BRB No. 04-0875 BLA

LESTER E. EVANS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARMONY MINING COMPANY	)	DATE ISSUED: 05/20/2005
	)	
and	)	
	)	
INSERVCO INSURANCE	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Gregory J. Fischer (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (02-BLA-0372) of Administrative Law Judge Michael P. Lesniak 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] In a Decision and Order dated August 3, 2004, the administrative law judge credited the miner with twenty-one years of coal mine employment,[2] and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), as stipulated by the parties, and further established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv), but failed to establish that the miner's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to consider the opinion of Dr. Sweet, a Board-certified pulmonologist, who found that the cause of claimant's disability was multifactorial and included pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits, and contending that any error on the part of the administrative law judge in failing to consider Dr. Sweet's opinion was harmless because Dr. Sweet failed to indicate that pneumoconiosis was a "substantially" contributing factor of claimant's total respiratory disability and the opinion was therefore insufficient to establish disability causation at Section 718.204(c). The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[3]

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. 33 U.S.C. §921(b)(3), as incorporated by 30

---

[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). Although the administrative law judge cited to the prior version of the regulations in the Decision and Order, all citations to the regulations contained herein refer to the amended regulations.

[2] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The administrative law judge's finding of twenty-one years of coal mine employment and his findings at 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b)(2)(i)-(iv) are affirmed as unchallenged on appeal. *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).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 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 a finding of 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).

Section 718.204(c) provides, in pertinent part, that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a 'substantially contributing cause' of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition;
>
> or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1), (i), (ii); *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989).[4]

In finding that the medical opinion evidence failed to establish that claimant's total disability was due to pneumoconiosis, the administrative law judge accorded greater

[4] The revised standard for causation set forth in the new regulations at 20 C.F.R. §718.204(c) is consistent with the causation standard previously set forth by the United States Court of Appeals for the Third Circuit in *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). In comments to the regulations, the Department of Labor explained the derivation and meaning of the new causation standard. Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969 as amended, 65 Fed. Reg. 79946-47 (Dec. 20, 2000). These comments clarify that the new regulations codify circuit court decisions on this subject.

weight to the opinions of Drs. Fino and Bush, that claimant's pneumoconiosis played no role in claimant's totally disabling respiratory impairment, than to the contrary opinion of Dr. Schaaf, because he found that their opinions were better reasoned, better explained, and better supported by the objective evidence of record.[5] Decision and Order at 11; *see* Director's Exhibits 33, 34; Employer's Exhibits 1, 2.

Claimant raises no allegations of error with regard to the administrative law judge's weighing of the opinions of Drs. Fino, Bush and Schaaf. Claimant's Brief at 1-2. Those findings are therefore affirmed. *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

However, as claimant contends, the administrative law judge failed to consider the relevant and probative opinion of Dr. Sweet, who opined, in a report dated May 23, 2002, that claimant's significant respiratory impairment was multifactorial: due in part to his years of mining with resultant pneumoconiosis, the effects of cigarette smoking with chronic bronchitis, his lung cancer with resection, his weight and his deconditioning. Director's Exhibit 57. Thus, the administrative law judge's Decision and Order fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a), which requires that the administrative law judge consider all of the relevant evidence of record and provide reasoning in support of his findings on all issues. *See Schaaf v. Mathews*, 574 F.2d 157 (3d Cir. 1978); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984). Consequently, as the administrative law judge failed to consider all of the relevant evidence of record, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c), and remand this case for the administrative law judge to determine whether the medical evidence of record, including Dr. Sweet's opinion, establishes disability causation. 20 C.F.R. §718.204(c); 65 Fed. Reg. 79946-47 (December 20, 2000); *Bonessa*, 884 F.2d at 734, 13 BLR at 2-37.

[5] Drs. Schaaf, Fino and Bush all diagnosed the existence of simple pneumoconiosis, arising out of coal dust exposure, and they were also all aware that the miner had been diagnosed with lung cancer, for which he had undergone a surgical resection of the right upper lung. Drs. Fino and Bush opined that claimant's pneumoconiosis played no role in his totally disabling respiratory impairment, while Dr. Schaaf opined that "[t]here is no alternative explanation for [claimant's] breathlessness save to invoke some contribution of his coal workers' pneumoconiosis since his symptoms antedated his lung resection." Director's Exhibits 8, 33, 34; Employer's Exhibits 1, 2. The record also contains a report from Dr. Desai, who did not offer an opinion as to the degree or cause of any impairment the miner might have. In the space provided for the physician to indicate the degree of impairment, Dr. Desai wrote only "retired." Director's Exhibit 8.

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

SO ORDERED.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge