BRB No. 09-0274 BLA

JOSEPH E. RUSSELBURG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 12/09/2009
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 on Remand – Award of Benefits and the Reconsideration Decision and Order on Remand – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits and the Reconsideration Decision and Order on Remand – Award of Benefits (06-BLA-5062) of Administrative Law Judge Daniel F. Solomon rendered 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 is before the Board for the second time. In his original Decision and Order, the administrative law judge credited claimant with twenty-four years of coal mine employment[1] and found that the medical opinion of

[1] As claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.

Dr. Simpao established the existence of legal pneumoconiosis,[2] in the form of an obstructive and restrictive impairment arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). He also found that the evidence established that claimant suffers from a totally disabling respiratory impairment that is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding pursuant to Section 718.202(a)(4) and instructed him to adequately resolve the conflicting evidence regarding the validity of the November 18, 2004 pulmonary function study, "as that finding bears on the credibility of Dr. Simpao's diagnosis of legal pneumoconiosis."[3] *J.E.R.* [*Russelburg*] *v. Peabody Coal Co.*, BRB No. 07-0370 BLA (Jan. 31, 2008)(unpub.), slip op. at 4. The Board also held that the administrative law judge mischaracterized the basis of Dr. Fino's opinion as to the existence of pneumoconiosis, and instructed him to reconsider whether Dr. Fino's opinion was documented and reasoned. The Board further instructed the administrative law judge to fully explain his reasons for crediting or discrediting the pulmonary function study evidence, and to then examine the medical opinions in light of the "studies conducted and the objective indications upon which the medical opinion or conclusion is based," to determine whether each opinion constitutes a reasoned medical judgment as to the presence or absence of legal pneumoconiosis, and to explain his credibility

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Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[3] As set forth in greater detail in the Board's prior decision, Dr. Simpao diagnosed a severe obstructive and restrictive impairment based on a pulmonary function study and attributed the impairment to both smoking and coal dust exposure. Drs. Fino and Repsher opined that claimant's pulmonary function studies are invalid for interpretation, and there is no evidence of any impairment in his blood gas studies or diffusion capacity studies. Drs. Fino and Repsher therefore concluded that claimant has no respiratory impairment or disease, and is not totally disabled. *J.E.R.* [*Russelburg*] *v. Peabody Coal Co.*, BRB No. 07-0370 BLA (Jan. 31, 2008)(unpub.), slip op. at 3.

determinations pursuant to Section 718.202(a)(4).[4] *Id*. at 5. Additionally, the Board vacated the administrative law judge's finding of total disability pursuant to Section 718.204(b)(2) because the administrative law judge did not explain his weighing of the relevant evidence. The Board instructed the administrative law judge to explain his findings pursuant to each subsection of Section 718.204(b)(2)(i)-(iv), and to then weigh together all of the relevant evidence to determine whether claimant established total disability pursuant to Section 718.204(b)(2). *Id*. at 6. Finally, because the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(b)(2) affected his determination that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c), the Board vacated that finding and instructed the administrative law judge to reconsider the disability causation issue, if reached on remand.[5] *Id*. at 7.

On remand, the administrative law judge reconsidered the November 18, 2004 pulmonary function study and discredited, as unsubstantiated, Dr. Fino's opinion that the study was invalid. The administrative law judge found Dr. Simpao's opinion that the November 18, 2004 pulmonary function study demonstrated an obstructive and restrictive impairment to be "more rational, and therefore credit[ed] his spirometry testing." Decision and Order on Remand at 3. Turning to the issue of pneumoconiosis, the administrative law judge again accorded greater weight to Dr. Simpao's opinion, and found that claimant established legal pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge further found the evidence sufficient to establish total disability pursuant to Section 718.204(b), and found that Dr. Simpao's opinion established that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's motion for reconsideration, the administrative law judge corrected his earlier statement that claimant's blood gas studies, which were non-

[4] In instructing the administrative law judge to assess the reasoning of each medical opinion, the Board noted employer's argument that the administrative law judge did not address Dr. Simpao's testimony suggesting that it is his practice to find that coal dust exposure contributes to an obstructive impairment in any case where the patient had a history of coal dust exposure. *Russelburg*, slip op. at 5 n.4.

[5] The Board further instructed the administrative law judge to reconsider Dr. Fino's opinion as to the cause of claimant's total disability, in view of Dr. Fino's statement that even if he were to assume that claimant suffers from coal workers' pneumoconiosis, there is no objective evidence that it caused any respiratory impairment or pulmonary disability. *Russelburg*, slip op. at 7 n.6.

qualifying[6] and interpreted as normal, established total disability. He reaffirmed his decision awarding benefits in all other respects.

On appeal, employer contends that the administrative law judge erred in his analysis of whether the November 18, 2004 pulmonary function study was valid. Employer further asserts that the administrative law judge failed to comply with the Board's remand instructions and provided invalid rationales in finding that the existence of legal pneumoconiosis, total disability, and total disability due to pneumoconiosis were established. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has submitted a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, we consider the administrative law judge's analysis of the November 18, 2004 pulmonary function study administered by Dr. Simpao.[7] The administrative law

[6] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

[7] The record contains the results of two pulmonary function studies. Dr. Simpao administered a pulmonary function study on November 18, 2004, which yielded qualifying values, and which Dr. Simpao stated was acceptable and reproducible. Director's Exhibit 12-8. Dr. Simpao opined that the study indicated severe restrictive and severe obstructive airway disease, but stated that the patient was overweight, "which could affect the test results." *Id*. Dr. Mettu, who is Board-certified in Internal Medicine and Pulmonary Diseases, reviewed the November 18, 2004 study and checked a box indicating that the study was acceptable, noting that its variability was within the acceptable range. *Id*. Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that upon review, the November 18, 2004 pulmonary

judge considered Dr. Simpao's statement that the study was acceptable, Dr. Mettu's form report stating that the study was acceptable despite variability, and Dr. Fino's narrative report stating that the test was invalid because of a lack of abrupt onset to exhalation, a premature termination of exhalation, and because its tracings were not reproducible.[8] The administrative law judge found that Dr. Fino's report was not well-documented or reasoned because Dr. Fino "did not set forth the exact calculation, based on measurement, to explain why he determined the test was prematurely terminated." Decision and Order on Recon. at 3. Further, the administrative law judge found that "[a]lthough [Dr. Fino] cited to reputedly authoritative texts, he did not attach them [or] show how Dr. Simpao's testing may have deviated from the norm, as substantiation for the allegation." *Id*. The administrative law judge noted that Dr. Mettu, who, like Dr. Fino, is Board-certified in

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function study was invalid "because of a premature termination to exhalation and a lack of reproducibility in the expiratory tracings. . . .[and] a lack of an abrupt onset to exhalation." Employer's Exhibit 2. Dr. Fino cited four articles in the medical literature regarding pulmonary function study standards. *Id*. Dr. Repsher administered a pulmonary function study on June 7, 2005, which yielded qualifying values on both the pre-bronchodilator test and the post-bronchodilator test. Dr. Repsher stated that the test was "uninterpretable . . . due to either extremely poor effort and cooperation with the testing or residua of his childhood paralytic poliomyelitis." Employer's Exhibit 1. Dr. Fino stated that upon review, the June 7, 2005 pulmonary function study was invalid due to "premature termination to exhalation," the "lack of reproducibility in the expiratory tracings," and the "lack of an abrupt onset to exhalation." Employer's Exhibit 2.

[8] Appendix B to 20 C.F.R. Part 718, governing the technical quality standards for the administration of pulmonary function studies, lists situations where the miner's effort "shall be judged unacceptable," including where the miner:

> (A) Has not reached full inspiration preceding the forced expiration; or
> (B) Has not used maximal effort during the entire forced expiration; or
> (C) Has not continued the expiration for at least 7 sec. or until an obvious plateau for at least 2 sec. in the volume-time curve has occurred; or. . .
> (F) Has an unsatisfactory start of expiration, one characterized by excessive hesitation (or false starts). . . .
> (G) Has excessive variability between the three acceptable curves. . . .

20 C.F.R. Part 718, Appendix B.

Internal Medicine and Pulmonary Disease, reviewed the same study "and did not find . . . premature termination," nor did Dr. Repsher find premature termination on the pulmonary function study he conducted on June 7, 2005. *Id*. at 8. Additionally, the administrative law judge noted that although Dr. Fino stated that the November 18, 2004 expiratory tracings were not reproducible, "Dr. Repsher made similar findings during the resting phase of the [June 7, 2005] spirometry. A review of the report shows there was [a] question about cooperation only in the exercise phase."[9] *Id*. at 3. Concluding that Dr. Fino stood "alone in his estimate of the validity of the November 18, 2004 test," the administrative law judge discounted his report as not well-reasoned.

We agree with employer that the administrative law judge did not adequately explain his credibility determinations. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). As employer asserts, the administrative law judge did not explain why Dr. Fino's invalidation report was not well-reasoned for lack of "exact calculation," or copies of the four medical literature articles that Dr. Fino cited, when Dr. Mettu supplied only a check-box validation form, and the record discloses no specific explanation for Dr. Simpao's opinion that the November 18, 2004 pulmonary function study was acceptable. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th. Cir. 1998)(holding that a check-box validation providing no reasons "len[ds] little persuasive authority" to a challenged study); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(holding that contrary opinions should be subjected to the same scrutiny). Further, as indicated *supra*, n.9, the administrative law judge relied on irrelevant and inaccurate information regarding a different pulmonary function study to evaluate the validity of the November 18, 2004 study. Therefore, we must vacate the administrative law judge's finding that the November 18, 2004 pulmonary function study conducted by Dr. Simpao was valid, and remand this case for further consideration.

[9] Contrary to the administrative law judge's statement, pulmonary function studies do not have "resting" and "exercise" phases. The Board assumes the administrative law judge meant to refer to the pre- and post-bronchodilator portions of the June 7, 2005 pulmonary function study. Further, assuming *arguendo* that Dr. Repsher's June 7, 2005 pulmonary function study was relevant to the validity of Dr. Simpao's November 18, 2004 study, contrary to the administrative law judge's statement, the record reflects that *the technician* who administered the June 7 study stated that claimant gave "poor effort post BD, otherwise good effort," Employer's Exhibit 2 at 7, but Dr. Repsher opined that the entire study was invalid: "Pulmonary function tests . . . reveal uninterpretable spirometry, due to either *extremely poor effort and cooperation* with the testing or residua of [claimant's] childhood paralytic poliomyelitis." Employer's Exhibit 1 at 2 (emphasis added).

Because the validity of the November 18, 2004 pulmonary function study bears on the credibility of Dr. Simpao's opinion regarding the existence of legal pneumoconiosis, we also vacate the administrative law judge's finding pursuant to Section 718.202(a)(4). On remand, the administrative law judge should discuss all relevant evidence and give his reasons for crediting or discrediting the pulmonary function study evidence. The administrative law judge must examine each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and determine whether it constitutes a reasoned medical judgment as to the presence or absence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). As we instructed the administrative law judge previously, he should address Dr. Simpao's testimony suggesting that it is his practice to attribute an obstructive impairment to coal dust exposure if the patient has a history of coal dust exposure. *Russelburg*, slip op. at 5 n.4. After the administrative law judge has determined which opinions he considers to be reasoned and documented, he must explain specifically the bases for his credibility determinations pursuant to Section 718.202(a)(4).[10] *See Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998).

Pursuant to Section 718.204(b)(2), we vacate the administrative law judge's finding that total disability was established. Under Section 718.204(b)(2)(i), the administrative law judge, on remand, must reconsider whether the pulmonary function study evidence supports a finding of total disability, after he has determined whether the November 18, 2004 pulmonary function study is valid. Under Section 718.204(b)(2)(ii), the administrative law judge initially found that the blood gas studies[11] supported total disability, but on reconsideration stated "I stand corrected," with no further discussion of

[10] We have considered employer's remaining arguments regarding the existence of pneumoconiosis and find that they lack merit. We note briefly that, contrary to employer's contention, Dr. Simpao's opinion is not legally insufficient to support a finding of pneumoconiosis by the doctor's inability to separate the effects of coal dust and smoking. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Further, the administrative law judge did not err in considering Dr. Simpao's experience as the Director of the Coal Miner's Clinic at Muhlenberg Community Hospital since the 1970's, as a factor relevant to the credibility of the doctor's opinion. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005).

[11] The record contains the reports of two blood gas studies, administered on November 18, 2004 and June 7, 2005, both of which yielded non-qualifying results. Director's Exhibit 12; Employer's Exhibit 1.

the blood gas study evidence. Decision and Order on Recon. at 9. As employer asserts, on remand, he should explain the impact this correction had on his weighing of the evidence. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Pursuant to Section 718.204(b)(iv), since the administrative law judge must reconsider the pulmonary function study underlying Dr. Simpao's diagnosis of a severe, disabling impairment, the administrative law judge must reconsider the medical opinions as to whether claimant is totally disabled. In addition, the administrative law judge must weigh together all of the relevant, contrary probative evidence regarding disability to determine whether claimant has established total disability pursuant to Section 718.204(b)(2). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Because the administrative law judge's findings that claimant established legal pneumoconiosis pursuant to Section 718.202(a)(4), and total disability pursuant to Section 718.204(b), influenced his credibility determinations on the issue of disability causation, we also vacate his finding of total disability due to pneumoconiosis pursuant to Section 718.204(c) and instruct the administrative law judge to reconsider this issue, if reached, on remand. In so doing, the administrative law judge must address whether each physician's opinion is reasoned and documented for the purpose of proving or disproving that claimant's total disability is due to pneumoconiosis.[12] *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

[12] As employer argues, the administrative law judge did not address Dr. Fino's statement that "even if I were to assume that [claimant] has coal workers' pneumoconiosis, there is still no objective evidence that it caused any respiratory impairment or pulmonary disability." Employer's Exhibit 2. As we instructed previously, on remand, the administrative law judge must consider Dr. Fino's statement and determine whether his opinion that claimant is not totally disabled due to pneumoconiosis is premised on a determination that is inconsistent with the administrative law judge's finding as to the presence or absence of legal pneumoconiosis. *Russelburg*, slip op. at 7 n.6.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits and the Reconsideration Decision and Order on Remand – Award of Benefits are vacated and the case is remanded for further consideration pursuant to this Decision and Order.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge