BRB No. 11-0271 BLA

JOSEPH E. RUSSELBURG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 12/22/2011
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Second Remand (2006-BLA-5062) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed on October 25, 2004, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is before the Board

[1] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to

for the third time.[2] Pursuant to the last appeal filed by employer, the Board vacated the administrative law judge's finding that the November 18, 2004 pulmonary function study was valid and remanded the case for further consideration.[3] The Board also vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as the validity of the November 18, 2004 pulmonary function study affected the credibility of Dr. Simpao's opinion regarding the issue of legal pneumoconiosis.[4] The Board instructed the administrative law judge, on remand, to examine each medical opinion in light of the studies conducted and the objective indications on which the medical opinion is based, and then 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). Further, the Board

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pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. Because claimant's claim was filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

[2] The full procedural history of this case is set forth in the Board's decisions in *J.E.R.* [*Russelburg*] *v. Peabody Coal Co.*, BRB No. 07-0370 BLA (Jan. 31, 2008) (unpub.), and *Russelburg v. Peabody Coal Co.*, BRB No. 09-0274 BLA (Dec. 9, 2009) (unpub.).

[3] In finding that the administrative law judge did not adequately explain his credibility determinations regarding the validity of the November 18, 2004 pulmonary function study, the Board stated: "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." *Russelburg*, BRB No. 09-0274 BLA, slip op. at 6. The Board also noted that "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." *Id*.

[4] The Board noted 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." *Russelburg*, BRB No. 09-0274 BLA, slip op. at 7 n.10. Further, the Board noted that "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." *Id*.

vacated the administrative law judge's finding that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The Board instructed the administrative law judge, on remand, to reconsider whether the pulmonary function study evidence supports a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and whether the medical opinion evidence supports a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), after he had determined whether the November 18, 2004 pulmonary function study was valid. The Board also instructed the administrative law judge to weigh together all of the relevant, contrary probative evidence regarding disability to determine whether claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b) overall.[5] Lastly, the Board vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and instructed him to reconsider this issue, if reached. *Russelburg v. Peabody Coal Co.*, BRB No. 09-0274 BLA (Dec. 9, 2009)(unpub.).

On remand, the administrative law judge found that the evidence did not establish the existence of clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a) or total respiratory disability at 20 C.F.R. §718.204(b).[6] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant also challenges the administrative law judge's finding that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i) and (iv). Employer responds, urging affirmance of the administrative

[5] The Board also instructed the administrative law judge to explain the impact that his correction on reconsideration, regarding the arterial blood gas study evidence, had on his weighing of the evidence. *Russelburg*, BRB No. 09-0274 BLA, slip op. at 8. As noted by the Board, the administrative law judge had erroneously stated that the blood gas study evidence supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii), even though none of those studies yielded qualifying values. 2008 Decision and Order on Remand at 4. On reconsideration, the administrative law judge acknowledged his error by stating, "I stand corrected." 2008 Reconsideration Decision and Order on Remand at 9. However, the Board correctly noted that the administrative law judge gave "no further discussion of the blood gas study evidence." *Russelburg*, BRB No. 09-0274 BLA, slip op. at 7-8.

[6] The administrative law judge found that the issue of disability causation at 20 C.F.R. §718.204(c) was moot because he found that the evidence did not establish the existence of pneumoconiosis or total respiratory disability.

law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive 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.[7] 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Initially, we will address claimant's contention that the administrative law judge erred in finding that the pulmonary function study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). The record contains two pulmonary function studies dated November 18, 2004 and June 7, 2005. The November 18, 2004 study conducted by Dr. Simpao yielded qualifying values at rest.[8] Director's Exhibit 12. The June 7, 2005 study conducted by Dr. Repsher yielded qualifying values at rest and during exercise.[9] Employer's Exhibit 1. In a validation report dated January 3, 2005, Dr. Mettu opined that the November 18, 2004 study was acceptable, noting that its variability

[7] As claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[8] Dr. Simpao noted that the spirometry data was acceptable and reproducible, and that claimant's effort, cooperation, and comprehension were good. Director's Exhibit 12. Dr. Simpao also noted that "this test indicates severe restrictive and severe obstructive airway disease," but that "[claimant] is overweight which could affect the test results." *Id.* Dr. Simpao additionally noted that diffuse volume studies may further evaluate claimant's airway disease. *Id.*

[9] The technician of the June 7, 2005 pulmonary function study noted "poor effort post BD, otherwise good effort for testing." Employer's Exhibit 1. Nevertheless, in a June 28, 2005 report, Dr. Repsher stated that "[p]ulmonary function tests (PFTs) reveal uninterpretable spirometry, due to either extremely poor effort and cooperation with the testing or residua of his childhood paralytic poliomyelitis." *Id.*

was within the acceptable range. Director's Exhibit 12. By contrast, Dr. Fino opined that "[the November 18, 2004 study] was invalid because of a premature termination to exhalation and a lack of reproducibility in the expiratory tracings," and because "[t]here was also a lack of an abrupt onset to exhalation."[10] Employer's Exhibit 2. Dr. Fino also opined that "[the June 7, 2005 study] was again invalid due to a premature termination to exhalation and a lack of reproducibility in the expiratory tracings," and because "[t]here was also a lack of an abrupt onset to exhalation." *Id*.

In considering the validity of the pulmonary function study evidence, the administrative law judge stated:

> In reviewing the record again, I note that Dr. Simpao noted that the [c]laimant was overweight and that factor could affect the test results. DX 12, at 8. Although Dr. Mettu determined that the [November 18, 2004] testing was valid, the obesity issue was addressed in the deposition, CX 1 at 13-14. Dr. Simpao stated that the restrictive portion could have been affected, and that diffusion studies and volume studies might help to define the restriction and had [c]laimant's diffusion capacity tests been normal, it would tend to rule out the presence of a restrictive disease.

2010 Decision and Order on Second Remand at 3. The administrative law judge then noted that the June 7, 2005 study conducted by Dr. Repsher yielded values that "were not interpretable due either to extremely poor effort and cooperation or the residual effects of [c]laimant's childhood poliomyelitis."[11] *Id*. Further, the administrative law judge noted that "[Dr. Fino] also found that both sets of pulmonary function studies were invalid because of premature termination to exhalation and a lack of reproducibility in the expiratory tracings, as well as a lack of abrupt onset to exhalation." *Id*. In addition, after stating that "[t]he [c]laimant has not proffered any rebuttal," the administrative law judge found that "the reliance by Dr. Simpao of [sic] the pulmonary function studies [sic] was

[10] Dr. Fino cited four articles in the medical literature regarding pulmonary function study standards. Employer's Exhibit 2.

[11] The Board noted that, "contrary to the administrative law judge's statement, the record reflects that *the technician* who administered the June 7, [2005] 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)." *Russelburg*, BRB No. 09-0274 BLA, slip op. at 6 n.9.

misplaced." *Id*. In so finding, the administrative law judge stated that "[c]laimant has failed to establish a restrictive disorder, as the diffusing test was dispositive, to rule out a restrictive disorder, given the deposition testimony," and that "no valid spirometry has been proffered." *Id*. The administrative law judge therefore found that the pulmonary function study evidence did not establish total respiratory disability at Section 718.204(b)(2)(i).

Claimant asserts that the administrative law judge erred in weighing the pulmonary function study evidence. We agree. In considering the validity of the pulmonary function study evidence, the administrative law judge found that claimant did not establish a restrictive disorder, based on the results of a diffusing capacity test. 2010 Decision and Order on Second Remand at 3. The administrative law judge then found that no valid pulmonary function study had been proffered into the record. However, the results of a diffusing capacity test are not relevant to the validity of a pulmonary function study at 20 C.F.R. §718.204(b)(2)(i).[12] 20 C.F.R. §718.103. Further, although it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the interpretation of medical data is for the medical experts, *Marcum v. Director*, OWCP, 11 BLR 1-23 (1987). Thus, because the administrative law judge found that claimant did not establish a restrictive disorder, based on the results of a diffusing capacity test, the administrative law judge erroneously substituted his opinion for that of the physicians.[13] *Marcum*, 11 BLR at 1-24. Consequently, we vacate the administrative law judge's finding that the pulmonary function study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i) and remand the case for further consideration of the pulmonary function evidence in accordance with the Administrative Procedure Act (APA).[14]

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[12] We note, however, that the results of a diffusing capacity test can provide a basis for an administrative law judge's finding that a medical judgment is reasoned. *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991).

[13] Claimant asserts that Dr. Repsher is biased against him. Because claimant has not provided any evidence of bias or prejudice on the part of Dr. Repsher, we reject claimant's assertion. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

[14] The Administrative Procedure Act, 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), requires that an administrative law judge independently evaluate the evidence and

Next, we address claimant's contention that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The record contains the opinions of Drs. Simpao, Repsher, and Fino. In a report dated November 29, 2004, Dr. Simpao opined that claimant has a severe pulmonary impairment that would keep him from his regular mining duties. Director's Exhibit 12. Further, during a deposition dated September 11, 2006, Dr. Simpao opined that claimant has a severe pulmonary impairment that would keep him from all employment. Claimant's Exhibit 1 (Dr. Simpao's Depo. at 10). By contrast, in a report dated June 28, 2005, Dr. Repsher opined that claimant does not have a significant pulmonary impairment. Employer's Exhibit 1. Dr. Repsher opined that, from a respiratory point of view, claimant is fully fit to perform his usual coal mine work or work of a similarly arduous nature in a different industry. *Id*. Similarly, in a report dated August 16, 2006, Dr. Fino opined that claimant does not have a respiratory impairment. Employer's Exhibit 2. Dr. Fino opined that, from a respiratory standpoint, claimant is neither partially nor totally disabled from returning to his last mining job or a job requiring similar effort. *Id*.

At Section 718.204(b)(2)(iv), the administrative law judge considered Dr. Simpao's opinion. The administrative law judge specifically stated, "I now find that he relied on the pulmonary function studies as to a restrictive disorder," and that "[a]s to the obstructive, [sic] disorder, I find that it is impossible, in this fact pattern to credit Dr. Simpao's opinion as to [an] obstructive disorder, because he did not identify it independently." 2010 Decision and Order on Second Remand at 4. Further, after finding that Dr. Simpao's opinion was flawed because it was based on an undocumented opinion, the administrative law judge stated that "[t]here is no reason to credit Drs. Simpao and Mettu over Dr. Fino on this point." *Id*. Hence, the administrative law judge found that claimant did not establish total respiratory disability through a reasoned medical opinion.

Because we herein vacate the administrative law judge's finding that the pulmonary function study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), we also vacate the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv)[15] and remand the case for further consideration of all the medical opinion evidence in accordance with the APA.

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provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[15] Because Dr. Simpao's disability opinion was based, in part, on the November 18, 2004 pulmonary function study, the validity of this study affects the credibility of the doctor's opinion.

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Finally, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the opinions of Drs. Simpao, Repsher, and Fino. In a report dated November 29, 2004, Dr. Simpao opined that claimant has a pulmonary impairment related to coal dust exposure. Director's Exhibit 12. Further, during a deposition dated September 11, 2006, Dr. Simpao opined that claimant has an obstructive airway disease related to coal dust exposure. Claimant's Exhibit 1 (Dr. Simpao's Depo. at 21). By contrast, in a report dated June 28, 2005, Dr. Repsher opined that claimant does not have a pulmonary or respiratory disease or condition caused, or aggravated, by coal mine dust. Employer's Exhibit 1. Similarly, in a report dated August 16, 2006, Dr. Fino opined that coal mine dust did not cause, or contribute to, any respiratory impairment. Employer's Exhibit 2.

In considering Dr. Simpao's opinion at Section 718.202(a)(4), the administrative law judge stated that, "[w]hereas I previously found that Dr. Simpao's opinion was well[-]reasoned, I now find otherwise, because it is largely based on the disputed pulmonary function studies [sic] of November 18, 2004." 2010 Decision and Order on Second Remand at 4. The administrative law judge then stated that, "[a]s a result, I do not accept that [c]laimant has established either clinical or legal pneumoconiosis." *Id*.

Because the validity of the November 18, 2004 pulmonary function study affects the credibility of Dr. Simpao's opinion that claimant has legal pneumoconiosis, and because we herein vacate the administrative law judge's finding that the pulmonary function study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), we also vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). If reached on remand, the administrative law judge must consider all of the medical opinion evidence in accordance with the APA.

Furthermore, if reached, on remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[16] *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997);

[16] Section 718.204(c)(1) provides that:

Adams v. Director, OWCP, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge must specifically consider whether legal pneumoconiosis contributed to claimant's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).[17]

Accordingly, the administrative law judge's Decision and Order on Second Remand denying benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

[17] The Board has affirmed the administrative law judge's prior finding that claimant failed to establish the existence of clinical pneumoconiosis. *J.E.R.* [*Russelburg*], BRB No. 07-0370 BLA, slip op. at 2 n.1.

BOGGS, Administrative Appeals Judge, concurring:

I concur with the majority's decision to vacate the administrative law judge's Decision and Order on Second Remand denying benefits and to remand the case for further consideration of the evidence with respect to the issue of whether claimant is totally disabled due to pneumoconiosis based on the existence of an obstructive pulmonary disorder. However, because it is supported by substantial evidence, I would affirm the administrative law judge's determination that the medical opinion and pulmonary testing evidence did not establish total disability based on the existence of a restrictive pulmonary impairment.

The administrative law judge permissibly credited Dr. Simpao's testimony that a subsequent diffusing test which produced normal results would tend to rule out the existence of a restrictive impairment. The administrative law judge also permissibly credited the evidence that a subsequent unimpeached and unrebutted diffusing test conducted by Dr. Repsher produced normal results, as determined by a qualified physician. Further, the administrative law judge acted within his discretion in relying on Dr. Simpao's testimony, in conjunction with the unimpeached and unrebutted subsequent normal diffusing test credibly reported by Dr. Repsher, to find that claimant did not establish the existence of a totally disabling *restrictive* pulmonary impairment. In so doing, the administrative law judge permissibly relied on the medical judgment of Dr. Simpao, in conjunction with the unimpeached and unrebutted results of the medical diffusing testing reported by Dr. Repsher, and did not substitute his judgment for that of the medical professionals. Moreover, this conclusion did not rest on the validity of the pulmonary function study evidence, but rather on Dr. Simpao's medical judgment as to the proper medical diagnostic conclusion to be drawn from the results of the medical testing, assuming that the pulmonary function test was properly conducted. *See* 20 C.F.R. §718.204(b)(2) ("*In the absence of contrary probative evidence*, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability").

However, as claimant points out, Dr. Simpao also diagnosed a totally disabling *obstructive* pulmonary impairment, and the administrative law judge failed to analyze and resolve the conflicting testimony as to the validity of the pulmonary function testing and other medical evidence concerning the existence of a totally disabling pulmonary or respiratory impairment which was not restrictive in nature.[18] Therefore, I would vacate

[18] Although the administrative law judge noted that Dr. Mettu had found that the pulmonary function study conducted by Dr. Simpao was valid, while Dr. Fino found to the contrary, and also cited Dr. Fino's statement that Dr. Simpao's finding of cyanosis on physical examination could not be reconciled with normal blood oxygen levels, he did

the administrative law judge's finding that the medical opinion evidence did not establish total disability based on the existence of an *obstructive* pulmonary impairment, and remand the case to the administrative law judge for further consideration with respect to that issue.

JUDITH S. BOGGS
Administrative Appeals Judge

not explain the bases on which he reconciled the inconsistencies in the evidence to find that no valid spirometry had been proffered and that Dr. Simpao's opinion with respect to the existence of a totally disabling *obstructive* disorder could not be credited. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).