BRB No. 02-0266 BLA

JAMES W. CLUTTER Claimant-Petitioner v. BENJAMIN COAL COMPANY and STATE WORKMEN'S INSURANCE FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William J. Walls, Pittsburgh, Pennsylvania, for employer and carrier.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-0257) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) 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] Claimant originally filed a claim on September 16, 1997. That claim was denied by Administrative Law Judge Daniel L. Leland on January 27, 1999. Claimant filed the instant duplicate claim on May 8, 2000. On September 11, 2000, the district director found no material change in conditions since the denial of the original claim, and, therefore, denied benefits pursuant to 20 C.F.R. §725.309(d) (2000). Thereafter, claimant requested a hearing before an administrative law judge. Following the hearing on this claim, the administrative law judge issued a Decision and Order denying the duplicate claim.

In the prior claim, Judge Leland denied benefits on the basis that the evidence failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Judge Leland's Decision and Order of Jan. 12, 1999 at 12. Considering the instant duplicate claim, the administrative law judge determined that pneumoconiosis had been established by the newly submitted x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Decision and Order of Dec. 12, 2001 at 9-10. Therefore, the administrative law judge properly held that the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000),[2] and claimant

[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 revisions to the regulations at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were filed before January 19, 2001.

was thus entitled to a *de novo* review of all of the evidence of record on the merits of the claim. 20 C.F.R. §725.309(d) (2000); *Labelle Processing Co., v. Swarrow,* 72 F. 3d 308, 20 BLR 2-76 (3d Cir. 1995). The administrative law judge further reviewed the claim and found that claimant established that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge found, however, that claimant failed to establish total pulmonary or respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's assessment of the medical opinion evidence, asserting that he improperly discredited the medical reports that support a finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Employer/carrier (employer) responds, urging affirmance of the denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a statement indicating that he will not participate in this appeal.

The Board must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish total pulmonary or respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement.

Claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence at Section 718.204(b)(2)(iv) because he failed to "provide[] [a] substantial or adequate explanation as to why the opinions of those physicians who found the Claimant to be disabled were rejected." Claimant's Brief at 3. Claimant argues that the administrative law judge's decision thus fails to comport with the requirements of the Administrative Procedure Act (APA), 5

[3]We affirm the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §921(b)(3), and 30 U.S.C. §932(a).

The administrative law judge, pursuant to Section 718.204(b)(2)(iv), initially found, "Of the physicians submitting opinions, Drs. Schaaf, Ignacio and Malhotra concluded that Claimant is totally disabled from performing his last coal mine employment." Decision and Order of Dec. 12, 2001 at 13. The administrative law judge then accorded less weight to Dr. Zlupko's reports as he found them to be inconsistent and inconclusive. He then discussed the opinions of Drs. Michos, Fino and Solic and stated:

> I accord more weight to the opinions of Drs. Michos, Fino, and Solic as related to whether the miner is totally disabled, because I find them more consistent with the underlying documentation and data, namely the universally non-qualifying ventilatory and arterial blood gas studies. After weighing all the evidence of record, I conclude that Claimant is not totally disabled from a pulmonary standpoint alone from engaging in his usual and comparable work.

Decision and Order of Dec. 12, 2001 at 14.

We agree with claimant's contention that the administrative law judge failed to provide a sufficient basis for his rejection of the opinions of Drs. Schaaf, Ignacio and Malhotra. When the administrative law judge accorded *more* weight to the opinions of Drs. Michos, Fino and Solic on the basis that they were *more* consistent with the underlying documentation and data, namely the non-qualifying pulmonary function studies and blood gas studies, he thereby indicated that the contrary opinions of Drs.Schaaf, Ignacio and Malhotra were not consistent with the underlying documentation and data. The administrative law judge did not, however, adequately set forth the reasons and bases for his discrediting of the medical opinions of Drs. Schaaf, Ignacio and Malhotra, sufficient to comply with the requirements of the APA. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997).[4] Specifically, the administrative law judge must provide further analysis of the physicians' opinions he rejected and explain how any pulmonary or respiratory impairment diagnosed, when compared to the actual exertional requirements of claimant's usual coal mine employment, prevents

[4]To the extent that the administrative law judge incorporated by reference the credibility findings of Administrative Law Judge Daniel L. Leland regarding the medical opinion evidence, he erred. *See* Decision and Order of Dec. 12, 2001 at 12. Claimant established a material change in conditions in the instant duplicate claim is thus entitled to *de novo* review of all the evidence of record. 20 C.F.R. §725.309 (2000); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

claimant from performing his usual coal mine employment or comparable and gainful employment.[5] 20 C.F.R. §718.204(b); *see Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *see also Witmer, supra*.

Based on the foregoing, we vacate the administrative law judge's finding at Section 718.204(b)(2)(iv) and remand the case to the administrative law judge to provide further explanation of his findings and conclusions in weighing the medical opinion evidence.

Claimant next contends that, contrary to the administrative law judge's finding, Dr. Zlupko's later medical report is not inconsistent with his earlier report. Claimant avers that Dr. Zlupko was provided with additional information regarding the exertional requirements of claimant's coal mine employment, after rendering his earlier opinion which reasonably caused Dr. Zlupko to alter his findings in his later opinion. We find merit in claimant's contention. The administrative law judge correctly noted that Dr. Zlupko rendered varying opinions. Specifically, Dr. Zlupko, in his June 23, 1998 opinion, stated that claimant is not "totally disabled... but he is effected (sic) by his previous occupational exposures." Director's Exhibit 26; Claimant's Exhibit 1. Dr. Zlupko, in his follow-up letter dated August 13, 1998, in which he indicated that he was responding to claimant's counsel's letter dated August 5, 1998, opined:

> I believe that [claimant's] overall degree of pulmonary dysfunction would prevent him from performing adequately in a job circumstance, which would require heavy and repeated physical exertion. It is my understanding that he worked as an oiler and a drag line operator. To the extent that these jobs would require heavy, prolonged and

[5]The administrative law judge addressed the evidence regarding the exertional requirements of claimant's "last coal mine job" as a drag line operator. Decision and Order at 3. Substantial evidence in the record supports the administrative law judge's reliance on claimant's coal mine employment as a drag line operator as his usual coal mine employment, including claimant's testimony that he worked for employer as a drag line operator from 1974 to 1989, at which time he left the mines. Hearing Transcript at 11, 13; *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

> repeated physical exertion, I think that Mr. Clutter would have difficulty performing some of these duties. This condition is unlikely to improve and for all practical purposes is permanent and irreversible.

Director's Exhibit 26-68.[6] Dr. Zlupko was thus provided with additional information by counsel subsequent to his June 23, 1998 opinion and prior to his August 5, 1998. On these facts, we hold that substantial evidence in the record does not support the administrative law judge's determination that Dr. Zlupko's August of 1998 opinion was inconsistent with his June of 1998 opinion. We, therefore, hold that the administrative law judge erred in discrediting Dr. Zlupko's opinion on the basis of inconsistency. On remand, the administrative law judge must reconsider the weight and credibility of Dr. Zlupko's opinions at Section 718.204(b)(2)(iv), along with the other medical reports of record.

If, on remand, the administrative law judge finds that the medical opinion evidence establishes total pulmonary or respiratory disability under Section 718.204(b)(2)(iv), he must then determine whether claimant has met his burden to establish total pulmonary or respiratory disability under 20 C.F.R. §718.204(b) based on the relevant evidence. 20 C.F.R. §718.204(b); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). If so, the administrative law judge is instructed to then determine whether claimant has met his burden to establish that his totally disabling pulmonary or respiratory impairment is due to pneumoconiosis under 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part and vacated in part. The case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[6]Claimant's counsel's letter of August 5, 1998, referred to by Dr. Zlupko in his August 13, 1998 opinion, is not contained in the record.

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge