BRB No. 08-0382 BLA

J.O.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 02/19/2009
	)	
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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (07-BLA-5065) of Administrative Law Judge Daniel F. Solomon rendered on a miner's 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). Upon stipulation of the parties, the administrative law judge credited claimant with forty-three years of coal mine employment, and adjudicated this claim, filed on November 2, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due

to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings that the evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) and total respiratory disability due to pneumoconiosis at Section 718.204(b)(2), (c). Claimant responds, urging affirmance of the award of benefits. Employer has replied in support of its position. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.[1]

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.[2] 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 under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Employer first challenges the administrative law judge's finding that the weight of the medical opinions of record was sufficient to establish legal pneumoconiosis at Section 718.202(a)(4). Employer contends that the administrative law judge failed to satisfy the duty of rational explanation imposed by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), by failing to provide any reason for crediting the opinion of Dr. Simpao,[3] which employer asserts is insufficient to satisfy claimant's burden, over the

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

[3] Dr. Simpao diagnosed coal workers' pneumoconiosis, noting that claimant's pulmonary function studies revealed a moderate degree of restrictive and obstructive airway disease, and that his arterial blood gases revealed mild hypoxemia. Dr. Simpao

contrary opinions of Drs. Repsher[4] and Fino,[5] "the admittedly best qualified doctors," that claimant does not suffer from clinical or legal pneumoconiosis. Employer's Brief at 7-12. Some of employer's arguments have merit. In evaluating the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge summarized the physicians' findings and acknowledged that Drs. Repsher and Fino possessed superior qualifications as Board-certified pulmonologists, but permissibly concluded that Dr. Simpao was "competent to render a diagnosis." Decision and Order at 9; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). The administrative law judge determined that Dr. Simpao's diagnosis of legal pneumoconiosis was based on his physical examination findings and laboratory test results that revealed restrictive and obstructive airway disease. While noting that Dr. Simpao admitted that claimant's subjective complaints could also be caused by other factors, including obesity, heart disease and smoking, and that a diffusion capacity that is within normal limits, such as that conducted by Dr. Repsher, may constitute evidence that claimant's respiratory problems could derive from an additional source, the administrative law judge concluded that "these possibilities do not undermine [Dr. Simpao's] logic," Decision and Order at 9, *i.e.*, that coal dust exposure was a "significant contributing factor in [claimant's] pulmonary impairment." Director's Exhibit 12 at 5. Finding that Drs. Repsher and Fino both agreed with Dr. Simpao that "there is some evidence of both restrictive and obstructive pulmonary problems, although they disagree as to [a] diagnosis of legal

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concluded that claimant's impairment was totally disabling, and was attributable to both coal dust exposure and smoking. Director's Exhibit 12; Claimant's Exhibit 3.

[4] Dr. Repsher determined that claimant did not suffer from any pulmonary or respiratory disease or condition either caused by, or aggravated by, coal dust exposure. Dr. Repsher determined that claimant was suffering from a number of serious diseases unrelated to coal dust exposure, including morbid obesity, untreated hypertension with probable decompensated hypertensive cardiovascular disease, and probable coronary artery disease, complicated by biventricular congestive heart failure, but that claimant had no objective pulmonary impairment. Dr. Repsher opined that claimant's pulmonary function studies were medically invalid due to his extreme morbid obesity, but stated that the diffusing capacity was normal and that the normal residual volume would rule out any clinically significant chronic obstructive disease. Further, Dr. Repsher concluded that the results of claimant's blood gas study were within normal limits when adjusted for age, altitude, and body habitus. Employer's Exhibit 1.

[5] Dr. Fino reviewed the medical evidence of record and opined that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis; that there was no respiratory impairment present; and that claimant was disabled due to non-pulmonary conditions, primarily obesity. Employer's Exhibit 3.

pneumoconiosis," the administrative law judge found Dr. Simpao's report and testimony to be "rational and therefore, reasoned," and sufficient to establish the existence of legal pneumoconiosis. Decision and Order at 9. The administrative law judge, however, has mischaracterized the opinions of Drs. Repsher and Fino, since both physicians agreed that claimant suffered from no chronic respiratory or pulmonary impairment or lung disease of any kind. Employer's Exhibits 1, 3. Further, the administrative law judge failed to explain why Dr. Simpao's opinion was more rational, reasoned and entitled to greater weight than the opinions of Drs. Repsher and Fino. While we reject employer's contention that Dr. Simpao's opinion is insufficient to support a finding of legal pneumoconiosis, we must vacate the administrative law judge's findings at Section 718.202(a)(4), as his analysis mischaracterizes relevant evidence and does not comport with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Consequently, we remand this case for the administrative law judge to reassess the conflicting medical opinions of record and provide a thorough analysis and explanation of his credibility determinations at Section 718.202(a)(4). Furthermore, because the administrative law judge relied upon his findings on the issue of legal pneumoconiosis in assessing the weight to be accorded to the conflicting medical opinions on the issue of disability causation, we also vacate his findings at Section 718.204(c) for a reevaluation and weighing of the evidence thereunder on remand, if reached.

Regarding the issue of total disability, employer contends that the administrative law judge failed to provide a rational, APA-compliant explanation for resolving conflicts in the proof. Specifically, employer argues that the administrative law judge failed to render any findings with respect to the pulmonary function studies or blood gas studies of record at Section 718.204(b)(2)(i), (ii), failed to provide valid reasons for discounting the opinions of Drs. Repsher and Fino at Section 718.204(b)(2)(iv), and confused the issue of total respiratory disability with the issue of disability causation. Employer's Brief at 12-15. Employer's arguments have merit. Despite noting that, pursuant to Section 718.204(b), "all relevant evidence . . . must be weighed," Decision and Order at 10, the administrative law judge failed to render explicit findings regarding the pulmonary function study and blood gas study evidence of record, and failed to weigh all relevant evidence together, like and unlike. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Rather, the administrative law judge weighed only the medical opinions of record, after noting claimant's argument that "pulmonary function studies verify that [claimant] has a qualifying disability under the Federal Regulations," and finding that "[t]his evidence is in dispute and I do not attribute conclusive weight to it." Decision and Order at 10. As the administrative law judge is charged with resolving conflicts in the evidence, and as the reliability of the objective evidence underlying a medical report is a factor that must be considered in assessing the weight of a physician's opinion, we vacate the administrative law judge's finding of total disability at Section 718.204(b)(2). *Cf.*

Director, OWCP v. Rowe, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1989); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). On remand, the administrative law judge must weigh the conflicting evidence regarding the validity of the objective tests, provide a rationale for his crediting or discrediting of the evidence, and determine whether the weight of the pulmonary function studies and blood gas studies of record is sufficient to establish total disability at Section 718.204(b)(2)(i), (ii).

We also agree with employer's argument that the administrative law judge failed to provide valid reasons for discounting the opinions of Drs. Repsher and Fino at Section 718.204(b)(2)(iv). The administrative law judge found that "Dr. Repsher's logic is flawed as to total disability" because "although Dr. Repsher described a history of 'severe heart failure' as the reason why he did not perform exercise testing, the record does not otherwise establish a history of congestive heart failure or any severe heart defect." Decision and Order at 10. No physician of record conducted exercise testing,[6] however, and Dr. Repsher's failure to do so is not relevant to the issue of whether claimant suffers a totally disabling pulmonary or respiratory impairment. Further, contrary to the administrative law judge's findings, Dr. Repsher did not describe a "history" of severe heart failure, but appears to have diagnosed the condition based on evidence of coronary artery disease on CT scan and an electrocardiogram showing incomplete right bundle branch block.[7] Employer's Exhibit 1.

The administrative law judge also found that Dr. Fino's report was entitled to less weight because "it is derivative, as he did not examine the Claimant and relies in part on Dr. Repsher's report and conclusions, especially as to the alleged heart condition." Decision and Order at 10. However, Dr. Fino, based upon his review of the medical reports and objective tests obtained by Drs. Simpao and Repsher, made no mention of any heart condition, but opined that claimant was disabled by his morbid obesity and had no respiratory impairment, defined as an intrinsic problem in the lungs causing an abnormality in lung function.[8] Employer's Exhibit 3. While the administrative law judge

[6] Dr. Simpao's blood gas study report noted that exercise testing was medically contraindicated due to claimant's high blood pressure. Director's Exhibit 12 at 35. Dr. Repsher additionally diagnosed hypertension with probable hypertensive cardiovascular disease, decompensated. Employer's Exhibit 1.

[7] Dr. Simpao also obtained an electrocardiogram reporting "First degree AV block." Director's Exhibit 12 at 37.

[8] The administrative law judge additionally stated, incorrectly, that "both [Drs. Repsher and Fino] assert that [claimant] is totally disabled due to morbid obesity," Decision and Order at 10, when, in fact, Dr. Repsher opined that claimant, with no

correctly noted that the amended regulatory provisions do not preclude entitlement if the miner suffers from a combination of disabling conditions, *see* Decision and Order at 11, claimant must still establish the presence of a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work or similar employment. 20 C.F.R. §718.204(a), (b)(1).

As the administrative law judge's findings at Section 718.204(b)(2)(i), (ii) may affect his weighing of the medical opinions, and as substantial evidence does not support the administrative law judge's credibility determinations at Section 718.204(b)(2)(iv), we vacate his findings thereunder. On remand, the administrative law judge must reassess and weigh the medical opinions of record in light of their reasoning and documentation, provide an analysis that complies with the provisions of the APA, and then weigh all relevant evidence together, like and unlike, in determining whether claimant has established total respiratory disability at Section 718.204(b)(2). *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Fields*, 10 BLR 1-19.

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objective pulmonary impairment, was able to perform his usual coal mine work from a respiratory standpoint, and the physician did not indicate whether claimant was disabled from another cause. Employer's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is affirmed in part and 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