

BRB No. 02-0785 BLA

JAMES AUBREY HOPPER)
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 Claimant-Respondent)
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 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 08/28/2003
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS=
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-BLA-0684) of Administrative Law
Judge Robert L. Hillyard awarding 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).¹ The administrative law judge accepted employer=s stipulation that
claimant had thirty-one years of qualifying coal mine employment, and adjudicated this

¹The Department of Labor (DOL) has amended the regulations implementing the Federal
Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective
on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All
citations to the regulations, unless otherwise noted, refer to the amended regulations.

claim, filed on July 27, 2000, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ' ' 718.202(a)(1), (4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. ' 718.204(b)(2)(i), (iv), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge=s findings at Sections 718.202(a)(1), (4) and 718.204(b), (c). Claimant responds, urging affirmance, to which employer replies, reiterating its arguments on appeal. The Director, Office of Workers= Compensation Programs, has declined to participate in this appeal.²

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

²We affirm, as unchallenged on appeal, the administrative law judge=s findings that claimant is entitled to the presumption that his pneumoconiosis arose from coal mine employment pursuant to 20 C.F.R. ' 718.203(b), with no rebuttal, and that the evidence of record is insufficient to establish total respiratory disability at 20 C.F.R. ' 718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer initially contends that the administrative law judge erred in finding that the weight of the x-ray evidence of record establishes the existence of pneumoconiosis at Section 718.202(a)(1). Employer does not challenge the administrative law judge's findings of fact, but maintains that the administrative law judge did not resolve the conflict in the evidence on any rational basis.³ We disagree. The administrative law judge determined that the record contained five positive and three negative interpretations of four films, and that the films dated August 8, 2000 and December 19, 2000 received conflicting interpretations by qualified readers,⁴ *i.e.*, positive interpretations by one B reader and one dually qualified physician, and negative interpretations by two dually qualified physicians and one B reader, while the two most recent films, dated July 21, 2001 and September 20, 2001, were each interpreted as positive for pneumoconiosis by a B reader, with no negative readings. Considering both the quality and quantity of the evidence, the administrative law judge then acted within his discretion in finding that the weight of the x-ray evidence was positive for pneumoconiosis, based on a preponderance of positive interpretations by qualified readers. Decision and Order at 3-4, 8-9; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The Board is not empowered to reweigh the evidence or substitute its judgment for that of the administrative law judge, even if our conclusions would have been

³We find no merit in employer's arguments that the administrative law judge ignored the fact that two of the positive x-ray interpretations were made despite the poor or indeterminate quality of the films, and that he ignored the timing of the isolated positive interpretation by Dr. Pope, a B reader, even though the physician conceded that he had never interpreted any of claimant's x-rays as positive until after claimant filed for benefits. Employer's Brief at 10. The administrative law judge reviewed the quality of each film as listed by each reader, and could reasonably rely upon the opinions of qualified readers who deemed the films to be of sufficient quality for accurate interpretation. Decision and Order at 3-4. The administrative law judge also acknowledged that in Dr. Pope's deposition, the physician testified that he did not initially diagnose pneumoconiosis although he noted claimant's coal mine employment history; that his September 2000 findings were consistent with early coal workers' pneumoconiosis but he did not make a definite diagnosis at that time; and that he read claimant's September 2001 x-ray as positive for pneumoconiosis. Decision and Order at 7; Employer's Exhibit 6 at 7-8, 14, 17, 24-25. The administrative law judge was not required to infer that Dr. Pope's diagnosis of pneumoconiosis was biased.

⁴The administrative law judge determined that the film dated August 8, 2000 was interpreted as positive for pneumoconiosis by a B reader and a physician with no special qualifications, and as negative by a physician with dual qualifications as a B reader and Board-certified radiologist; and that the December 19, 2000 film was interpreted as positive by a physician with dual qualifications, and as negative by a dually qualified physician as well as by a B reader. Decision and Order at 3-4, 9.

different. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002). The administrative law judge=s findings pursuant to Section 718.202(a)(1) are supported by substantial evidence and therefore must be affirmed. Since establishing the existence of pneumoconiosis under one of the four methods set out at Section 718.202(a)(1)-(4) obviates the need to do so under any of the other methods, *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), we need not reach employer=s arguments regarding the administrative law judge=s weighing of the medical opinion evidence at Section 718.202(a)(4).

Employer next challenges the administrative law judge=s finding that the pulmonary function studies of record establish total respiratory disability at Section 718.204(b)(2)(i), arguing that the administrative law judge failed to address and weigh all relevant evidence. We agree. The administrative law judge determined that the record contained the results of five pulmonary function studies, and that the four most recent tests produced qualifying values. The administrative law judge noted that Dr. Burki invalidated the test conducted on August 8, 2000,⁵ and that the most recent pulmonary function study produced higher values than the previous tests, although it still satisfied the regulatory requirements for establishing total respiratory disability.⁶ The administrative law judge then concluded that the pulmonary

⁵While it appears that the administrative law judge credited Dr. Burki=s invalidation of this test due to suboptimal effort over the administering technician=s comments, as signed by Dr. Simpao, that the spirometry data was acceptable and reproducible and patient effort, cooperation and comprehension good, the administrative law judge did not provide any reason for his credibility determination. Decision and Order at 4, 11; Director=s Exhibits 11, 12.

⁶The administrative law judge listed the first three pulmonary function studies of record in chronological order, but then listed the most recent study obtained by Dr. Baker on July 21, 2001 before Dr. Selby=s study dated December 19, 2000. Decision and Order at 4-5. It is not clear from a comparison of the values of the last two tests as to whether the administrative law judge was actually referring to Dr. Baker=s study or to Dr. Selby=s study.

function studies supported a finding that claimant was totally disabled. Decision and Order at 11. Employer correctly maintains, however, that the administrative law judge did not address and weigh the invalidations by Drs. Fino and Branscomb of the tests obtained on August 8, 2000, September 28, 2000 and December 19, 2000. *See* Employer=s Exhibits 3, 4. As the administrative law judge may not reject relevant evidence without explanation, *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983), we must vacate the administrative law judge=s findings pursuant to Section 718.204(b)(2)(i), and remand this case for the administrative law judge to provide his reasons for either crediting or discounting the conflicting opinions regarding the validity of the pulmonary function studies of record, including the opinions of administering technicians and/or physicians, and determine whether the weight of the evidence is sufficient to establish total disability thereunder.

Moreover, because the validity of the objective tests relied upon may affect the weight to be accorded to each physician=s opinion, we also vacate the administrative law judge=s finding that the medical opinions of record establish total respiratory disability at Section 718.204(b)(2)(iv) and disability causation at Section 718.204(c).⁷ On remand, the administrative law judge is instructed to reevaluate the medical opinions of record and accord each opinion appropriate weight based on the quality and persuasiveness of its reasoning and the support provided by its documentation, as well as the relative qualifications of the physician. *See Eastover Mining Co. v. Williams*, ___ F.3d ___, 2003 WL 21756342 (6th Cir. July 31, 2003); *Rowe*, 710 F.2d 251, 5 BLR 2-99. The administrative law judge must then weigh all like and unlike evidence together and determine whether the evidence supportive of a finding of total disability outweighs the contrary and probative evidence at Section 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). If, on remand, the administrative law judge again finds total respiratory disability established, he must provide his reasons for crediting or discounting the conflicting medical opinions of record and determine whether the weight of the evidence establishes disability causation pursuant to Section 718.204(c), in accordance with *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge=s Decision and Order - Award of Benefits

⁷We agree with employer=s assertion that, regardless of whether the miner=s objective test values are qualifying, a physician may make a medical judgment that the miner is not totally disabled. Employer=s Brief at 20; *see generally Nelson v. Kaiser Steel Corp.*, 7 BLR 1-283 (1984); *Strunk v. Monarch Coal Inc.*, 7 BLR 1-49 (1984). The administrative law judge must then evaluate the physician=s reasoning and, if appropriate, compare the physician=s assessment with the exertional requirements of the miner=s usual coal mine employment.

is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge