BRB No. 07-0420 BLA

D.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARLAN CUMBERLAND COAL COMPANY	)	
	)	
	)	
and	)	DATE ISSUED: 02/29/2008
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
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 of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-6824) of Administrative Law Judge Ralph A. Romano (the administrative law judge) 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). Claimant filed his claim for benefits on September 3, 2003. Director's Exhibit 2. The administrative law judge accepted the

parties' stipulation that claimant has sixteen years of coal mine employment,[1] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but found that the medical opinion evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). Further, the administrative law judge found claimant entitled to the rebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305(a), and found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, employer argues that the administrative law judge erred in applying the rebuttable presumption of 20 C.F.R. §718.305, because Section 718.305 applies only to claims filed before January 1, 1982. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed 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 into the Act 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 that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Initially, employer contends that the administrative law judge, having found that the x-ray evidence did not establish pneumoconiosis, erred in finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer argues that substantial evidence does not support the

[1] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 5, 6A, 17. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge's determination that Drs. Simpao and Rosenberg relied on more than their own x-ray readings to diagnose pneumoconiosis. The administrative law judge considered the reports of Drs. Simpao, Rosenberg, and Broudy. Drs. Simpao, Rosenberg, and Broudy opined that claimant has coal workers' pneumoconiosis. Director's Exhibit 10; Employer's Exhibits 2, 8. The administrative law judge determined that the opinions of Drs. Simpao and Rosenberg were entitled to substantial weight, because they were well-reasoned and well-documented. Decision and Order at 7-8. Conversely, the administrative law judge determined that Dr. Broudy's opinion was entitled to no weight, because it was not documented. *Id*. at 8. The administrative law judge therefore found that the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4).

Employer argues that Dr. Simpao's opinion was not well-reasoned and well-documented, because it was based solely on a chest x-ray interpretation. The administrative law judge stated that "Dr. Simpao based his conclusion on [c]laimant's coal mine employment, smoking history, physical examination, chest [x]-ray, and objective medical testing." Decision and Order at 8. The administrative law judge additionally stated that "[a]lthough Dr. Simpao relied, in part, on a positive interpretation of an [x]-ray that I have found to be negative for pneumoconiosis, the physician also relied on the physical examination and complaints reported by [c]laimant." *Id*. However, in the cardiopulmonary diagnosis section of a Department of Labor (DOL) medical report, Dr. Simpao diagnosed only "CWP 3/2."[2] Director's Exhibit 10. This was Dr. Simpao's reading of claimant's October 2, 2003 x-ray, which the administrative law judge found to be negative for pneumoconiosis. Decision and Order at 5. Besides the positive chest x-ray interpretation, no other basis was expressly provided for Dr. Simpao's diagnosis of coal worker's pneumoconiosis. Because the administrative law judge did not explain why he found that Dr. Simpao's diagnosis of coal workers' pneumoconiosis was otherwise based on a coal mine employment history, a smoking history, a physical examination, and objective tests, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the basis for Dr. Simpao's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer also argues that the administrative law judge erred in failing to address the discrepancy between the length of coal mine employment found by the administrative law judge and that noted by Dr. Simpao. While the administrative law judge credited

[2] The cardiopulmonary diagnosis section of the Department of Labor medical report instructed Dr. Simpao to provide the bases for his diagnoses. Director's Exhibit 10.

claimant with sixteen years of coal mine employment, Decision and Order at 2, Dr. Simpao noted a coal mine employment history of twenty-three and one-half years. Director's Exhibit 10. If, on remand, the administrative law judge determines that Dr. Simpao's diagnosis of coal workers' pneumoconiosis was based, in part, on the coal mine employment history noted in his report, then he must explain the effect of the discrepancy in the length of the coal mine employment histories noted by the administrative law judge and Dr. Simpao. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989).

Employer further argues that Dr. Rosenberg's diagnosis of pneumoconiosis was not well-reasoned and well-documented, because it was based only on a positive chest x-ray interpretation. In his report, Dr. Rosenberg summarized claimant's heart disease history, symptoms, smoking and coal mine employment histories, pulmonary function study results, arterial blood gas study results, and lung examination. Dr. Rosenberg further stated:

> Based on a review of the above information, it can be appreciated that [claimant's] TLC was 105% [of] predicted, so clearly he does not have restriction. In addition, his diffusing capacity corrected for lung volumes was normal, which indicates the alveolar capillary bed within his lungs is intact. Also, on auscultation of his chest, his lung fields were clear, without the presence of chronic end-inspiratory rales. Finally, on inspection of his chest [x]-ray, he did have category 1 micronodular changes. Clearly, when all the above information is looked at in total, [claimant] has simple CWP, without large opacity formation.

Employer's Exhibit 8.

In finding that Dr. Rosenberg's opinion was well-reasoned and well-documented, the administrative law judge stated that "[t]he physician relied on the physical examination, prior medical records, and objective medical testing." Decision and Order at 8. However, as employer notes, it is unclear how the physical examination and objective tests that were noted in Dr. Rosenberg's report support his diagnosis of simple coal workers' pneumoconiosis.[3] Employer's Exhibit 8. Therefore, on remand, the administrative law judge should explain his determination that Dr. Rosenberg's diagnosis was based on more than an x-ray reading. *See Rowe*, 710 F.2d at 254, 5 BLR at 2-103.

[3] As noted, Dr. Rosenberg observed that the physical examination revealed that claimant's lungs were clear. Employer's Exhibit 8. Dr. Rosenberg also observed that the pulmonary function study revealed no obstruction or restriction. Lastly, Dr. Rosenberg observed that the arterial blood gas study revealed that claimant's oxygenation was preserved. *Id*.

Next, employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability at Section 718.204(b)(2)(iv). Dr. Simpao opined that claimant has a total impairment, Director's Exhibit 10, while Dr. Rosenberg opined that from a pulmonary perspective claimant could perform his previous coal mining job or other similarly arduous types of labor. Employer's Exhibit 8. Similarly, Dr. Broudy opined that claimant retained the respiratory capacity to do his previous work or work requiring similar effort. Employer's Exhibit 2.

The administrative law judge determined that Dr. Simpao's opinion was entitled to substantial weight, because it was well-reasoned and well-documented. Decision and Order at 11. The administrative law judge also determined that the opinions of Drs. Rosenberg and Broudy were entitled to little weight, because they were not reasoned. *Id*. Further, the administrative law judge determined that claimant's testimony and coal mine employment history supported Dr. Simpao's opinion that claimant was totally disabled. *Id*. at 11-12. Hence, the administrative law judge found that the medical opinion evidence established total disability at Section 718.204(b)(2)(iv). *Id*. at 12.

Employer argues that Dr. Simpao's opinion does not establish total disability, because Dr. Simpao failed to explain how he concluded that claimant has a total impairment. Based on Dr. Simpao's opinion that claimant has a "total impairment," Director's Exhibit 10, the administrative law judge inferred that Dr. Simpao was of the opinion that claimant was totally disabled and cannot perform his previous coal mine employment. Decision and Order at 11. In finding that Dr. Simpao's opinion was well-reasoned and well-documented, the administrative law judge stated that "Dr. Simpao relied on the physical examination, [c]laimant's coal mine employment history, and [c]laimant's symptoms in reaching his conclusion." *Id*. In addition, the administrative law judge stated that "Dr. Simpao also noted [c]laimant cannot walk more than seventy five feet before experiencing shortness of breath." *Id*. However, as employer argues, Dr. Simpao noted only that claimant has a total impairment. Director's Exhibit 10. Dr. Simpao did not explain why he found that claimant has a total impairment. *Id*. Further, without additional explanation by the administrative law judge, it is unclear how the objective tests or symptoms that Dr. Simpao may have relied on supported his diagnosis of total impairment.[4] *See Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Because the administrative law judge did not adequately explain why he found that Dr. Simpao's disability opinion was well-reasoned and well-documented, we vacate the administrative law judge's finding that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case

[4] The record reflects that Dr. Simpao interpreted claimant's ventilatory study as "normal," and interpreted claimant's blood gas study as revealing "a ventilatory perfusion mismatch." Director's Exhibit 10 at 25.

for further consideration of Dr. Simpao's opinion. *See Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165.

Employer further argues that the administrative law judge erred in finding that Dr. Broudy did not explain the basis for his belief that the miner was not totally disabled. Dr. Broudy concluded that there was no evidence of a disabling respiratory impairment. Employer's Exhibit 2. Dr. Broudy noted that claimant's spirometry was normal, and that his arterial blood gases showed moderate hypoxemia. *Id*. Based on a determination that claimant's lung function testing was "virtually" normal, Dr. Broudy opined that claimant did not have a chronic lung disease that was significantly related to coal dust exposure. *Id*. Dr. Broudy then stated that "[t]here was some diminution in the diffusing capacity and hypoxemia that could be related to coal dust exposure, but I do not believe that he is totally disabled." *Id*. The administrative law judge determined that Dr. Broudy failed to explain why the objective testing that showed diminution in diffusing capacity and hypoxemia was not significant, in concluding that claimant was not totally disabled. Decision and Order at 11. Whether a medical report is adequately reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*). Because the administrative law judge acted within his discretion in finding that Dr. Broudy's opinion was not well-reasoned, *see Clark*, 12 BLR at 1-155, we reject employer's argument that administrative law judge erred in finding that Dr. Broudy failed to explain the basis for his belief that the miner was not totally disabled. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113.

Employer additionally argues that the administrative law judge erred in finding that Dr. Rosenberg failed to explain why he found that claimant was not totally disabled. Dr. Rosenberg opined that from a pulmonary perspective claimant could perform his previous coal mining job or other similarly arduous types of labor. Employer's Exhibit 8. The administrative law judge stated that "Dr. Rosenberg did not explain the basis for his [disability] opinion." Decision and Order at 11. Contrary to the administrative law judge's finding, Dr. Rosenberg explained that from a pulmonary perspective claimant could perform his previous coal mining job, because the pulmonary function test did not reveal any obstruction or restriction, the diffusing capacity measurement was normal, and the blood gas test revealed preserved oxygenation. Employer's Exhibit 8. Because the administrative law judge mischaracterized Dr. Rosenberg's opinion, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), the administrative law judge erred in finding that Dr. Rosenberg's opinion was entitled to little weight.

Finally, employer contends that the administrative law judge erred in applying the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305. We agree. The administrative law judge noted that claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305. The

administrative law judge also noted that while employer offered the opinions of Drs. Rosenberg and Broudy, "both physicians concluded [c]laimant is not totally disabled and thus did not offer opinions on the etiology of [c]laimant's total disability." Decision and Order at 12. The administrative law judge additionally noted that employer offered no other evidence to rebut the presumption at 20 C.F.R. §718.305. Consequently, the administrative law judge concluded that the evidence established total disability due to pneumoconiosis. However, as employer argues, the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305 does not apply to claims filed on or after January 1, 1982. *See* 20 C.F.R. §718.305(e). The instant claim was filed on August 28, 2003. Director's Exhibit 2. Because the administrative law judge erred in applying the presumption at 20 C.F.R. §718.305, we vacate the administrative law judge's finding thereunder and remand the case for further consideration of whether claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), if that issue is reached.

On remand, the administrative law judge must consider all of the medical opinion evidence to determine whether or not claimant has met his burden of establishing total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See 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 awarding benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge