BRB No. 11-0878 BLA

MARLIN L. GOSSETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/21/2012
	)	
TN NITRATE TECHNOLOGY, INCORPORATED	)	
	)	
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 Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Michael A. Anderson (Patrick, Beard, Schulman & Jacoway, P.C.), Chattanooga, Tennessee, for claimant.

J. Al Johnson, Spencer, Tennessee, and Herbert B. Williams (Stokes, Williams, Sharp & Davies), Knoxville, Tennessee, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Claim (2008-BLA-05634) of Administrative Law Judge Daniel F. Solomon issued pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case is before the Board for a second time and involves a claim filed on February 7, 2007. The Board previously vacated the

administrative law judge's denial of benefits on the ground that he erred in weighing the medical opinion evidence relevant to whether claimant established total disability.[1] *Gossett v. TN Nitrate Techonlogy, Inc.*, BRB Nos. 09-0855 BLA and 09-0855 BLA-A, slip op. at 6 (Oct. 29, 2010) (unpub.). Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the Board noted that, while the administrative law judge found that claimant worked as a truck driver, there was evidence in the record which, if credited, could establish that claimant's last coal mine job involved work as both a truck driver and a material handler. *Id*. Because the administrative law judge rejected the opinion of Dr. Toban, that claimant is totally disabled, without fully addressing the evidence relevant to the nature of claimant's usual coal mine employment, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv), and remanded the case for further consideration. *Id*. The Board instructed the administrative law judge to reconsider claimant's entitlement to benefits pursuant to 20 C.F.R. Part 718 and based on the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4) of the Act.[2] *Id*. The Board further instructed the administrative law judge to allow for the submission of additional evidence by the parties on remand, relevant to amended Section 411(c)(4), consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414. *Id*. at 7.

[1] The administrative law judge did not reach the issue of the existence of pneumoconiosis. The Board affirmed the administrative law judge's finding that claimant failed to establish the dependent status of his child pursuant to 20 C.F.R. §725.209; his determination that employer is the responsible operator; and his decision to exclude the affidavits prepared by witnesses who did not testify at the hearing. *Gossett v. TN Nitrate Technology, Inc.*, BRB Nos. 09-0855 BLA and 09-0855 BLA-A, slip op. at 7-14 (Oct. 29, 2010) (unpub.). The Board also affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). *Id*. at 5 n.4.

[2] On March 23, 2010, while the case was pending before the Board, amendments to the Act, contained in the Patient Protection and Affordable Care Act were enacted. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.SC. §921(c)(4)).

On March 25, 2011, the administrative law judge issued an Order on Remand, giving the parties until June 1, 2011 to submit one additional medical report.[3] The parties filed respective motions for extensions of time. On June 27, 2011, a telephone conference was held to address the parties' motions. During the conference call, the administrative law judge determined that no further time should be allowed for the submission of additional evidence. Claimant, employer and the Director, Office of Workers' Compensation Programs (the Director), filed briefs in response to the Order on Remand. Claimant included with his brief a copy of a June 9, 2009 CT scan report. Employer filed a motion to strike claimant's additional evidence. In his Decision and Order on Remand dated August 29, 2011, which is the subject of this appeal, the administrative law judge granted employer's motion to strike and excluded the June 9, 2009 CT scan report. Reviewing the merits of the claim, the administrative law judge found that claimant established sixteen years of underground coal mine employment, but also found that claimant failed to establish a totally disabling respiratory or pulmonary impairment. Accordingly, the administrative law judge found that claimant was not entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), and that benefits were precluded under 20 C.F.R. Part 718.

On appeal, claimant contends that the administrative law judge abused his discretion in refusing to allow the parties sufficient time on remand to submit additional evidence, as instructed by the Board, and by not admitting the June 9, 2009 CT scan into the record. Claimant also contends that the administrative law judge erred in finding that he is not totally disabled. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has declined to file a brief in this appeal.

The Board's scope of review is defined by statute. 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.[4] 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).

[3] Thereafter, the parties were instructed to file simultaneous briefs by July 5, 2011, and reply briefs by July 19, 2011.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 1.

I. EVIDENTIARY ISSUES

In order to address claimant's evidentiary challenges, a brief procedural history of the claim on remand follows. By Order dated March 25, 2011, the administrative law judge advised the parties that the record would remain open until June 1, 2011, for submission of one additional medical report. On May 9, 2011, employer filed a motion requesting an extension of time, until September 1, 2011, to obtain a new physical examination of claimant and submit a medical report. On May 24, 2011, claimant also filed a motion requesting additional time to submit a medical report, but he did not specify why the additional time was needed. Claimant stated only that he had no objection to employer's request for an extension "so long as he was afforded an equal extension of time." *See* Claimant's Motion for Extension at [2] (unpaginated). In a June 8, 2011 Addendum to employer's motion for an extension of time, employer notified the administrative law judge that an examination of claimant was scheduled for August 11, 2011.

On June 27, 2011, the administrative law judge conducted a telephone conference with counsel for claimant and employer regarding the motions for extensions of time. The administrative law judge noted that Dr. Toban conducted the Department of Labor evaluation of claimant and that he had previously determined that Dr. Toban's opinion did not establish total disability. The administrative law judge explained that he was required to reconsider Dr. Toban's opinion in light of the fact that claimant worked as both a truck driver and a material handler. The following discussion with the parties then ensued:

> **Judge Solomon**: Okay, so let me just ask the parties, why do you need to develop this further?
>
> **Mr. Anderson**: Well, at this point –
>
> **Judge Solomon**: Mr. Anderson, go first.
>
> **Mr. Anderson**: Excuse me, this is Michael Anderson on behalf of [claimant]. Based upon the Court's recitation, it would appear that the Court has found that the evidence in the record from Dr. Toban may not meet the burden of proving [total disability] --
>
> **Judge Solomon**: I said it didn't in the order.
>
> **Mr. Anderson**: Okay, well, on the remand and then you gave us time to develop additional proof.
>
> **Judge Solomon**: Right.
>
> **Mr. Anderson**: And Mr. Williams and I discussed the matter and he indicated he needed additional time and I told him I had no objection --
>
> **Judge Solomon**: Okay, let me just ask both of you, has anybody asked me for a subpoena? No?
>
> **Mr. Anderson**: [Claimant] has not.

Mr. Williams: No.
Judge Solomon: Okay, neither party?
Mr. Anderson: Neither has.
Judge Solomon: Were interrogatories sent to Dr. Toban?
Mr. Anderson: No.
Judge Solomon: Has anybody written to Dr. Toban?
Mr. Anderson: No.
Mr. Williams: No.
Judge Solomon: Okay, here's what we're going to do. I'm going to leave the record open for another month for briefs. I'm not going to permit any further development at this point.

Transcript of Telephone Conference (June 27, 2011) at 7-8. The administrative law judge next advised the parties of their respective burdens of proof under amended Section 411(c)(4) and the call ended. *Id*. at 9-10.

Claimant contends that the administrative law judge abused his discretion in denying his motion for an extension of time to submit additional evidence. Claimant states:

> At all times prior to the telephone conference, counsel for [claimant] acted in good faith and cooperated in a professional manner to attempt to accommodate the request of counsel for the employer and to arrange for the submission of additional proof. Unfortunately, and due to time constraints to obtain participation of the very limited population of reviewing physicians and the schedules and other obligations of counsel, the parties were unable to meet the deadline established by the [administrative law judge]. The administrative law judge refused to afford the parties any additional time beyond what was originally granted and refused to state a reason for doing so.

Claimant's Brief at [5] (unpaginated). Claimant concludes that the administrative law judge's ruling was improper and "was done under circumstances that have created a cloud of impropriety."[5] *Id*.

[5] Claimant notes that employer's counsel spoke with the administrative law judge prior to the conference and that he was not privy to what was discussed. Claimant further states, however, that he "is in no way suggesting that employer's counsel acted inappropriately in communicating with the [administrative law judge]." Claimant's Brief at [5 n.2] (unpaginated). Based on claimant's statement, we will not consider whether there was an improper *ex parte* communication in this case. *See* 5 U.S.C §§551(14), 557(d)(1)(A), (B).

The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 621, 23 BLR 2-345, 2-370-71 (4th Cir. 2006). Previously, the Board remanded this case in order for the administrative law judge to reweigh Dr. Toban's opinion relevant to whether claimant was totally disabled by a respiratory or pulmonary impairment. Claimant did not specify in his motion requesting an extension of time the type of evidence he planned to develop and submit. i.e., a supplemental report from Dr. Toban or a new medical report from a different physician. Claimant did not explain during the telephone conference why he needed an extension, nor did he indicate that additional medical development was being pursued. In fact, it appears that claimant merely requested the extension in order to respond to employer's new examination report. Claimant's brief in this appeal does nothing to dispel that conclusion. Since employer was precluded from submitting a new examination report, based on the administrative law judge's ruling, and claimant has not specified in this appeal what exact evidence he was unable to obtain in the time allotted by the administrative law judge for medical development, we reject claimant's assertion of error and conclude that the administrative law judge acted within his discretion in denying the parties' motions for an extension of time. *See Keener*, 23 BLR at 1-236; *Williams*, 453 F.3d at 621, 23 BLR at 2-370-71; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986)..

We also affirm the administrative law judge's decision to exclude the CT scan. *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992); *Clark*, 12 BLR at 1-153; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Claimant was informed during the telephone conference that no additional evidence would be admitted into the record. Claimant did not argue good cause for the admission of the untimely evidence before the administrative law judge, and merely asserts in this appeal that it should be admitted based on his motion for an extension of time. Because we reject claimant's argument, that the administrative law judge abused his discretion in denying claimant's motion, we affirm the administrative law judge's exclusion of the CT scan.[6] *See Clark*, 12 BLR at 1-153.

II. TOTAL DISABILITY

Claimant next argues that the administrative law judge erred in finding that he is not totally disabled. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law

[6] We note that, even if the CT scan had been admitted into the record, the result of this case is the same, as the CT scan is relevant to the existence of pneumoconiosis, but does not diagnose complicated pneumoconiosis. Thus, it is not relevant to the issue of total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

judge noted that, while Dr. Toban opined that claimant was unable to work in the coal mines, he did not "specifically state whether claimant could return to his work as a truck driver and material handler." Decision and Order on Remand at 8; *see* Director's Exhibits 10, 18. The administrative law judge further found that, while Dr. Toban diagnosed a moderate respiratory impairment, "he did not provide an adequate explanation regarding any physical limitations of [c]laimant." *Id*. In contrast, the administrative law judge credited Dr. Fino's opinion, that claimant is not totally disabled from performing even heavy manual labor, because he found that it was reasoned and documented and "better supported by the objective data of record." *Id*.; *see* Employer's Exhibit 2. Thus, the administrative law judge concluded that claimant did not satisfy his burden to establish a totally disabling respiratory impairment. The administrative law judge therefore found that claimant was not entitled to the amended Section 411(c)(4) presumption.

The Board's circumscribed scope of review requires that the party challenging the Decision and Order below identify any errors made by the administrative law judge and cite evidence and legal authority that support these allegations. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Although claimant maintains that Dr. Toban's opinion is sufficient to satisfy his burden of proof, he does not raise specific error with the administrative law judge's credibility determinations or his decision to credit Dr. Fino's opinion. Thus, we affirm the administrative law judge's finding that claimant failed to establish total disability, based on either the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), or a weighing of the evidence, overall, at 20 C.F.R. §718.204(b). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. As claimant did not establish a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant is not eligible for the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4). Furthermore, because claimant failed to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718,[7] we affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[7] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Accordingly, the administrative law judge's Decision and Order – Denial of Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge