



BRB No. 20-0449 BLA

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| ROBERT W. FIELDS              | ) |                         |
|                               | ) |                         |
| Claimant-Respondent           | ) |                         |
|                               | ) |                         |
| v.                            | ) |                         |
|                               | ) |                         |
| CLINCHFIELD COAL              | ) |                         |
| COMPANY/PITTSTON COMPANY      | ) |                         |
|                               | ) | DATE ISSUED: 08/31/2021 |
| Employer/Carrier-             | ) |                         |
| Petitioners                   | ) |                         |
|                               | ) |                         |
| DIRECTOR, OFFICE OF WORKERS'  | ) |                         |
| COMPENSATION PROGRAMS, UNITED | ) |                         |
| STATES DEPARTMENT OF LABOR    | ) |                         |
|                               | ) |                         |
| Party-in-Interest             | ) | DECISION and ORDER      |

Appeal of the Decision and Order on Remand Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order on Remand Awarding Benefits (2012-BLA-05702) rendered on a claim filed on December 3, 2010, pursuant to the provisions of the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case is before the Benefits Review Board for the second time.<sup>1</sup>

In a Decision and Order Awarding Benefits dated October 30, 2015, the ALJ accepted the parties' stipulation that Claimant has 12.05 years of coal mine employment and accepted Employer's concession he has clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203. The ALJ found Claimant is totally disabled due to pneumoconiosis and awarded benefits. 20 C.F.R. §718.204(b)(2), (c).

Considering Employer's appeal, the Board affirmed the ALJ's findings that Claimant has 12.05 years of coal mine employment, that he has clinical pneumoconiosis arising out of coal mine employment, and that he is totally disabled. *Fields v. Clinchfield Coal Co.*, BRB No. 16-0130 BLA slip op. at 2-6 (Dec. 19, 2016) (unpub.) With respect to disability causation, 20 C.F.R. §718.204(c), the Board rejected Employer's allegations of error and affirmed the ALJ's finding that Dr. Forehand's opinion attributing Claimant's disability to clinical pneumoconiosis was well-reasoned and documented, and entitled to great weight.<sup>2</sup> *Id.* at 7-9.

However, the majority of the Board's three-member panel held that the ALJ did not provide a valid basis for discrediting Dr. Hippensteel's contrary opinion that Claimant's disability is due to cardiac disease and other factors. *Id.* at 9-10. The majority therefore vacated the ALJ's finding that Claimant is totally disabled due to pneumoconiosis, and remanded the case for him to reconsider Dr. Hippensteel's opinion.<sup>3</sup> *Id.* at 10. The majority instructed him to determine whether Dr. Hippensteel's opinion was documented and reasoned, addressing the argument by the Director, Office of Workers' Compensation Programs (the Director), that his opinion was undocumented because he relied on the results of an exercise electrocardiogram (EKG) that was not in the record. *Id.* at 10-11. The majority further instructed him that if he found Dr. Hippensteel's opinion documented and reasoned, he was to weigh it against Dr. Forehand's opinion, addressing Employer's

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<sup>1</sup> We incorporate the procedural history of the case as set forth in the Board's prior decision. *Fields v. Clinchfield Coal Co.*, BRB No. 16-0130 BLA, slip op. at 2 (Dec. 19, 2016) (unpub.).

<sup>2</sup> The Board additionally affirmed, as unchallenged, the ALJ's decision to accord little weight to Dr. McSharry's opinion that Claimant's total disability is due to smoking. *Fields*, BRB No. 16-0130 BLA slip op. at 8 n.13.

<sup>3</sup> Administrative Appeals Judge Greg J. Buzzard would have held the ALJ permissibly discredited Dr. Hippensteel's opinion and affirmed the award of benefits. *Fields*, BRB No. 16-0130 BLA, slip op. at 12-15 (Buzzard, J., dissenting).

argument that Dr. Hippensteel is more highly qualified than Dr. Forehand and that therefore his opinion is entitled to greater weight. *Id.* at 10 n.16.

On remand, the ALJ found Dr. Hippensteel's disability causation opinion was not well-documented or reasoned, and accorded it little weight. He again found Claimant established he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c) and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant's total disability is due to pneumoconiosis. Neither Claimant nor the Director has filed a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Without the benefit of any statutory presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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 an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

### **Dr. Hippensteel**

Employer argues the ALJ erred by mischaracterizing and discrediting Dr. Hippensteel's opinion,<sup>5</sup> and by failing to adequately resolve the conflict in the medical opinion evidence. Employer's Brief at 4. We disagree.

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<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

<sup>5</sup> Dr. Hippensteel excluded coal workers' pneumoconiosis as causing, or contributing to, Claimant's blood gas study abnormalities, and opined that the abnormalities can be attributed to Claimant's cardiac condition. Employer's Exhibit 8 at 21-23. In addition to coronary artery disease, Dr. Hippensteel implicated cigarette smoking, obesity, and sleep apnea as playing a role in Claimant's disability. *Id.* at 26-27.

The Board instructed the ALJ to determine “whether Dr. Hippensteel’s disability causation opinion is reasoned and documented.” *Fields*, BRB No. 16-0130 BLA, slip op. at 10. As part of that inquiry, he was to consider the Director’s argument that the physician’s opinion was not documented because Dr. Hippensteel relied on an exercise EKG that was not in the record. *Id.* at 11. On remand, the ALJ found that Dr. Hippensteel relied on the missing EKG report to support his conclusion that cardiac abnormalities are causing Claimant’s hypoxemia with exercise. Ultimately, the ALJ accorded “very diminished weight” to Dr. Hippensteel’s opinion as he found it “tainted by the absence from the record of the exercise electrocardiogram upon which [Dr. Hippensteel] relies.” Decision and Order on Remand at 5. The ALJ concluded that Dr. Hippensteel’s opinion on total disability causation is neither well-documented nor well-reasoned, “due to the absence of the exercise EKG to which the physician accorded significant weight.” *Id.*

Employer contends the ALJ erred because Dr. Hippensteel also based his opinion on “what he viewed during the exercise ABG that he performed.” Employer’s Brief at 5. Contrary to Employer’s contention, the ALJ accurately characterized Dr. Hippensteel’s opinion. Reviewing Dr. Hippensteel’s “written report, his supplemental blood gas study test, his analysis of the supplemental blood gas study, and his deposition testimony,” the ALJ noted that Dr. Hippensteel stated he relied on the exercise EKG to attribute Claimant’s hypoxemia to cardiac abnormalities. Decision and Order at 5-6 (citing Employer’s Exhibit 8 at 23). The ALJ further found that Dr. Hippensteel noted the significance of the EKG he administered as part of the exercise portion of Claimant’s blood gas study and criticized Dr. Forehand for conducting only a resting EKG.<sup>6</sup> Decision and Order at 6 (citing Employer’s Exhibit 8 at 28-29).

Based on the foregoing, we conclude that substantial evidence supports the ALJ’s determination that Dr. Hippensteel “accorded significant weight and importance” to an exercise EKG report not contained in the record when he concluded that Claimant’s hypoxemia is due to cardiac abnormalities. Decision and Order on Remand at 6. We therefore reject Employer’s argument that the ALJ mischaracterized Dr. Hippensteel’s

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<sup>6</sup> Dr. Hippensteel emphasized how analyzing Claimant’s exercise and resting EKG and arterial blood gas studies is critical, because only the exercise results displayed the “cardiac abnormalities . . . consistent with peripheral arterial disease.” Director’s Exhibit 33 at 2. During his deposition, Dr. Hippensteel further highlighted the importance of exercise studies, and criticized Dr. Forehand’s report for its lack of exercise EKG tests. Employer’s Exhibit 8 at 24-25, 28-29; Decision and Order on Remand at 4. Dr. Hippensteel specified, “the details of how you monitor and how you look at what happens with the heart during exercise is critical to properly interpreting the results of exercise arterial blood gas testing.” Employer’s Exhibit 8 at 28-29.

opinion, and affirm his credibility determination that Dr. Hippensteel's opinion is entitled to "very diminished weight" because it was not well-documented. *Id.*; Employer's Brief at 4, 8. The ALJ acted reasonably as it is his duty to evaluate the credibility and probative value of medical opinions,<sup>7</sup> including where medical evidence referenced is not in the record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-09 (2006) (en banc).

Because the underlying exercise EKG was not in the record, the ALJ found Dr. Hippensteel's opinion not well-documented, regardless of his qualifications.<sup>8</sup> Decision and Order on Remand at 5; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Substantial evidence supports the ALJ's credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113.

#### **Dr. Forehand**

Employer argues the ALJ erred in relying on Dr. Forehand's opinion because it is neither well-reasoned nor well-documented. Employer's Brief at 6-9. The Board previously rejected this argument. *Fields*, BRB No. 16-0130 BLA, slip op. at 7-9. The Board's holding constitutes the law of the case, and Employer has not made any arguments as to a valid exception to the law of the case doctrine. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990). We therefore decline to disturb the Board's disposition of this issue. *See Brinkley*, 14 BLR at 1-150-51.

Because the Board previously affirmed the ALJ's finding that Dr. Forehand's opinion attributing Claimant's total disability to pneumoconiosis was well-reasoned, well-documented, and entitled to great weight, he again found that Claimant established he is

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<sup>7</sup> Whether the conclusions set forth in a medical opinion are reasoned and documented is a determination committed to the ALJ's discretion. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

<sup>8</sup> Employer's argument that the ALJ ignored the physicians' qualifications is without merit. Employer's Brief at 7. The ALJ was not required to give greater weight to Dr. Hippensteel's report based solely on his superior qualifications, when the ALJ determined that Dr. Hippensteel's opinion was not well-documented. *See Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951 (4th Cir. 1997) ("In weighing opinions, the ALJ is called upon to consider their quality.").

totally disabled due to pneumoconiosis. Decision and Order on Remand at 6. Because it is supported by substantial evidence, we affirm the ALJ's finding Claimant established his total disability is due to pneumoconiosis. 20 C.F.R. §718.204(c).

Accordingly, the ALJ's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge