BRB No. 02-0880 BLA

WILLIAM KILLMAN Claimant-Petitioner v. SAHARA COAL COMPANY	)))))))	DATE ISSUED: 09/30/2003
Employer -Respondent 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-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand-Denial of Benefits (99-BLA-0760) of Administrative Law Judge Robert L. Hillyard on a duplicate 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] This case is before the Board for a second time.[2]

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[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.

[2] The history of this case is set forth in the Board's prior Decision and Order in

When the case was previously before the Board, the Board vacated the administrative law judge's determination that the new medical opinion evidence of record failed to demonstrate the presence of a totally disabling respiratory impairment and, therefore, a material change in conditions and remanded the case for further consideration of the opinions in light of the exertional requirements of claimant's usual coal mine employment. *Killman v. Sahara Coal Co.*, BRB No. 01-0288 BLA (Dec. 26, 2001)(unpub.). Additionally, the Board held that if, on remand, the administrative law judge determined that claimant established total disability, and therefore, a material change in conditions, he must then consider the merits of entitlement and address claimant's objection to the consideration of exhibits which were excluded by the previous administrative law judge. *Killman*, slip op. at 9. On remand, the administrative law judge found that claimant failed to demonstrate the presence of a totally disabling respiratory impairment and failed, therefore, to establish a material change in conditions. Accordingly, benefits were denied.

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).

After careful consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order denying benefits is supported by substantial evidence, in accordance with law, and contains no reversible error. It is, therefore, affirmed. In affirming the administrative law judge's Decision and Order denying benefits, we hold that the administrative law judge has complied with the Board's remand instructions in substance, and that the claimant's assertions, on appeal, are tantamount to a request that the Board reweigh the evidence, a function outside the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

In finding that claimant failed to establish total disability, the administrative law judge extensively discussed the job duties and exertional requirements of claimant's usual coal mine employment, *see* Decision and Order at 13-15. Turning to the new medical opinion evidence, the administrative law judge found that the physicians were aware of the exertional requirements of claimant's usual coal mine employment, Decision and Order at 15, and found that, of the five physicians rendering opinions in connection with the duplicate claim, only one found claimant to be totally disabled; the remaining four, including the two examining physicians, found that claimant was not totally disabled. Decision and Order at 14-15. The administrative law judge concluded, therefore, that based on "the reports of the physicians, the qualifications of the physicians, the reasoning of the physicians and the

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Killman v. Sahara Coal Co., BRB No. 01-0288 BLA (Dec. 26, 2001)(unpub.).

objective tests on which they relied[,]" Decision and Order at 15, that claimant failed to establish total disability in light of the exertional requirements of claimant's usual coal mine employment. Claimant's argument that the administrative law judge did not sufficiently address the exertional requirements of claimant's usual coal mine employment when he found that claimant failed to establish total disability is rejected. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990); *Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 15 BLR 2-116 (7th Cir. 1991); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-471 (1984); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Eagle v. Director, OWCP*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

Further, contrary to claimant's assertion, a review of the administrative law judge's decision shows that he has considered all of the new medical opinions of record. Decision and Order at 14-15. Moreover, we reject claimant's assertion that the administrative law judge erred in characterizing the opinion of Dr. Baker, that claimant could do mild to moderate exertion at most, as one supporting a finding of no total disability, inasmuch as Dr. Baker also clearly stated that claimant had a "nondisabling degree of respiratory insufficiency." Director's Exhibit 44. Accordingly, contrary to claimant's contention, the administrative law judge rationally concluded that Dr. Baker's opinion was one of non-disability. *SeeAnderson*, 12 BLR 1-111, 1-113; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) *aff=d on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985).

Lastly, we reject claimant's assertion that the administrative law judge erred in failing to fully consider the findings of Dr. Cohen and further erred in failing to consider his status as an examining physician, while according greater weight to the opinions of other physicians because they examined claimant. A review of the administrative law judge's Decision and Order on Remand demonstrates that the administrative law judge specifically considered the medical findings of Dr. Cohen and his diagnosis of a totally disabling respiratory impairment, and in a permissible exercise of his discretion concluded that Dr. Cohen's opinion was outweighed by the other opinions that claimant was not totally disabled. Decision and Order on Remand at 15; Director's Exhibits 60, 89; Claimant's Exhibit 1; *Poole*, 897 F.2d 888, 895, 896, 13 BLR 2-348, 2-358. Contrary to claimant's argument, the administrative law judge did not accord greater weight to physicians' opinions solely because they were examining physicians, but considered the totality of the opinions, *i.e.*, the qualifications of the physicians, the reasoning of the physicians, and the objective tests on which they relied. This finding is proper and is consistent with the Board's remand instructions. While claimant is correct that the administrative law judge failed to acknowledge that Dr. Cohen had also examined claimant, Director's Exhibit 60, this failure constitutes harmless error inasmuch as the administrative law judge's consideration of the

medical opinions was based on many factors. *See Larioni*, 6 BLR 1-1276; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish total disability, and thereby, a material change in conditions. Because we affirm that finding, we need not consider claimant's other arguments on appeal. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc reh'g*), *modif'g* 94 F.3d 369 (7th Cir. 1996), and *aff'g* 19 BLR 1-45 (1995)(adopting the Director's "one element" test); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order on Remand-Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I must respectfully dissent from the majority's decision to affirm the denial of benefits. The administrative law judge has failed to comply with the Board's remand instructions to determine the exertional requirements of claimant's usual coal mine work as a foreman and then to reconsider the entirety of new medical opinion evidence in light of that finding in order to determine whether claimant's respiratory impairment prevents him from performing his usual coal mine work. *See Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) *aff=d on recon.*, 9 BLR 1-104 (1986)(*en banc*); *see also Mazgaj v. Valley Camp Coal Co.,* 9 BLR 1-201 (1986). This failure has further delayed resolution of this case which is an injustice to both parties.

Employer concedes the very arduous nature of claimant's coal mine employment as a foreman in its response brief, stating:

> The judge recognized that [claimant] had to walk to inspect eight mine sites-480 feet every twenty minutes. [Decision and Order on Remand] at 13. He noted that this required [claimant] to walk bent over to fit his 6'1" frame through the 4'2'' to 4'8" passageways. *Id*. The administrative law judge recalled that [claimant] had to carry thirty pounds of equipment while conducting his inspections. *Id*. at 12. Judge Hillyard also noted [claimant's] testimony that he had to be able to do whatever else was necessary, such as racking oil or changing tires. *Id*. at 14.

Response Brief at 16 (emphasis added).

Although the administrative law judge has recognized claimant's specific job duties, he failed to make the findings mandated by the Board in its most recent Decision and Order. These findings are essential to a proper evaluation of the medical opinion evidence. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990). A review of the relevant physicians' opinions of record reveals that none of the physicians, including Dr. Cohen, demonstrated knowledge of all the exertional requirements of claimant's coal mine employment, as set forth in the administrative law judge's Decision and Order and recounted in employer's brief. Because none of the physicians' opinions demonstrates a thorough understanding of the physical demands of claimant's coal mine employment, the administrative law judge cannot rely upon the finding by any of the doctors that claimant can perform his usual coal mine employment. *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). Under these circumstances, the administrative law judge must determine the credibility of the physical limitations, if any, found by the doctors and determine the extent, if any, to which those limitations would interfere with claimant's performance of his usual coal mine employment. *See Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 15 BLR 2-116 (7th Cir. 1991). The law is clear that "even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties, depending on the exertional requirements of the miner's usual coal mine employment." *See Cornett v. Benham Coal Co., Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000).

Accordingly, I would vacate the administrative law judge's Decision and Order on Remand-denial of benefits and remand the case to the administrative law judge for further consideration.

REGINA C. McGRANERY
Administrative Appeals Judge