

BRB No. 08-0618 BLA

R. C. )  
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 Claimant-Petitioner )  
 )  
 v. )  
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 EMILY ENTERPRISES, INCORPORATED ) DATE ISSUED: 04/28/2009  
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 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 – Denial of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer.

Emily Goldberg-Kraft (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2005-BLA-6292) of Administrative Law Judge Edward Terhune Miller rendered on a miner's 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

credited claimant with thirty years of qualifying coal mine employment, and adjudicated this claim, filed on March 17, 2004, pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that total respiratory disability had been established pursuant to 20 C.F.R. §718.204(b), but that the evidence was insufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding on the issue of disability causation, and also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a credible pulmonary evaluation, as required pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response, arguing that he met his obligation to provide claimant with a pulmonary evaluation that complies with the requirements of Section 413(b) of the Act.

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.<sup>1</sup> 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 demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901, 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant generally contends that the administrative law judge erred in failing to find that claimant's disabling respiratory impairment is due to pneumoconiosis pursuant to Section 718.204(c). Claimant argues that the administrative law judge improperly "categorized and rejected" the opinions of Drs. Mettu, Ebo, and Ammisetty, all of whom treated claimant starting in 2006. Claimant's Brief at 10-14. Claimant further argues that the administrative law judge applied an incorrect legal standard by requiring claimant to

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<sup>1</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 9.

establish a causal connection between his disability and pneumoconiosis. Claimant's Brief at 13. Claimant's arguments lack merit.

In considering the medical opinion evidence relevant to disability causation at Section 718.204(c), the administrative law judge accurately summarized the opinions of record and permissibly accorded Dr. Mettu's opinion little weight because he relied, in part, on pulmonary function studies that were invalidated due to claimant's less than optimal effort, cooperation and comprehension, and because the doctor failed to establish a basis for his opinion that claimant was disabled due to pneumoconiosis, as opposed to other possible causes. Decision and Order at 13. Similarly, the administrative law judge permissibly found the medical report forms completed by Drs. Ebeo and Ammisetty, indicating that claimant's impairment was "related to pneumoconiosis," to be unsupported by explicit reasoning or documentation. Decision and Order at 13; Claimant's Exhibits 5, 6; see *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge was not required to accord determinative weight to these opinions solely because they were offered by a treating or attending physician. 20 C.F.R. §718.104(d)(5); see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). The administrative law judge properly concluded, therefore, that the medical opinion evidence of record failed to establish a causal connection between claimant's coal dust exposure and his totally disabling pulmonary impairment, and that claimant had failed, therefore, to carry his burden of proof in establishing disability causation at Section 718.204(c).<sup>2</sup>

Moreover, we note that claimant bears the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). As claimant restates the evidence of record favorable to his case, but has not asserted any specific error committed by the administrative law judge relative to the administrative law judge's findings on causation, claimant's contention constitutes a request that the Board reweigh the evidence of record, which is beyond the scope of the Board's powers. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). Accordingly, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish disability causation pursuant to Section 718.204(c).

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<sup>2</sup> The only other medical opinion of record is that of Dr. Dahhan, who did not diagnose pneumoconiosis and found no evidence of total or permanent pulmonary disability. Director's Exhibit 40.

Claimant also argues that, because the administrative law judge discounted the opinion of Dr. Mettu, the Director violated his duty under Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a), to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim. Claimant's Brief at 14. Claimant's argument is rejected. The administrative law judge discredited Dr. Mettu's opinion on the issue of causation, in part, because the doctor relied on the results of pulmonary function studies that were determined to be technically unacceptable by Drs. Burki and Ranavaya due to claimant's deficient effort, cooperation and comprehension, a circumstance beyond the Director's control. Decision and Order at 13. Consequently, as the Director correctly notes, because Dr. Mettu performed all necessary testing<sup>3</sup> and addressed the essential elements of entitlement, the Director's statutory obligation to provide the miner with a complete pulmonary evaluation is discharged, as the Director is required to provide each miner with a complete evaluation, not a dispositive one. *See Gallagher v. Bellaire Corp.*, 71 Fed. Appx. 528, 531 (6th Cir. 2003)(unpub.); *see also* 30 U.S.C. §923(b), 20 C.F.R. §725.406(a); Director's Exhibit 13.

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<sup>3</sup> After Dr. Burki invalidated the May 25, 2004 pulmonary function study due to a lack of effort by claimant, the district director scheduled a second pulmonary function study pursuant to 20 C.F.R. §725.406(c). Director's Exhibits 13-20, 13-21. The second pulmonary function study obtained by Dr. Mettu on July 22, 2004 was also determined to be unacceptable by Dr. Ranavaya due to claimant's less than optimal effort. Director's Exhibits 13-13, 13-14. Where the deficiencies in the report are the result of lack of effort on the part of the miner, the miner is afforded only one additional opportunity to produce a satisfactory result. 20 C.F.R. §725.406(c).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits 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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REGINA C. McGRANERY  
Administrative Appeals Judge