BRB No. 98-1616 BLA

ERNEST W. SHERRILL	)	
	)	
Employer-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES STEEL MINING COMPANY, LLC	)	DATE ISSUED:
	)	
Claimant-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Howard G. Salisbury (Kay, Casto, Chaney, Love & Wise), Charleston, West Virginia, for employer.

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

Employer appeals the Decision and Order Granting Benefits (97-BLA-894) of Administrative Law Judge Pamela Lakes Wood 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 noted that the parties stipulated to thirty-nine years of coal mine employment and that Judge Clarke had previously found at least forty years of coal mine employment, and the existence of pneumoconiosis, but that total disability due to pneumoconiosis was not established in the Decision and Order of March 3, 1992. Based on the filing date of this duplicate claim, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Employer stipulated to, and the administrative law judge found the existence of pneumoconiosis arising out of coal mine

employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. After considering the newly submitted evidence of record, the administrative law judge concluded that the evidence of record was sufficient to establish total disability, and thus, was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge then considered all the evidence of record and concluded that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded. On appeal, employer urges reversal of the award of benefits, arguing that the administrative law judge erred in finding a material change in conditions and a totally disabling respiratory impairment pursuant to 718.204. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate 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 supported by substantial evidence, is rational, and is in accordance with law. 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).

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. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erred in according more weight to Dr. Jabour's opinion than to Dr. Castle's on the grounds that Dr. Jabour was better apprised of the exertional duties of claimant's usual coal mine employment and Dr. Castle's opinion of no total disability was based solely on non-qualifying pulmonary function studies. Dr. Jabour noted that there was strong evidence of pneumoconiosis based on claimant's x-ray and pulmonary function study, and that the severity of this impairment resulted in complete functional impairment which would completely impair claimant from returning to work in his job setting, while Dr. Castle found that claimant had the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 16; Employer's Exhibit 1. The administrative law judge relied on Dr. Jabour's opinion to find total disability because he found that Dr. Jabour took into account the "heavy" work involved in claimant's occupation as a "roof bolter." As employer contends, however, contrary to the administrative law judge's finding, although Dr. Jabour addresses claimant's limitations on exertion, he does not address the exertional requirement of claimant's work as a roof bolter, while Dr. Castle does. Director's Exhibit 16; Employer's Exhibits 1, 2. Thus, we vacate the administrative law judge's finding of total disability. *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, in determining

the credibility of the opinion, *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), the administrative law judge must determine whether Dr. Jabour's statements regarding claimant's functional impairment constitute an opinion, on its face, of total disability. If not the administrative law judge must consider the physical limitations listed in Dr. Jabour's report in light of the exertional requirements of claimant's usual coal mine employment in determining whether claimant has established total disability. *See Lane v. Union Carbondale Corp.*, 105 F.3d 166, No. 95-3131 (4th Cir. January 24, 1997); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grounds*, 14 BLR 1-37 (1990)(*en banc*); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984). Further, as employer contends, Dr. Castle's opinion appears to be based on a complete physical examination, history and objective tests and does not appear to rely solely on nonquality objective tests in finding no totally disabling respiratory impairment. Employer's Exhibits 1, 2. *Tackett*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). On remand, therefore, the administrative law judge must reconsider the opinions of Drs. Castle and Jabour in determining whether claimant has established total disability under Section 718.204(c) and therefore a material change in condition under Section 725.309(d), *Lisa Lee Mines v. Director, OWCP, [Rutter]*, 86 F.3d 1358, 20 BLR 2-229 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995) and, if reached, consider their opinions along with the other medical evidence of record in determining whether total disability is established at Section 718.204(c). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Further, if on remand, the administrative law judge finds total disability established, then the evidence relevant to Section 718.204(b) must be reconsidered.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.[1]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[1] The administrative law judge's findings pursuant to Sections 718.202(a), 718.203, and 718.204(c)(1)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-616 (1983).