BRB No. 07-0439 BLA

S.N.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/29/2008
	)	
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 Awarding Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-BLA-06674) of Administrative Law Judge Paul H. Teitler 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). The administrative law judge credited claimant with eighteen years of coal mine employment, based on the parties' stipulation, and adjudicated this claim, filed on June 27, 2003, pursuant to the regulations contained

in 20 C.F.R. Part 718.[1] The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge further found the evidence sufficient to establish that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). The administrative law judge also found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer raises multiple challenges to the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), asserting that the administrative law judge erred in his evaluation of the medical opinions. Employer also challenges the administrative law judge's findings that the blood gas studies and the medical opinions were sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and that total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal. Employer filed a reply to claimant's response brief, reiterating its prior contentions.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grills 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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

[1] Claimant's employment records suggest that he worked as a miner in both Virginia and Kentucky. Director's Exhibits 5, 19 at 7. The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last eighteen years of coal mine employment were in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 5, 19 at 7.

[2] Because the administrative law judge's length of coal mine employment determination and his findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), are not challenged on appeal, we affirm those findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*).

The evidence relevant to 20 C.F.R. §718.202(a)(4) consists of the medical opinions of Drs. Powell, Baker, Repsher, and Broudy. Dr. Powell examined claimant and interpreted the chest x-ray that he obtained as positive for simple coal workers' pneumoconiosis. Director's Exhibit 10. Based upon claimant's pulmonary function study, Dr. Powell diagnosed a mild obstructive ventilatory defect with hyperinflation and identified smoking as the cause. He also diagnosed a minimal fine interstitial infiltrate in the mid and lower lung zones and moderate hypoxemia. Dr. Powell indicated that the cause of the latter conditions was unknown, but that the hypoxemia was possibly due to the interstitial disease. *Id.* Dr. Baker, claimant's treating physician, determined that claimant's chest x-ray was positive for simple coal workers' pneumoconiosis and diagnosed chronic bronchitis, a restrictive ventilatory defect, and hypoxemia, based on claimant's pulmonary function and blood gas studies. Claimant's Exhibit 1. Dr. Baker attributed these conditions to claimant's "30-year history of smoking as well as his 30-year history of coal dust exposure in a non-definable percentage." *Id.* Dr. Repsher examined claimant and did not diagnose any respiratory disease either caused or aggravated by dust exposure in coal mine employment. Director's Exhibits 14, 15. Based upon claimant's blood gas studies, Dr. Repsher found "nonqualifying" hypoxemia "which may well be due to" left ventricular congestive heart failure. *Id.* Dr. Broudy examined claimant and diagnosed chronic obstructive asthma, unrelated to coal dust exposure. Employer's Exhibits 1-3.

After summarizing the physicians' findings, the administrative law judge stated that:

> [T]he diagnoses of hypoxemia, possibly caused by coal mine employment, [are] sufficient to meet [c]laimant's burden of establishing a chronic obstructive or restrictive lung disease arising out of coal mine employment. Weighing all of the evidence together, I find that [c]laimant has established the presence of pneumoconiosis.

Decision and Order at 6. Employer argues that the administrative law judge did not properly weigh the relevant evidence in finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4).[3] We agree.

[3] Pursuant to 20 C.F.R. §718.201(a)(2), (b):

> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive

As employer suggests, by determining that "the diagnoses of hypoxemia, *possibly* caused by coal mine employment" were sufficient to establish the existence of legal pneumoconiosis, the administrative law judge applied a burden of proof that did not require claimant to prove, by a preponderance of the evidence, that he actually has legal pneumoconiosis. Decision and Order at 6 (emphasis supplied). The administrative law judge's finding under 20 C.F.R. §718.202(a)(4) does not conform, therefore, to the Administrative Procedure Act (APA), which requires that the proponent of a rule or order has the burden of proof. 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 67, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 6 (emphasis supplied).

In addition, the basis for the administrative law judge's finding cannot be discerned from his Decision and Order or from the evidence that he summarized. Drs. Powell, Repsher, and Broudy did not attribute any of the conditions that they diagnosed to pneumoconiosis or coal dust exposure, but instead stated that the etiology was either unknown, possibly due to interstitial lung disease or left ventricular congestive heart failure, or unrelated to coal dust exposure. Director's Exhibits 10, 14, 15; Employer's Exhibits 1-3. Dr. Baker is the only physician who explicitly identified coal dust exposure or pneumoconiosis as a cause of claimant's respiratory conditions. Claimant's Exhibit 1. Employer is correct, however, in maintaining that the administrative law judge did not determine whether Dr. Baker's attribution of claimant's respiratory conditions to smoking and coal dust exposure was reasoned and documented, nor did he determine whether Dr. Baker's statement was sufficient to establish, as required under 20 C.F.R. §718.201(b), that claimant's respiratory conditions were "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The APA requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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,

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> pulmonary disease arising out of coal mine employment.… For purposes of this section, a disease "arising out of coal mine employment" includes 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(a)(2), (b).

1-165 (1989). Accordingly, we must vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4) and remand the case to the administrative law judge for reconsideration of this issue. *Wojtowicz*, 12 BLR at 1-165. In light of our decision to vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, we must also vacate his finding, at 20 C.F.R. §718.203(b), that claimant invoked the presumption that his pneumoconiosis arose out of coal mine employment and employer did not rebut it. Decision and Order at 6.

On remand, the administrative law judge must specifically address, under 20 C.F.R. §718.202(a)(4), whether each physician's opinion is reasoned and documented, and sufficient to satisfy claimant's burden of establishing the existence of legal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2), (b).[4] The administrative law judge must also set forth his findings, including the underlying rationale, in detail in accordance with the APA. If the administrative law judge finds that claimant has satisfied his burden of proof at 20 C.F.R. §718.202(a)(4), the administrative law judge must then reconsider the issue of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

Regarding the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), employer argues that the administrative law judge applied a mechanical approach in weighing the blood gas studies, as he relied upon the mere preponderance of the qualifying studies.[5] We find merit in employer's assertion. The administrative law judge determined that total disability was established, as three of the four tests produced qualifying values that showed significant hypoxemia. Decision and Order at 8; Director's Exhibits 10, 12, 15; Employer's Exhibit 1. Resolving conflicts by relying primarily upon the numerical superiority of one type of evidence is generally considered inappropriate, particularly in cases, such as the present one, where other factors are present that could assist in resolving the conflict. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Wetzel v.*

[4] A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Id*.

[5] A "qualifying" blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

Director, OWCP, 8 BLR 1-139 (1985). In this case, the two-to-three year gap between the qualifying studies obtained on March 23, 2002, October 1, 2003, and October 15, 2003, and the nonqualifying study obtained on May 11, 2005, is a factor that the administrative law judge did not address when weighing the blood gas study evidence. We vacate, therefore, the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2)(ii).

Employer further argues that because the administrative law judge's consideration of the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv) was dependent upon his finding at 20 C.F.R. §718.204(b)(2)(ii), we must also vacate the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer's contention has merit, as in rendering his finding with respect to the medical opinion evidence, the administrative law judge relied upon the opinions in which Drs. Powell and Baker diagnosed total disability based upon the qualifying blood gas studies that showed hypoxemia. Decision and Order at 11. In addition, we find merit in employer's contention that the administrative law judge did not properly address the medical opinions relevant to total disability causation under 20 C.F.R. §718.204(c). The administrative law judge addressed the issues of total disability and total disability causation together and found:

> While [claimant's] pulmonary condition has certainly been affected by his long and continued smoking history, two physicians have opined that his employment substantially contributed to this condition. It is that condition that has rendered [c]laimant disabled. I find the assertion by the other physicians that [c]laimant could return to work, notwithstanding the arterial blood gas results, somewhat befuddling. Accordingly, I find that [c]laimant has shown total disability on the basis of medical opinion.

Id. In rendering this finding, the administrative law judge did not actually resolve the conflict in the evidence regarding the cause of claimant's hypoxemia – he merely noted that two physicians opined that it substantially contributed to claimant's condition. *Id*. We vacate, therefore, the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv) and (c). *Wojtowicz*, 12 BLR at 1-165.

On remand, if the administrative law judge finds that claimant has established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b), he must reconsider whether the blood gas studies and medical opinions are sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iv). When weighing the blood gas studies of record, the administrative law judge must consider the significance of the two-to-three year gap between the qualifying tests and the nonqualifying test and explain his finding. In addressing the medical opinion evidence, the administrative law judge must determine

whether each medical opinion is reasoned and documented, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), setting forth the rationale underlying his findings, and then reach a conclusion as to whether the medical opinions demonstrate that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

After rendering a finding as to the evidence at 20 C.F.R. §718.204(b)(2)(ii) and (iv), the administrative law judge must then weigh all of the evidence relevant to total disability, like and unlike, and determine whether it is sufficient to establish total respiratory disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Fields*, 10 BLR 1-19; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). If the administrative law judge finds total disability established, he must reconsider whether claimant has established that pneumoconiosis is a substantially contributing cause of his total disability under 20 C.F.R. §718.204(c) by reasoned and documented medical opinion evidence. 20 C.F.R. §718.204(c); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610, 22 BLR 2-288, 2-303 (6th Cir. 2001), citing *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-186 (6th Cir. 1997)(a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and this case is remanded 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