BRB No. 05-0539 BLA

LARRY L. KNAPP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	DATE ISSUED: 04/26/2006
	)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (03-BLA-6710) of Administrative Law Judge Richard A. Morgan denying benefits 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). This case involves a subsequent claim filed on December 6, 2001.[1] After crediting claimant with at least eighteen years of coal mine employment, the

[1]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on December 2, 1999. Director's Exhibit 1. The district director denied benefits on April 24, 2000. *Id.* The district director found that the evidence was insufficient to establish (1) the existence of pneumoconiosis; (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by

administrative law judge noted that the parties stipulated that the evidence was sufficient to establish the existence of pneumoconiosis. Consequently, the administrative law judge found that claimant had established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered the merits of claimant's 2001 claim. After noting that the parties stipulated to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). However, the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). In light of his finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge noted that claimant could clearly not establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, claimant reiterates his previous contentions.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In this case, several physicians expressed opinions regarding whether claimant was capable, from a pulmonary standpoint, of performing his coal mine

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the disease. *Id.* There is no indication that claimant took any further action in regard to his 1999 claim.

Claimant filed a second claim on December 6, 2001. Director's Exhibit 3.

[2]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

employment. Before an administrative law judge can determine whether a miner is able to perform his usual coal mine work, he must identify the employment that is or was the miner's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). It is the miner's burden to establish the exertional requirements of his usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *Id.*; *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

The Board has defined an individual's usual coal mine work as "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). In this case, the administrative law judge found that claimant's usual coal mine employment was that of a mobile equipment operator.[3] *See* Decision and Order at 4-5. Because no party

[3]The administrative law judge explained that:

> On the Employment History form, dated October 1, 1999, [c]laimant stated that his last coal mine job was as a "Mobile Equipment Operator," and that he worked in that capacity from June 12, 1982 until January or February 1988. On the same Employment History form, [c]laimant noted that prior thereto (*i.e.*, September 1969 – June 12, 1982), he had worked as: "General Labor Mobile Equipment Operator. Brick Layer Carpenter." Furthermore, on an Employment History form, dated December 4, 2001, [c]laimant listed his only occupation, throughout the period from September 1969 until February 1988, as "Equipment Operator." However, on an Employment History Form, dated May 13, 2002, Claimant listed the following coal mine jobs: "General Labor & Equipment" (September 1969 – June 1982) and "Labor Equipment Bricklayer Carpenter" (June 1982 – January 1988). Furthermore, on the "Description of Coal Mine Work and Other Employment" form, which is also dated May 13, 2002, the job title of [c]laimant's last coal mine employment is listed as follows: "Gen. Laborer/Carpenter/block layer/mobile equipment operator." On the other hand, [e]mployer's records are more consistent with [c]laimant's initial Employment History form, albeit with somewhat different dates in the respective job classifications. Employer's records reveal that [c]laimant's initial coal mine work, throughout the period from September 10, 1969 until September 30, 1984, was as a "General Labor Carpenter/block layer Mobile Equipment Operator." However, [c]laimant's last coal mine job, from January 14, 1985 until January 31, 1988 was as a "Mobile Equipment Operator."

challenges this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In addressing the exertional requirements of claimant's most recent coal mine employment, the administrative law judge stated:

> I have….carefully considered [c]laimant's testimony at the formal hearing. Claimant testified that 70 percent of his overall time as a coal miner, from 1969 to 1988, entailed work other than as a mobile equipment operator (TR 10). Furthermore, [c]laimant testified, at length, regarding the physical exertion required in his *non*-mobile equipment operator work (TR 11-14). However, [c]laimant did not provide any credible testimony which established that such duties were a significant part of his last usual coal mine job, as a mobile equipment operator. To the contrary, [c]laimant acknowledged that his work as an equipment operator did not require much physical labor (TR 11). Moreover, the exertional requirements described in [c]laimant's testimony are inconsistent with his own statements on the "Description of Coal Mine Work and Other Employment" form, even though he included *non*-mobile equipment operator work therein (DX 6). Claimant testified that his coal mine work entailed lifting objects which allegedly weighed between 30 and 80 pounds (TR 12-13). However, on the "Description of Coal Mine Work and Other Employment" form, [c]laimant testified that his usual coal mine job primarily entailed sitting for 10 hours, and lifting and carrying 25 pounds 7 ¼ times per day, when he laid cinder blocks (DX 6). Accordingly, as fact finder, I find that the credible evidence establishes that Claimant's last usual coal mine job was as a Mobile Equipment Operator, and that it primarily, if not exclusively, was a

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Decision and Order at 4-5 (citations to exhibits omitted).

The administrative law judge found that claimant's "last" usual coal mine job was as a mobile equipment operator "since it is the most recent job that he performed regularly over a substantial period of time." Decision and Order at 5. In making that determination, the administrative law judge explained:

> I find that [c]laimant's recollection was fresher in 1999, when he completed his initial Employment History form. Moreover, as stated above, the initial Employment History form is more consistent with [e]mployer's records than [c]laimant's statements on subsequent Employment History forms.

Decision and Order at 5 (citations to exhibits omitted).

> sedentary position, which, *at most*, entailed periodic, mild to moderate labor.

Decision and Order at 5.

Claimant argues that the administrative law judge erred in finding that claimant's usual coal mine job as a mobile equipment operator was primarily a sedentary position requiring, at most, periodic mild to moderate labor. Claimant argues that his most recent job, as a mobile equipment operator, required arduous labor. Claimant's Brief at 11. Claimant contends that the administrative law judge, in addressing the exertional requirements of his usual coal mine employment, failed to adequately address claimant's testimony and other relevant evidence.

Contrary to claimant's contention, the administrative law judge properly considered claimant's hearing testimony. At the hearing, the following exchange took place:

> [Claimant's counsel]: What percentage of the time that you were a miner, *all those years*, did you work as a mobile equipment operator?
>
> [Claimant]: Probably 30/70, 30 percent of the time I's [sic] on the mobile equipment, yes.
>
> [Claimant's counsel]: What did you do the other 70 percent of the time?
>
> [Claimant]: Just whatever they told me, maintenance work mainly. Laid block, done welding, torching, whatever I was told, repairs.

Transcript at 10 (emphasis added).

Claimant relies upon this testimony to support his contention that a significant part of his job as a mobile equipment operator required additional duties. However, the administrative law judge reasonably interpreted claimant's testimony as establishing only that thirty percent of his overall *time as a miner* was spent as a mobile equipment operator. This testimony is consistent with claimant's initial listing of his employment history, as well as employer's listing of claimant's employment history, identifying claimant's *only* occupation from 1984 to 1988 as a "mobile equipment operator."

In considering the exertional requirements of claimant's job as a mobile equipment operator, the administrative law judge relied upon claimant's testimony, noting that claimant testified that his work as a mobile equipment operator did not require "a whole lot of physical labor." Decision and Order at 5; Transcript at 11. Although the

administrative law judge acknowledged that claimant provided credible testimony regarding the physical exertion that was required in his *non*-mobile equipment operator work, the administrative law judge found that such testimony was largely irrelevant in light of the fact that claimant had not provided any testimony, or other evidence, establishing that such duties were a significant part of his "*last*" usual coal mine job as a mobile equipment operator. Decision and Order at 5.

The administrative law judge similarly found that claimant's "Description of Coal Mine Work and Other Employment" form was of little assistance in establishing that his job as a mobile equipment operator entailed anything other than sedentary activity. On this form, claimant attempted to describe the physical activities required during his entire coal mine employment from 1969 through 1988. *See* Director's Exhibit 6. While driving a coal truck or operating an endloader, claimant indicated that he sat for ten hours a day. Director's Exhibit 6. When laying cinder blocks, claimant indicated that he was required to lift and carry 25 pounds 7¼ times per day. *Id.* Claimant, however, did not indicate that he was required to lay cinder blocks as part of his job as a mobile equipment operator.[4]

[4]Claimant argues that the administrative law judge erred in rejecting the fact that the *Dictionary of Occupational Titles* describes his work as a mobile equipment operator as "moderate." Claimant's Brief at 11. Contrary to claimant's contention, the administrative law judge's finding that claimant's job as a mobile equipment operator required, at most, periodic mild to *moderate* labor appears to be based upon the fact that the *Dictionary of Occupational Titles* describes the work of a mobile equipment operator as "moderate." *See* Decision and Order at 12 n.6. Where there is no alternative method to establish the exertional requirements of a miner's usual coal mine employment (for example, when a miner is deceased and cannot testify), an administrative law judge is not precluded from taking judicial notice of the *Dictionary of Occupational Titles* in order to do so. *See generally Ondecko v. Director, OWCP*, 14 BLR 1-2 (1989). However, even in these circumstances, the administrative law judge should not rely upon the *Dictionary of Occupational Titles* unless it is contained in the record, either directly or by appropriate reference. *See* 20 C.F.R. §725.464; *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). In this case, we hold that the administrative law judge's reliance upon the *Dictionary of Occupational Titles* is harmless error since he relied upon it to establish only that claimant's usual coal mine employment required, *at most*, periodic mild to moderate labor. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant also contends that the administrative law judge erred in failing to consider the fact that his testimony was consistent with the work histories provided by Drs. Gaziano, Rasmussen, Crisalli and Cohen. Contrary to claimant's characterization, the administrative law judge did not find his testimony regarding the exertional

Since the administrative law judge's finding, that claimant's usual coal mine employment was primarily, if not exclusively, a sedentary position, was based upon his reasonable understanding of claimant's testimony and his review of the other relevant evidence, it cannot be set aside. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997). As long as the administrative law judge's conclusions are supported by the evidence, they will not be reversed, "even if the facts permit an alternative conclusion." *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246, 19 BLR 2-123, 2-127 (6th Cir. 1995); *see also Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). After review of the administrative law judge's findings, we hold that he acted within his discretion in characterizing claimant's most recent coal mine employment as "primarily, if not exclusively,…..a sedentary position, which, *at most*, entailed periodic, mild to moderate labor."[5] Decision and Order at 5.

Claimant also contends that the administrative law judge erred in his weighing of the conflicting medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). While Drs. Gaziano, Rasmussen and Cohen opined that claimant was totally disabled from a pulmonary standpoint,[6] Dr. Crisalli opined that claimant retained the pulmonary

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requirements of his usual coal mine employment to be consistent with that relied upon by these physicians.

[5]If claimant's work as a mobile equipment operator encompassed additional duties and more strenuous physical activity, claimant had the burden of establishing these additional exertional requirements. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984). Under the facts of this case, the administrative law judge reasonably determined that claimant failed to do so.

[6]In a report dated March 13, 2000, Dr. Gaziano opined that claimant suffered from a moderate pulmonary impairment that would prevent him from performing his usual coal mine work. Director's Exhibit 1. In a report dated February 10, 2003, Dr. Rasmussen opined that claimant had "at least moderate loss of lung function" and did not retain the pulmonary capacity to perform his last regular coal mine job. Director's Exhibit 15. In a report dated August 9, 2004, Dr. Cohen stated that:

> The data from the pulmonary function testing shows that [claimant] has moderate obstructive lung disease which reverses to mild impairment post bronchodilator. [Claimant] could not work in the dusty environment of a coal mine which would worsen his obstructive lung disease. This impairment is severe enough to preclude him from engaging in the heavy physical exertion required of his coal mine employment.

Claimant's Exhibit 4.

capacity to perform his previous coal mine employment.[7]

The administrative law judge permissibly discredited Dr. Rasmussen's opinion, that claimant did not retain the pulmonary capacity to perform his last regular coal mine job, because he found that Dr. Rasmussen did not have an accurate understanding of the exertional requirements of claimant's usual coal mine employment. Although Dr. Rasmussen assumed that claimant's usual coal mine employment involved "considerable heavy manual labor," the administrative law judge found that claimant's usual coal mine employment did not require heavy physical labor. Since Dr. Rasmussen's finding of total disability was premised upon an inaccurate assumption that claimant's coal mine employment required heavy labor, the administrative law judge properly found that Dr. Rasmussen's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

The administrative law judge similarly discredited Dr. Cohen's opinion that claimant's respiratory impairment was "disabling for his last coalmine job as a mobile equipment operator." Claimant's Exhibit 4. The administrative law judge accurately noted that Dr. Cohen relied upon a coal mine employment history that exaggerated the exertional requirements of claimant's usual coal mine employment. Decision and Order at 12. Dr. Cohen improperly assumed that claimant's usual coal mine employment required "heavy physical exertion." Claimant's Exhibit 4.

[7]In a report dated June 24, 2003, Dr. Crisalli opined that claimant suffered from a moderate degree of pulmonary impairment prior to the use of bronchodilator therapy. Employer's Exhibit 1. However, after bronchodilator therapy, Dr. Crisalli opined that claimant only suffered from a mild degree of impairment. *Id.* In a supplemental report dated August 12, 2003, Dr. Crisalli opined that claimant, with bronchodilator therapy, could perform his previous job in the mines. Employer's Exhibit 2.

Although Drs. Gaziano, Cohen and Crisalli opined that claimant suffered from a moderate pulmonary impairment, the administrative law judge noted that Drs. Cohen and Crisalli agreed that claimant's moderate pulmonary impairment improved to only a mild pulmonary impairment after bronchodilator therapy. Decision and Order at 12. The administrative law judge, therefore, found that the opinions of Drs. Cohen and Crisalli were sufficient to establish that claimant's pulmonary impairment was only mild after the administration of a bronchodilator.[8] *Id.* Because the administrative law judge found that claimant's usual coal mine employment was primarily a sedentary position, entailing at most periodic mild to moderate physical exertion, the administrative law judge found that claimant was not totally disabled by a mild impairment. Inasmuch as it is supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[8]The administrative law judge also noted that the opinions of Drs. Cohen and Crisalli were consistent with the more recent clinical data. Decision and Order at 12.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's opinion insofar as it affirms the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as unchallenged on appeal. However, I disagree with the majority's decision to affirm the administrative law judge's finding regarding the exertional requirements of claimant's usual coal mine employment and his finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant's testimony has been consistent in this case. During his eighteen years of coal mine employment, he has always been a mobile equipment operator. However, while operating the equipment for thirty percent of the time, he was required to perform additional tasks, as assigned, for the remaining seventy percent of the time. *See* Transcript at 10. These other tasks included repairing beltlines (requiring the lifting of thirty to fifty pound skirts); repairing pipeline (requiring laying pipe weighing forty to eighty pounds); and laying cinder blocks (requiring the lifting and carrying of fifty to sixty pounds). *Id.* at 11-13. These tasks involve heavy manual labor.

In light of this evidence, the administrative law judge failed to adequately explain his basis for finding that claimant's exclusive job was that of a mobile equipment operator. Claimant's testimony is not inconsistent with what was relied upon by the

physicians in this case. Although claimant was a mobile equipment operator, he was also required to perform a myriad of other tasks involving heavy labor. Consequently, I would vacate the administrative law judge's finding regarding the exertional requirements of claimant's usual coal mine employment and remand the case for reconsideration. Because it was based upon his finding regarding the exertional requirements of claimant's usual coal mine employment, I would also vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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BETTY JEAN HALL
Administrative Appeals Judge