[t]he coal with which the [c]laimant worked must have been in the extracting, preparing, or processing stage and cannot be a finished product to be used by an ultimate consumer." Decision and Order at 3.

[5]The administrative law judge summarily stated that "[c]laimant's work from 1947 to 1953 also does not meet the second and third prongs of the inquiry because [c]laimant's work did not contribute to the extraction or preparation of coal (function), and because [c]laimant's work was not performed in or around a coal mine (situs)." Decision and Order at 3.

coal mine employment,[6] the United States Courts of Appeals for the Third and Fourth Circuits have held that the job of loading coal constitutes coal mine employment. *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988)(the work of loading coal from the tipple onto the barges was a necessary part of the work of preparing coal for delivery); *Sexton v. Mathews*, 538 F.2d 88 (4th Cir. 1976)(the work of loading coal into a lorry for delivery to the coke ovens constitutes coal preparation). In the instant case, the administrative law judge did not resolve the conflict in the evidence regarding claimant's alleged coal mine employment from 1947 to 1953. While an administrative law judge is not required to accept medical evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Thus, we vacate the administrative law judge's length of coal mine employment finding and remand the case to the administrative law judge to reconsider all of the relevant evidence of record. Following remand of this case to the district director for a full pulmonary evaluation, the administrative law judge must determine whether the work of loading coal from the mine site to claimant's father's truck satisfies the status, function and situs tests, and thus, whether it constitutes coal mine employment. *Whisman*, 8 BLR at 1-97.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded to the district director to allow for a complete pulmonary

[6]This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit as the miner was employed in the coal mine industry in Oklahoma. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

evaluation, at no expense to claimant, and for reconsideration of the merits of this claim in light of the new evidence.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge