BRB No. 03-0411 BLA

JOHN H. COMBS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 09/30/2003
	)	
	)	
Respondent	)	

DECISION and ORDER

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

John Hunt Morgan, Hyden, Kentucky, for claimant.

Rita Roppolo (Howard M. 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: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order--Denying Benefits (2002-BLA-5217) of Administrative Law Judge Joseph E. Kane rendered 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] Claimant's first application for benefits filed on February 22, 1993 was finally denied on August 20, 1999 based on findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), but did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(2000). Director's Exhibit 1; *Combs v. Director, OWCP*, BRB No. 98-1469 BLA (Aug. 20, 1999)(unpub.). On February 12, 2001, claimant filed his current application for benefits, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order--Denying Benefits issued on February 25, 2003, the administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), and therefore did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant is not totally disabled. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's findings, but moves to remand this case to the district director for further evidentiary development. In support of this motion, the Director states that he has failed to fulfill his statutory duty, pursuant to Section 413(b), 30 U.S.C. 932(b), to provide claimant with a complete pulmonary evaluation.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

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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] We affirm as unchallenged on appeal the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant contends that the administrative law judge erred in according less weight to the opinion of Dr. Baker. Claimant's Brief at 3-4. Claimant's contention lacks merit. Dr. Baker opined that claimant is totally disabled for two reasons. First, the administrative law judge found that Dr. Baker concluded that claimant is totally disabled "from coal mine employment because he must avoid dusty environments." Decision and Order at 10; *see also* Director's Exhibit 14 at 2 (Observing that impairment evaluation guide "states that persons who develop pneumoconiosis should limit further exposure to the offending agent," which "would imply the patient is 100% occupationally disabled . . . ."). The administrative law judge correctly found that Dr. Baker's statement advising against further coal mine dust exposure was insufficient to establish the presence of a totally disabling respiratory or pulmonary impairment. *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Second, Dr. Baker opined that claimant is totally disabled because he has a mild restrictive impairment based on pulmonary function studies. Director's Exhibit 14 at 2. Although claimant contends that the administrative law judge did not compare Dr. Baker's impairment rating with the exertional requirements of claimant's coal mine work, Claimant's Brief at 4, the administrative law judge in fact made the comparison, as follows:

> Claimant suffers from a mild restrictive ventilatory defect. . . . When I compare Claimant's proven respiratory capacity with the proven exertional requirements of his coal mine employment, I cannot conclude that Claimant is totally disabled. . . . Claimant has demonstrated that his roof bolting job required, from an exertional standpoint: 1) constant standing, and 2) lifting 30-35 pounds eight to nine times throughout the workday. (DX 1, 5; Tr. 15-17). I find that Claimant's mild impairment is not sufficient to prevent his performance of his usual coal mine employment. The lifting requirements of claimant's job are appreciable; however, I find a mild respiratory impairment does not prevent Claimant from standing during the workday and lifting thirty to thirty-five pounds eight to nine times per day, or, in other words, once an hour.

Decision and Order at 11. Claimant raises no challenge to the administrative law judge's analysis, which is supported by substantial evidence and in accordance with law. *See Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999)(The administrative law judge must compare a physician's impairment rating with the physical requirements of claimant's usual job duties.). Consequently, we affirm the administrative law judge's finding that Dr. Baker's opinion did not establish that claimant is totally disabled.

Claimant further contends that the administrative law judge erred in discounting Dr. Hussain's opinion on the ground that it was poorly reasoned. Claimant's Brief at 3-4. Dr. Hussain examined claimant on behalf of the Department of Labor and opined that

claimant is totally disabled based on "effort intolerance, dyspnea, [and] wheeze." Director's Exhibit 12 at 21. The administrative law judge found this rationale by Dr. Hussain to be "less probative" because it was not specific enough to determine claimant's ability to perform his job duties as a roof bolter. Decision and Order at 11. Contrary to claimant's argument, the administrative law judge properly accorded less weight to Dr. Hussain's opinion because he found it to be insufficiently reasoned or explained. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983)(The determination of whether a report is reasoned is a credibility matter for the administrative law judge); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge further considered that Dr. Hussain diagnosed a "moderate impairment." Director's Exhibit 12 at 20. Upon review of Dr. Hussain's report, however, the administrative law judge found that Dr. Hussain "provide[d] no explicit basis for his diagnosis of a moderate impairment," and therefore "grant[ed] less weight to his impairment opinion due to his failure to provide the bases for his opinion . . . ." Decision and Order at 10-11. Substantial evidence supports the administrative law judge's permissible credibility determination. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89 and n.4. Therefore, we reject claimant's contentions and affirm the administrative law judge's finding that Dr. Hussain's opinion did not establish that claimant is totally disabled.

The Director requests that the denial of benefits be vacated and "the case be remanded to the district director for further development of the evidence." Director's Brief at 3. We grant the Director's motion to remand this case to the district director, based on the Director's concession that Dr. Hussain's opinion fails to meet the Director's obligation of providing claimant with a complete pulmonary evaluation sufficient to substantiate his claim. *See Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994)(granting Director's motion to remand for a complete pulmonary evaluation); *Pettry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990)(*en banc*)(same); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-53 (1990)(*en banc*)(same).

Accordingly, the administrative law judge's Decision and Order--Denying Benefits is affirmed in part and vacated in part, the Director's motion is granted, and the case is remanded to the district director for a complete pulmonary evaluation of claimant, and for reconsideration of his claim in light of the new evidence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge