U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7500
(202) 693-7365 (FAX)

***Issue Date:* 24 January 2003**

In the matter of
Lanious J. Mize
Claimant

Case No. 2002-BLA-00194

v.

L.J. Coal Company, Inc.
Employer

and

Director, Office of Workers' Compensation Programs
Party in Interest.

APPEARANCES:

On behalf of Claimant:
Joseph Wolfe, Esquire
Wolfe & Farmer
P.O. Box 625
Norton, VA 24273

On behalf of Employer:
Herbert B. Williams, Esquire
Stokes, Rutherford, Williams
Sharp & Davies
920 Volunteer Landing Lane
Knoxville, TN 37915

BEFORE:
Daniel F. Solomon
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS[1]

This case comes on a request for a formal hearing filed by the Claimant, Lanious J. Mize, on November 2, 2001 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.).

Claim History

Claimant originally filed a claim for Black Lung benefits on April 30, 1993, naming L.J. Coal Company, Inc. (hereinafter "Employer") as the responsible operator (DX 29-1). A determination of non-entitlement was made by the District Director on October 13, 1993 when he found that the evidence failed to show that Claimant had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that the Claimant was totally disabled by the disease (DX 29-10).

---

[1] 20 CFR § 725.477, 5 CFR § 554-7 (Administrative Procedure Act), and also 20 CFR § 725.479 Finality of decisions and orders.

Claimant filed a second application for benefits on October 28, 1999 (DX 1). The District Director, on April 20, 2000, again denied Claimant's application for benefits, holding that the evidence failed to establish that the Claimant is totally disabled by the disease (DX 17). The Claimant did not request a hearing before an administrative law judge. Instead, the Claimant, on March 5, 2001, filed a timely request for a modification (DX 18). On September 11, 2001, the District Director issued a Proposed Decision and Order Denying Claimant's Request for Modification. In doing so, the District Director, while noting that the Claimant previously established that he suffered from coal workers' pneumoconiosis, held that the additional evidence does not establish that Claimant is totally disabled due to coal workers' pneumoconiosis (DX 27).

Thereafter, the Claimant appealed the District Director's decision denying Claimant's request for a modification and requested a formal hearing (DX 28). As a result, this matter was referred to the Office of Administrative Law Judges on January 22, 2002 (DX 30). Originally, this case was assigned to Administrative Law Judge John C. Holmes. However, on July 29, 2002, this case was reassigned to me.

A hearing was held on August 20, 2002 in Middlesboro, Kentucky. The Claimant was represented by Joseph Wolfe, Esquire, of Wolfe, Farmer, Williams & Rutherford, located in Norton, Virginia. L.J. Coal Company was represented by Herbert B. Williams, Esquire, of Stokes, Rutherford, Williams, Sharp & Davies, located in Knoxville, Tennessee. At the hearing, thirty (30) Director's Exhibits were entered into evidence[2] (Tr. 8). The Employer offered one (1) exhibit, which was also entered into evidence (Tr. 28). The Claimant offered two (2) exhibits which were both admitted into evidence over the Employer's objection[3] (Tr. 21). Testimony was received by the Claimant. Lastly, post-hearing briefs were submitted by the Claimant and the Employer and are admitted into evidence.

It should be noted that the record remained open to give Claimant's Counsel a chance to submit a marriage license or marriage certificate with respect to the Claimant's spouse. The Claimant had previously been married, but recently remarried. As a result, there was nothing in the record to show that the Claimant was married other than his testimony, to which he testified that he married Sarah Margaret Mize on April 29, 2002 (Tr. 14-15).

On November 26, 2002, a telephone hearing was held in order to discuss the matters left open for further development. During the telephone hearing, a post-hearing deposition of Dr. Fino was accepted into evidence as Employer's Exhibit No. 2 (Nov. 26, 2002 Telephone Hearing Tr. 6). Also admitted into evidence was an Amended Notice of Hearing, dated July 31, 2002

---

[2] References to "DX" are exhibits of the Director, whereas Claimant's Exhibits are referred to as "CX" and Employer's "EX."

[3] The Attorney for the Employer objected to the admission of Claimant's Exhibits 1 and 2 – the medical opinions of Drs. Vaezy and Robinette, dated October 31, 2001 and June 7, 2001 respectively (Tr. 18-19). The documents were admitted into evidence, effectively waiving the 20-day rule since the documents were around for a long time and were previously sent to Judge Holmes' attention (Tr. 18-20). However, the Employer was given an 60 days, post-hearing, to develop an issue regarding CX 1 and CX 2 (Tr. 30-31). Thereafter, Claimant's Counsel was given 14 days for rebuttal.

(Nov. 26, 2002 Telephone Hearing Tr. 7). The Amended Notice was admitted as Administrative Law Judge Exhibit No. 1 (Id.). The final matter discussed during the November 26, 2002 telephone hearing was the issue of dependency, or more specifically, the Claimant's ability to produce documentation of his recent marriage certificate. Claimant's attorney advised that he would provide the Court with a certified copy of the marriage certificate, if the Court was willing to leave the record open for another week. Seeing that there was no objection from the Counsel for the Employer, at the conclusion of the telephone hearing, I left the record open for another ten (10) days in order for Mr. Wolfe to produce a copy of the Claimant's marriage certificate to this Court, as well as Employer's Counsel (Nov. 26, 2002 Telephone Hearing Tr. 7). Thereafter, I gave Mr. Williams a week to render any objection to the Claimant's marriage certificate (Id.).

On December 3, 2002, I received a copy of Claimant's marriage certificate, wherein the Claimant wed Ms. Sarah Cobb Gilbert on April 29, 2002. Being that there was no follow-up objection by the Employer, the parties have thereby stipulated to the issue of dependency as it relates to Claimant's wife.

The Claimant was born on December 17, 1950 (DX 1), making him fifty-one (51) years of age at the time of the hearing. On April 29, 2002, he married the former Sarah Cobb Gilbert (Tr. 14-15). Claimant testified that he has one (1) child, Christopher Brandon Mize, under the age of eighteen (18) (Tr. 15). Claimant further testified that his son, who is adopted (Tr. 15, EX 8), lives with his ex-wife, Lori. As a result, the Claimant is currently paying child support (Tr. 15).

Claimant testified that he is not currently working, but last worked in 1992 for L & J Coal Company of Bell County, Kentucky (Tr. 12-13). Claimant testified that he worked for L.J. from 1980 to 1992 as a cutting machine operator. Prior to working for L.J., Claimant acknowledged that he worked for LP Coal Company from 1973 – 1980; Malcolm Coal Company from 1971 – 1973; and Mingle Mountain Coal from 1969 – 1971. Claimant further testified that all four (4) of these companies were involved in underground mining (Tr. 13). For each of these jobs, Claimant testified that he worked at the face of the mine (Tr. 13-14). In his last job as a miner operator, which required him to operate a machine that mines coal, Claimant stated that he had to lift up to 100 lbs. every time the belt broke down and drag 100 lbs. for 50 – 300 feet many times a day (Tr. 14). In addition to working as a cutting machine operator, Claimant stated that he did general inside when asked, which resulted in heavy labor (Tr. 16).

In his Description of Employment, Claimant provided that he stopped working in May, 1992 because he could not breathe (DX 3). At hearing, Claimant testified that, at such time, he felt that he would be unable to return to work in the mines and do any of the jobs that he did before (Tr. 16).

On cross-examination, Claimant testified that, although he had been a smoker, he was no longer smoking cigarettes and had stopped over a year or two (2) ago, probably 1999 (Tr. 23). Claimant's medical records indicate that he has a significant smoking history of 25 to 30 years, smoking anywhere between a 1-3 packs per day before he quit in 1999 or 2000 (CX 1, CX 2, DX 29-6, DX 10).

Nature and Scope of Proceeding

Any time within one (1) year of a denial or award of benefits, any party to the proceeding

may request a reconsideration based on a change in condition or a mistake of fact made during the determination of the claim. 20 C.F.R. §§ 725.310. However, after the expiration of one (1) year, the submission of additional material or another claim is considered a duplicate claim which will be denied on the basis of the prior denial unless the claimant demonstrates a material change in conditions under the provisions of 20 C.F.R. §§ 725.309 as interpreted by the Benefits Review Board and Federal Courts of Appeals.

Herein, the Claimant filed his original claim for Black Lung benefits on April 30, 1993 (DX 29-1). By failing to file an appeal to the District Director's denial Claimant's original claim, Mr. Mize's original claim for benefits was deemed administratively closed (DX 29). Thereafter, the Claimant filed a second application for benefits or his duplicate claim on October 28, 1999 (DX 1). The District Director, on April 20, 2000, again denied Claimant's application for benefits, holding that the evidence failed to establish that the Claimant is totally disabled by the disease (DX 17). Because the Claimant did not request a formal hearing before an administrative law judge within the thirty (30) day period as set forth in 20 C.F.R. § 725.419(a), the District Director's Proposed Decision and Order became final and effective pursuant to 725.419(d).

On March 5, 2001, the Claimant timely filed his request for a modification in regard to the District Director's April 20, 2000 decision denying benefits (DX 18). Such request was denied in the District Director's September 11, 2001 Proposed Decision and Order, wherein the District Director, while noting that the Claimant previously established that he suffered from coal workers' pneumoconiosis, concluded that the additional evidence does not establish that Claimant is totally disabled due to coal workers' pneumoconiosis (DX 27). Thereafter, Mr. Mize filed an appeal to the District Director's decision denying Claimant's request for a modification and requested a formal hearing on this matter (DX 28). As a result, this matter was referred to the Office of Administrative Law Judges on January 22, 2002 (DX 30). Essentially, I am presented with a modification of a duplicate claim.

In evaluating a modification request based on an alleged change in conditions, an administrative law judge is required to undertake a *de novo* consideration of the issue by first independently assessing the newly submitted evidence to determine whether it is sufficient to establish the requisite change in conditions. If a change is established, the administrative law judge must then consider all of the evidence of record to determine whether the claimant has established entitlement to benefits on the merits of the claim. ***Kovac v. BNCR Mining Corp.,*** 14 B.L.R. 1-156 (1990, *modified on reconsideration,* 16 B.L.R. 1-71 (1992).[4] *See also* ***Nataloni v. Director, OWCP,*** 17 B.L.R. 1-82 (1993); ***Kingery v. Hunt Branch Coal Co.,*** 19 B.L.R. 1-8 (1994). In ***Kingery,*** the Board, citing its decisions in ***Kovac*** and ***Nataloni,*** described the proper scope of the de novo review of a modification request as follows:

> [A]n administrative law judge is obligated to perform an independent assessment of the newly submitted evidence (all evidence submitted subsequent to the prior denial)

---

[4] In its decision on reconsideration, the Board modified its holding in ***Kovac*** by stating that new evidence is not a prerequisite to a modification based on an alleged mistake in a determination of fact; rather, "[m]istakes of fact may be corrected whether demonstrated by new evidence, cumulative evidence, or further reflection on the evidence initially submitted." ***Kovac,*** 16 B.L.R. at 73.

> and consider it in conjunction with the previously submitted evidence to determine if the weight of the evidence is sufficient to demonstrate an element or elements which were previously adjudicated against claimant.

Kingery, 19 B.L.R. at 11.

The Board has also held that the Administrative Law Judge should always review the record on modification to assess whether a mistake of fact has occurred. ***Id.*** *See also* 20 C.F.R. § 725.310(c). In determining whether a mistake of fact has occurred, the Administrative Law Judge has board discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. ***Jessee v. Director, OWCP,*** 5 F.3d 723 (4th Cir. 1993). *See* ***Consolidation Coal Co. v. Director, OWCP [Worrell],*** 27 F.3d 227 (6th Cir. 1994).

In this case, modification is requested regarding Claimant's 1999 application, and therefore, a mistake of fact evaluation goes to the period of time from October 1999 to the present. A thorough review of the record shows that there has been no mistake of fact.

Burden of Proof

"Burden of proof," as used in this setting and under the Administrative Procedure Act[5] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d).[6] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).[7]

The Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the miner's total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986)(*en banc)*; ***Baumgartner v. Director, OWCP***, 9 B.L.R. 1-65 (1986)(*en banc)*.

---

[5] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. §§ 932(a).

[6] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP [Sainz***], 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

[7] Also known as the risk of nonpersuasion, see 9 J. Wigmore, ***Evidence*** § 2486 (J. Chadbourn rev.1981).

A Claimant has the general burden of establishing entitlement *and* the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim.[8] Therefore, the claimant cannot rely on the Director to gather evidence.[9] A claimant, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985). Evidence which is in equipoise is insufficient to sustain claimant's burden in this regard. ***Director, OWCP v. Greenwhich Colleries, et al.,*** 114 S. Ct. 2251 (1994), *aff'd sub nom.* ***Greenwhich Collieries v. Director, OWCP,*** 990 F.2d 730 (3rd Cir. 1993). Failure to establish any one of these elements will result in a denial of benefits. ***Hall v. Director, OWCP,*** 2 B.L.R. 1-998 (1980).

Issues Presented

The following issues are listed as contested by the Employer:[10] (1) whether the medical evidence establishes that the Miner suffered from pneumoconiosis pursuant to 20 C.F.R. § 718.202(a); (2) whether Claimant's pneumoconiosis arose, at least in part, out of coal mine employment; (3) whether the Claimant is totally disabled; (4) whether Claimant's disability is caused by pneumoconiosis pursuant to §§718.204; and (5) whether the evidence establishes a change in conditions and/or that a mistake was made in the determination of any fact in the prior denial per 20 C.F.R. § 725.310.

Stipulations

The parties agree that Claimant timely filed his claim for benefits, that Claimant falls within statutory definition of "miner" pursuant to 20 C.F.R. § 725.202, that he worked as a miner after December 31, 1969 and Claimant worked in coal mine employment in excess of ten (10) years (Tr. 10, 30). The parties further agree that L.J. Coal Company is the responsible operator (Tr. 30). Lastly, the parties agree that Sarah Margaret Mize is the dependent wife of the Claimant (November 26, 2002 Telephone Hearing).

Summary of the Medical Evidence

The following is a summary of the evidence of record:

		X-Ray Interpretations	
Exhibit No.	***Date of X-Ray***	***Physician and Qualifications***[11]	***Diagnosis/History Noted Comments***

[8] ***Id***, *also see* ***White v. Director, OWCP***, 6 BLR 1-368 (1983)

[9] ***Id***.

[10] See the CM-1025 (DX 30).

[11] The abbreviations above are used to designate physician's qualifications: "B" for "B-reader," "BCR" for "Board-certified Radiologist," "BER" for Board-eligible

1.	DX 29-8	6-15-93	Cohen "BCR"	No CWP; film quality 1; benign-appearing denisty, upper rt. hemithorax, possibly anterior tubercle of rt. first rib, otherwise normal chest – no evidence of pneumoconiosis.
2.	DX 29-9	6-15-93	Sargent "B/BCR"	No CWP; film quality 2 – underexposed; smoking history?.
3.	DX 12	3-10-00	Patel "B/BCR"	Positive, 1/1, t/t; film quality 1; emphysema noted; the lungs are mildly hyperinflated and the bronchovascular markings are thickened, t/t opacities of 1/1 profusion affect all lung zones and classifiable as pneumoconiosis.
4.	DX 13	3-10-00	Sargent "B/BCR"	No CWP; film quality 1; calcification in aortic arch.
5.	DX 15	3-10-00	Goldstein "B"	Completely negative; film quality 1.
6.	DX 18	10-17-00	Robinette "B"	Positive, 1/0, q/q; film quality 1; emphysema noted and few perihilar calcifications are present.
7.	DX 26	10-17-00	Shipley "B/BCR"	Completely negative; film quality 1.
8.	DX 26	10-17-00	Spitz "B/BCR"	No CWP; film quality 1; emphysema.
9.	DX 26	10-17-00	Wiot "B/BCR"	No CWP; film quality 2 – dark; emphysema.

Pulmonary Function Tests

	Exhibit No.	***Test Date***	***Physician***	***FEV1***	***FVC***	***MVV***	***TR***	***Age/Ht.***	***Coop./ Comp.***
1.	DX 29-5	6-15-93	Seargeant		2.74	3.86	94.4	Yes 43/68"	Good
	Post-Bronchodilator			-----	-----	-----			
	Comments:	Three tries, three accepted. No match. This test suggests a mild obstruction.							
2.	DX 9	3-10-00	Rasmussen	2.16	3.43	96.0	Yes	49/68"	Good
	Post-Bronchodilator			2.52	4.00	117.0			
	Comments:	Moderate, partially reversible obstructive ventilatory impairment. Maximum breathing capacity is minimally reduced (Predicted 148). Single breath carbon monoxide diffusing capacity is minimally reduced. Normal resting ABG.							
3.	CX 2	4-6-01	Robinette	2.22	3.14	-----	Yes	50/67"	Good
	Post-Bronchodilator			2.65	3.82	-----			
	Comments:	Best patient efforts reported. Albuterol Metered Dose Inhaler given, two puffs (90 mcg per puff) via aerochamber. No adverse reaction noted.							
4.	CX 2	8-23-01	Vaezy	2.44	3.55	-----	No	50/67"	-------
	Post-Bronchodilator			-----	-----	-----			
	Comments:	Mild obstructive impairment. CXR 1/0 p/q of CWP.							
5.	CX 2	1-22-02	Vaezy	1.89	3.24	-----	No	51/67"	-------

Radiologist" and "BCP" for "Board-certified Pulmonologist".

Post-Bronchodilator	-----	-----	-----

Comments: No flow volume loop. Moderate obstructive ventilatory impairment, worse since November 9, 2001.

Arterial Blood Gas Tests

	Exhibit No.	***Test Date***	***Physician***	***PO2***	***PC02***
1.	DX 29-7	6-15-93	Seargeant	93.0	36.0
	Exercise if Administered:			108.0	29.0
	Predicted Normal Range:			80 – 100	35 – 45
2.	DX 11	3-10-00	Rasmussen	76.0	37.0
	Exercise if Administered:			-----	-----
	Predicted Normal Range:			74 – 102	37 – 44
	Comments:	Patient declined exercise portion of the study due to back pain.			
3.	CX 2	4-6-01	Robinette	80.0	34.0
	Exercise if Administered:			-----	-----
	Predicted Normal Range:			84 – 92	34 – 45

Relevant Examination and Medical Reports

	Exhibit No.	***Physician and Qualifications***	***Exam/Report Date***
1.	DX 29-6	Dr. Seargeant	6-15-93

Comments: Dr. Seargeant's medical report is based on his physical examination of the Claimant. Claimant's laboratory studies and chest x-rays and a review of Claimant's work, medical and social histories. Claimant's medical history includes: heart disease/problems (myocardial infarction in 1983) and high blood pressure which began six months ago. Claimant provided that he started smoking in his teens, averaging 2-3 packs per day until he quit in 1992. Claimant reported present illnesses which included dyspnea and a cough for the past three years. Claimant complained that he can walk about three city blocks on level ground at normal pace wihtout having to stop to get his breath.

Diagnosis: From examination and laboratory tests, Dr. Seargeant concluded that Claimant certainly does not have COPD or pneumoconiosis. However, Dr. Seargeant noted that Claimant did need an additional chest x-ray examination to rule out significant pulmonary nodule, which could be done by his family physician.

2.	DX 29-8	Dr. Cohen	6-15-93

Comments: Dr. Rasmussen's medical report is based on a chest x-ray, dated June 15, 1993. According to Dr. Cohen, there is minimal calcification within the aortic knob. There is no sign of pulmonary infiltrate, pulmonary fibrosis, pleural thickening or pleural calcification. Rounded, sharply marginated density measuring 1.8 centimeters in diameter, noted at the level of the upper right hemithorax more likely represents benign entity, such as prominent anterior tubercle of the right first rib, than significant pulmonary nodule.

Impression: Density at level of upper right hemithorax, as noted above, although benign entity, such as prominent anterior tubercle of right first rib, is suspected, in the absence of previous chest films for comparison, apical lordotic chest film would be strongly recommended to more definitely confirm the absence of significant pulmonary nodule. PA chest film otherwise normal, with no radiographic evidence of pneumoconiosis.

3. DX 10 Dr. Rasmussen 3-10-00

Comments: Dr. Rasmussen's medical report is based on a physical examination of Claimant, Claimant's laboratory studies and chest x-rays and a review of Claimant's work, medical and social histories.

Claimant's medical history includes: wheezing attacks, arthritis (spine), systemic hypertension and high blood pressure. Claimant noted shortness of breath with exertion some 10-12 years ago. Claimant further noted that he experiences dyspnea after climbing one flight of stairs and when exposed to smoke. Claimant complained of a chronic, productive morning cough; wheezing with exertion and in the morning; and sharp pain in various locations of the left and right anterior chest. A review of Claimant's systems provided the following: a significant loss of hearing; occasional difficulty swallowing; relative urinary frequency and nocturia; frequent headaches and headaches and dizziness with exertion; low back pain when he stands or walks too much, or sits for any period of time; and his nerves are bad – feels stressed all the time.

Claimant reported that he first began to smoke regularly in 1967. He smoked an average of two packs of cigarettes, or less, until he quit in 1992. Claimant drank in the past, but quit in 1990. Claimant reported that he worked 23 years in the coal mining industry as a mine operator, but did some mechanic and maintenance work as well.

Upon physical examination, Dr. Rasmussen noted that breath sounds were moderately to markedly reduced. There was prolonged expiratory phase and expiratory wheezing with forced respirations.

Dr. Rasmussen reviewed a chest x-ray interpreted by Dr. Patel, a board certified radiologist and B reader, which indicated pneumoconiosis t/t with a profusion of 1/1. Dr. Rasmussen noted that Claimant's electrocardiogram was within normal limits.

Claimant's ventilatory function studies revealed moderate, partially reversible obstructive insufficiency. Maximum breathing capacity and single breath carbon monoxide diffusing capacity were both minimally reduced. Claimant's resting blood gases were normal, while he declined the exercise studies due to back pain.

Conclusions: Overall, the Claimant does have impairment in function which would be classified as minimal. Claimant has minimal overall loss of resting lung function. Based on these studies, he retains the pulmonary capacity to perform his last regular coal mine job. The Claimant has a significant history of exposure to coal mine dust and x-ray changes consistent with pneumoconiosis. It is medically reasonable to conclude that the Claimant has coal workers' pneumoconiosis which arose from his coal mine employment. There appear to be two, and possibly three, risk factors for his impaired function. These include cigarette smoking, possible asthma and coal mine dust exposure.

4. CX 2 Dr. Coburn 10-16-00

Comments: Dr. Coburn's report is based on his interpretation of Claimant's October 16, 2000 chest x-ray. Dr. Coburn noted that there is very minimal increase in the interstitial markings in the mid to lower lung zone with small rounded small irregular densities. No pleural thickening is noted. Hyperexpansion of the lung is noted.

Impression: No acute abnormality.

5. CX 2 Dr. Robinette 4-6-01/6-7-01

Comments: Dr. Rasmussen's medical report is based on a physical examination of Claimant, Claimant's laboratory studies and chest x-rays and a review of Claimant's work, medical and social histories. Historically, Claimant complains of progressive syndrome of chronic cough, chronic congestion, paroxysmal wheezing and difficulty breathing. His symptoms have progressed since 1992. Dr. Robinette noted that Claimant has been hospitalized on several separate occasions for respiratory embarrassment, bronchitis and active hemoptysis. Claimant's past medical history is complicated by ASCVD with a previous myocardial infarction in the mid 1980 to which he apparently underwent a non-invasive cardiac evaluation as part of his follow-up treatment. Prior surgical procedures include a history of a surgical repair of an arm laceration. Claimant also sustained a traumatic fracture to his spine, requiring a back brace and stabilization.

Claimant's social history included him smoking up to one pack of cigarettes per day and has at least a 30 pack year smoking history before he recently quit. His occupational history provides that he last worked in the mining industry in 1992. Claimant last worked as a miner operator and spent a total of 25 years in and around the mining industry. All of his work experience was spent as an underground miner.

A review of Claimant's systems revealed that his weight has been stable. Claimant has occasional headaches which are non-localizing. His hearing is unchanged. He has shortness of breath on minimal exertional activity and has difficulty performing tasks such as walking up one flight of stairs. Claimant has one pillow orthopnea and a cough that produces small quantities of green sputum on a regular basis. Claimant reported to having recurrent episodes of sharp stabbing chest pain and occasional palpitations. Claimant complained of numbness and paraesthesias of his lower extremities and has nocturia one time per night.

Upon physical examination, Claimant's chest on auscultation revealed diminished breath sounds with diffuse bilateral expiratory wheezes present. There was marked prolongation of the expiratory phase.

Claimant's October 17, 2000 chest x-ray revealed increased interstitial markings in the mid and lower lung zones with small rounded opacities. When compared to the Standard 1980 ILO X-ray Series for the interpretation of pneumoconiosis, there were scattered opacities present consistent with pneumoconiosis with a primary opacity size of q and a secondary opacity of q with a profusion abnormality of 1/0. There was evidence of emphysema and calcifications present.

Claimant's pulmonary function studies showed the flow rates to decreased with a decreased FVC. The FEF 25-75 was diminished. Following the administration of bronchodilators, a significant improvement in the FEV_1 and FVC was observed. Lung volume studies indicated a normal total lung capacity with slight elevation of the residual volume. The diffusion capacity was normal at 95% of predicted. Claimant's resting arterial blood gas studies are normal.

Impression: Dr. Robinette diagnosed Claimant as having (1) simple coal workers' pneumoconiosis with a profusion abnormality of 1/0, predominant q opacities; (2) ASCVD with a history of a previous myocardial infarction; and (3) obstructive lung disease with response to bronchodilators.

At the time of Dr. Robinette's evaluation, the Claimant related a history of working in the mining industry for a total of 25 years. He worked as a continuous miner operator and last worked in 1992 as a continuous miner operator. Since that date, he has not worked. Claimant has smoked in the past and has a 30 pack year smoking history. The physical assessment revealed evidence of diminished breath sounds with bilateral expiratory wheezes present. There was marked prolongation of the expiratory phase. Peak expiratory flow rates were only 250, but the oxygen saturation was normal. His cardiac exam was normal. The chest x-ray showed changes compatible with an occupational pneumoconiosis which has occurred as a direct consequence of his prior coal mining employment. There is evidence of a functional impairment

with an FEV_1 of only 2.22 or 67% of predicated. The Claimant did respond favorable to the administration of bronchodilators with an FEV_1 of 2.65 or 19% improvement following the administration of Albuterol.

It is my opinion that Mr. Mize has evidence of coal workers' pneumoconiosis which occurred as a direct consequence of his prior coal mining employment. He additionally has evidence of a functional impairment which is felt to mild to moderate in severity with interval response to bronchodilators. This condition is probably at least partially related to his prior coal mining employment. His condition is chronic and the progression of this disorder is unknown.

6. DX 26 Dr. Wiot 6-6-01
B Reader and Board Certified Radiologist

Comments: Dr. Wiot's report is based on his interpretation of Claimant's October 17, 2000 chest x-ray. Dr. Wiot noted that the films are of acceptable quality by ILO standards. Furthermore, Dr. Wiot reported that Claimant's lung fields are somewhat overexpanded, consistent with emphysema. Otherwise, the chest is unremarkable.

Impression: No evidence of coal workers' pneumoconiosis.

7. DX 26 Dr. Shipley 6-19-01
B Reader and Board Certified Radiologist

Comments: Dr. Shipley's report is based on his interpretation of Claimant's October 17, 2000 chest x-ray. Dr. Shipley noted that the upright PA and lateral views of the chest show that the heart is normal and the lungs are clear.

Impression: No pleural or parenchymal evidence of pneumoconiosis.

8. DX 26 Dr. Spitz 7-24-01
B Reader and Board Certified Radiologist

Comments: Dr. Spitz's report is based on his interpretation of Claimant's October 17, 2000 chest x-ray. Dr. Spitz noted that the Claimant's bones, soft tissues, heart and aorta are normal. Furthermore, Dr. Spitz reported that Claimant's lung are clear, and there is no pleural disease.

Impression: No evidence of coal workers' pneumoconiosis. Emphysema.

9. CX 1 Dr. Vaezy 10-31-01

Comments: Dr. Vaezy's physical examination of Claimant resulted from Dr. Kaw's referral for Claimant to undergo a pulmonary consultation with Dr. Vaezy. Upon examination, Claimant complained of shortness of breath. Claimant reported a significant history for smoking one pack of cigarettes a day for 25 years, but none for the last one year. Claimant reported that he had been a coal miner for 20 years, all of it underground, until he quit in 1992.

Impression: Claimant seems to have a mild COPD per his pulmonary function test, as well as stage one coal workers' pneumoconiosis. However, Claimant's shortness of breath seems out of proportion to his pulmonary findings. His bronchodilators were adjusted and on October 29, I gave him Advair inhaler to try for a couple of weeks and suggested returning in two weeks for a follow-up pulmonary function test. Apparently, Claimant had cardiac work-up, the result of which is not clear. Claimant may have a

component of cardiac cause for his shortness of breath. I hope he is not taking beta blockers that may cause him to have episodes of bronchospasm. Hopefully, Claimant will bring his medications for review the next time. If not better and no explanation from the cardiac findings, maybe a functional component for his subjective symptoms and mild objective findings.

Discussion

At issue in this case is the question of whether the Claimant has experienced a change in condition since the District Director's September 11, 2001 decision, or whether the District Director's decision contains a mistake of fact. 20 C.F.R. § 725.310; ***O'Keefe v. Aerojet-General Shipyards, Inc.,*** 404 U.S. 245 (1971). Since the District Director found that the Claimant was not totally disabled due to coal workers' pneumoconiosis, an analysis of the newly submitted evidence is required in order to determine whether the Claimant now has a totally disabling respiratory impairment that prevents him from performing his usual coal mine work; and if so, whether his disability is caused by his coal workers' pneumoconiosis.

Total Disability

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Section 718.204(b)(2) provides the following methods for establishing total disability: (1) qualifying pulmonary function tests; (2) qualifying arterial blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinions; and (5) lay testimony.[12]

a. Pulmonary Function Tests

As previously stated, total disability may be established with qualifying pulmonary function studies. The pulmonary function study, also referred to as a ventilatory study or spirometry, measures obstruction in the airways of the lungs. The greater the resistance to the flow of air, the more severe any lung impairment. A pulmonary function study does not indicate the existence of pneumoconiosis; rather, it is employed to measure the level of the miner's disability. In performing the study, the miner is required to blow hard into a mouthpiece which is connected to a flowmeter. The spirometer records the amount of air expired over a period of time onto tracings which must be included in the miner's case record. The regulations require that this study be conducted three (3) times to assess whether the miner exerted optimal effort among trials, ***Estes v. Director, OWCP,*** 7 B.L.R. 1-414 (1984), but the Board has held that a ventilatory study which is accompanied by only two (2) tracings is in "substantial compliance" with the quality standards at §§ 718.204(c)(1). ***Defore v. Alabama By-Products Corp.,*** 12 B.L.R. 1-27 (1988). Furthermore, the administrative law judge may accord lesser weight to those studies where the miner exhibited "poor" cooperation or comprehension. ***Houchin v. Old Ben Coal Co.,*** 6 B.L.R. 1-1141 (1984); ***Runco v. Director, OWCP,*** 6 B.L.R. 1-945 (1984). It is important to realize that, if the miner does have a pulmonary or respiratory impairment, undergoing such test

[12] The Board has held that a judge cannot rely solely upon lay evidence to find total disability in a living miner's claim. ***Tedesco v. Director, OWCP,*** 18 B.L.R. 1-103 (1994).

may be very painful, and the miner may be unable to complete the test due to coughing or shortness of breath.

As an individual ages, his or her lung capacity lessens. Differences in lung volume have also been noted between men and women of the same age and height. As a result, tables of data based upon the miner's age, height and gender are used to determine whether the study has produced qualifying results. To qualify under the regulations, the FEV_1 and either the MVV or FVC values must be equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B for a miner of similar age, gender and height.[13]

Claimant underwent one (1) pulmonary function test, dated January 22, 2002, since his request for modification was denied by the District Director on September 11, 2001 (CX 2). Claimant additionally submitted results from two (2) pulmonary function tests, dated April 6, 2001 and August 23, 2001 respectively, which were undertaken prior to the District Director's September 11, 2001 decision (CX 2). Although these results were not reviewed by the District Director, they will be taken into account herein. None of the Claimant's tests are qualifying under the regulations at 20 C.F.R. § 718.204 (b)(2), App. B (Id). Therefore, Claimant is not totally disabled under the Act based on these non-qualifying pulmonary function test.

b. Blood Gas Studies

Section 718.204(b)(2)(ii) provides that a claimant may prove total disability through evidence of qualifying blood gas studies. Moreover, Claimant's arterial blood gas levels must correspond to the values in Appendix C. 20 C.F.R. § 718.204(b)(2). According to Appendix C, for tests conducted at sites up to 2,999 feet above sea level, the sum of Claimant's PCO2 and PO2 levels must be equal to or less than 100 mm Hg.

As was the case with a portion of Claimant's pulmonary function tests, Claimant submitted results from one (1) blood gas study, dated April 6, 2001, which was undertaken before the District Director rendered his decision on September 11, 2001 (CX 2). Although the April 6, 2001 study was not reviewed by the District Director, it will be taken into account herein. Claimant's results at rest did not qualify under the values set for in Appendix C.[14] As a result, Claimant is not totally disabled under the Act based on this non-qualifying blood gas study.

c. Evidence of Cor Pulmonale

Under section 718.204(b)(2)(iii), total disability may be proven through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

d. Physician Opinion Evidence

Lastly, the regulations provide that a claimant may prove total disability where a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory

---

[13] Based upon the record, the Claimant's height is 68.5 inches (average between the three reported heights).

[14] The sum of Claimant's PCO2 and PO2 levels equaled 114.0 mm Hg (CX 2).

diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work. 20 C.F.R. § 718.204(b)(iv). The Claimant must first compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. ***Schetroma v. Director, OWCP,*** 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding for total disability is made, thereby shifting the burden to the party opposing entitlement to prove that the claimant is able to perform gainful and comparable and gainful work, as defined pursuant to 20 C.F.R. § 718.204(b)(2). ***Taylor v. Evans and Grambrel Co.,*** 12 B.L.R. 1-83, 1-87 (1988).

Claimant alleges that he worked for 23 years in coal mine employment, until he quit in 1992 due to breathing problems (DX 1). During his time as a coal miner, Claimant worked mostly as cut machine operator, but also worked in general inside, as a miner operator and in the capacity of a supervisor (Tr. 13-14, 16, DX 2). Claimant testified that his work for all of these jobs was located at the face of the mine (Tr. 13-14). At the time he left the mines, Claimant worked as a miner operator, which entailed operating machines to extract coal (DX 3). Claimant testified that, as a miner operator, he had to lift up to 100 lbs. every time the belt broke down and drag 100 lbs. or more, 50 – 300 feet many times a day (Tr. 14, DX 3).

Because Claimant appeared credible and testified at the hearing that he last worked as a miner operator, I find that his last usual coal mining job was as a miner operator for L.J. Coal Company, which included occasional episodes of moderate to heavy manual labor. When asked if he felt that he'd be able to return to work in the mines at this time and do any of the jobs that he had done before, Claimant testified in the negative (Tr. 16).

Turning to the physician opinion evidence, the Claimant submitted two (2) medical reports, one of which resulted a from physical examination taken prior to the District Director's September 11, 2001 decision. Although Dr. Robinette's June 7, 2001 medical report was not reviewed by the District Director, it will be taken into account herein. On April 6, 2001, Dr. Robinette examined the Claimant and administered a full range of laboratory studies. In addition to the examination and laboratory tests, Dr. Robinette noted that he reviewed Claimant's occupational, social and medical histories. After such review, Dr. Robinette concluded that there is evidence of a functional impairment which is felt to be mild to moderate in severity with interval response to bronchodilators (CX 2).

Dr. Vaezy submitted a medical report on October 31, 2001 based on his physical examination of the Claimant, which included a pulmonary function test. After a review of the foregoing as well as Claimant's social and employment histories, Dr. Vaezy concluded that Claimant seems to have a mild chronic obstructive pulmonary disability per his pulmonary function test (CX 1).

The Employer, on the other hand, submitted the medical opinion of Dr. Fino.[15] Dr. Fino's medical opinion is in the form of deposition testimony, the first dated July 18, 2002 (EX 1) and latter dated September 19, 2002 (EX 2). Dr. Fino's testimony from his July 18, 2002 deposition will not be considered since his medical opinion was based on his review of Claimant's medical,

---

[15] Dr. Fino's Curriculum Vitae, which is attached to his depositions as an exhibit, propound that he is a B Reader and Board Certified Pulmonologist (EX 1, EX 2).

social and employment histories, as well as Claimant's medical records, chest x-rays and laboratory studies – all of which were pre-dated and taken into consideration by the District Director before rendering his Decision Denying Claimant's Request for a Modification, dated September 11, 2001.[16]

The medical opinion provided in Dr. Fino's post-hearing deposition testimony was based on his review of Claimant's additional medical records, which included the medical reports of Drs. Robinette and Vaezy and Claimant's pulmonary functions studies comprised in Claimant's Exhibit 2, as well as his previous review of Claimant's medical, social and work histories. When asked to summarize his prior diagnosis and any changes he may have in his opinion, testified as follows:

> In my first report, I felt that he (Claimant) had a moderate obstructive abnormality that would prevent him from returning to his last job in the mines on my -- on my previous report that the new. I did comment that with bronchodilator therapy, he had significant improvement, and that if he would take his bronchodilator therapy regularly that he would not be disabled.
>
> The new information shows pulmonary function values that are significantly better than previously noted on both pre- and post-bronchodilator treatments. So, I would change my opinion now that he only has a mild obstructive abnormality. And that at the present time, based on the pulmonary function study of Dr. Robinette on April 6, 2001 and Dr. Vaezy of August 23, 2001, that he is not disabled. And that would be regardless of whether his lung disease was due to smoking, which I believe to be the case, or due to coal mine dust, or even due to a combination of both.

(EX 2).

In evaluating medical opinions, I must first determine whether opinions are based on objective documentation and then consider whether the conclusions are reasonable in light of that documentation. A well-documented opinion is based on clinical findings, physical examinations, symptoms and a patient's work history. ***Fields v. Island Creek Coal Company,*** 10 B.L.R. 1-19 (1987); ***Hoffman v. B&G Construction Company,*** 8 B.L.R. 1-65 (1985). For a medical opinion to be "reasoned," the underlying documentation and data should be sufficient to support the doctor's conclusion. ***Fields,*** *supra.*

Claimant's request for a modification hinges upon the medical opinions Drs. Vaezy, Robinette and Fino. Drs. Vaezy and Robinette both diagnosed Claimant as having a functional pulmonary impairment. Dr. Vaezy specifically concluded that the Claimant seems to have a mild chronic obstructive pulmonary disease per his pulmonary function test (CX 1). Dr. Robinette diagnosed Claimant as having an obstructive lung disease with response to bronchodilators. Additionally, Dr. Robinette offered that Claimant's functional impairment is mild to moderate in severity with interval response to bronchodilators (CX 2). Alternatively, Dr. Fino's diagnosis

---

[16] Specifically, Dr. Fino's medical opinion was based on his review of x-ray interpretations, dated March 10, 2000 and October 16, 2000; pulmonary function studies, dated June 15, 1993 and March 10, 2000; an arterial blood gas study, dated March 10, 2000; and Claimant's medical records pre-dating the District Director's September 11, 2001 Decision.

provides that Claimant only has a mild obstructive abnormality, and at the present time, Claimant is not totally disabled.

As alluded to above, a miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Herein, Dr. Fino is the only physician to offer a medical opinion that fully discusses the total disability element. While Drs. Vaezy and Robinette each diagnosed the Claimant with a pulmonary impairment, neither physician concluded that such impairment has prevented the Claimant from performing his usual coal mine work or comparable as required by the Regulations. On the other hand, Dr. Fino testified that Claimant is not totally disabled by his mild obstructive abnormality.

Additionally, little weight can be afforded to the medical opinion of Dr. Vaezy. Dr. Vaezy's medical report does not include his credentials, nor have his qualifications been made a part of the record. Secondly, Dr. Vaezy relied on non-qualifying medical data in forming his medical opinion. In ***Estes v. Director, OWCP,*** 7 B.L.R. 1-414 (1984), the Board held that a ventilatory study, which is not accompanied by three (3) tracings, may be discredited given that such tracings are used to determined the reliability of the ventilatory study. For each of the pulmonary function tests performed by Dr. Vaezy, which are submitted as Claimant's Exhibit 2, the results do not contain the necessary tracings (CX 2). While I won't go as far as to discredit Dr. Vaezy's medical opinion, I give less weight to his opinion based on the foregoing reasons.

While Dr. Robinette provides that he is a B Reader (DX 18), his curriculum vitae has not been admitted into evidence to verify such assertion. Furthermore and more importantly, Dr. Robinette's medical report is silent as to whether Claimant's pulmonary impairment is such that it prevents him from performing his usual coal mine work. As a result, I give little weight to Dr. Robinette's opinion as to the issue of total disability.

I give more weight to the opinion of Dr. Fino, who concluded that Claimant is not totally disabled (EX 2). Despite the fact that Dr. Fino did not examine the Claimant, Dr. Fino's opinion is well reasoned and more thorough based on the fact that he discusses the elements of entitlement in full as they relate to the Claimant's condition. Additionally, Dr. Fino's medical opinion is well documented in that he bases his opinion on a review of Claimant's medical records – specifically on the opinions and reports of Drs. Vaezy and Robinette. Lastly, I give his opinion more weight because of his expert qualifications.[17]

It must be noted that the Claimant offered credible lay testimony wherein he responded in the negative to the question of whether he felt that he would be able to return to work in the mines at such time and perform any of the jobs he had previously worked (Tr. 16). Despite this, the Board has held that "lay testimony offered by claimant at the hearing ... is generally insufficient to establish total disability unless it is corroborated by at least a quantum of medical evidence." ***Madden v. Gopher Mining Co.,*** 21 B.L.R. 1-122 (1999). Due to the Claimant's lack of corroborating medical evidence to support his assertion that he is incapable of returning to work in his usual coal mining work, it must follow that the Claimant has not carried his burden in proving that he has a respiratory impairment that prevents him from performing his usual coal

---

[17] Dr. Fino is a B Reader and Board Certified in Internal Medicine and his Curriculum Vitae has been admitted into evidence at EX 2.

mine work. I further find that the Claimant's impairment does not preclude him from returning to work for all of his former mining jobs. Claimant testified that he was a supervisor at one time (Tr. 14). Based on the Dictionary of Occupational Titles' definition of Surface Supervisor for mines and quarries[18], I do not find Claimant's work as a supervisor to be considered heavy labor. Therefore, I conclude that Claimant can return to past relevant coal mine work.

Based on the foregoing, I accept that the totality of the evidence shows that total disability is not established by the medical evidence set forth in 20 C.F.R. § 718.204(b)(2)(i–iii). Furthermore, the Claimant has not provided a medical opinion from a physician, who, exercising sound medical judgment, concludes that the Claimant's respiratory or pulmonary condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(2)(iv).

After a review of all the newly submitted evidence, I find that total disability has not been established under 20 C.F.R. § 718.204(b)(1). Therefore, all other issues are moot. As the Claimant has not met his burden under 20 C.F.R. § 718.204, there is no need to discuss any other issue.

Conclusion

Based on the foregoing, I find that Claimant has not established that he is total disabled. By failing to do so, Mr. Mize has failed to establish a crucial element in his case. ***Oggero v. Director, OWCP***, *supra*. Consequently, the Claimant has also failed to establish total disability form pneumoconiosis, another crucial element. Even if I accepted the District Director's earlier findings that Claimant suffers from pneumoconiosis, which arose out of his coal mine employment, the Claimant still would not prevail since he is unable to prove that he is totally disabled.

I further find that the Claimant has not established a mistake of fact during the determination of the claim or a change in condition since the denial of his request for a modification on September 11, 2001. 20 C.F.R. § 725.310.

---

[18] The Dictionary of Occupational Titles (4th Ed., Rev. 1991) defines a Surface Supervisor (mine & quarry) as an individual who: Supervises and coordinates activities of workers engaged in operating equipment to move personnel, machinery, and supplies to various levels of underground mine; Consults with supervisory personnel to establish daily work schedule; Coordinates use of hoisting devices to raise or lower equipment that transports personnel, machinery, and supplies to and from various mine levels; Directs workers who load and unload materials from trucks or railroad cars; Inspects equipment to detect malfunctions and schedules repairs as needed; Conducts safety meetings and resolves grievances. http://www.oalj.dol.gov/public/dot/refrnc/dot09b.htm

ORDER

IT IS ORDERED that the request for a modification filed by Lanious J. Mize is **denied.**

SO ORDERED.

A

Daniel F. Solomon
Administrative Law Judge

Notice of Appeal Rights: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision if filed with the District Director, Office of Worker's Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-7601. See 20 C.F.R. §725.478 and §725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2605, 200 Constitution Avenue, NW, Washington, DC 20210.