BRB No. 08-0475 BLA

O.D.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAINBOW VALLEY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/25/2009
	)	
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 – Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, 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 – Awarding Benefits (07-BLA-5261) of Administrative Law Judge Ralph A. Romano 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 eleven years and four months 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, although claimant did not establish the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3), claimant established the existence of legal pneumoconiosis,[2] in the form of chronic bronchitis and obstructive lung disease arising out of coal mine employment, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further determined that claimant established the existence of a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2), and that his totally disabling impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that the evidence establishes the existence of pneumoconiosis under Section 718.202(a)(4) and that claimant is totally disabled due to pneumoconiosis under Section 718.204(b)(2),(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[3] Employer has filed a reply brief reiterating its allegations of error.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that

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

[2] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eleven years and four months of qualifying coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Relevant to Section 718.202(a)(4), the administrative law judge considered three medical opinions. Dr. Baker diagnosed claimant with chronic obstructive pulmonary disease (COPD) and chronic bronchitis attributable to both coal dust exposure and cigarette smoking. Director's Exhibit 19. Dr. Alam attributed claimant's severe emphysema and chronic bronchitis to tobacco abuse and coal dust exposure. Director's Exhibit 26. Dr. Jarboe opined that claimant's respiratory condition was caused by bronchial asthma unrelated to coal mine employment, and cigarette smoking. Director's Exhibits 22, 24; Employer's Exhibit 2. Finding the opinions of Drs. Baker and Alam to be better reasoned, the administrative law judge credited their opinions over that of Dr. Jarboe. The administrative law judge explained that Dr. Alam's opinion merited "controlling weight" because "[c]laimant testified that Dr. Alam was his treating physician," and because Dr. Alam's report was well-documented and reasoned. Decision and Order at 12. The administrative law judge further found that Dr. Baker's opinion was well-reasoned because it was supported by its underlying documentation. By contrast, the administrative law judge found that Dr. Jarboe's opinion was inadequately reasoned because Dr. Jarboe failed to explain how he ruled out coal dust exposure "as a potential etiology or aggravating factor" in claimant's chronic bronchitis. *Id*. at 12-13.

Employer initially asserts that the administrative law judge erred in finding Dr. Alam's diagnosis of legal pneumoconiosis to be reasoned, where it is unclear whether Dr. Alam based his opinion on an accurate coal mine employment history. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Employer's Brief at 13-14. We agree. As employer asserts, although Dr. Alam was aware that claimant had only nine to eleven years of documented coal mine employment, Dr. Alam noted that claimant reported a thirty-five-year coal mine employment history, and Dr. Alam indicated that since claimant stated "that he worked all his life in coal mines," Dr. Alam would give claimant the benefit of the doubt as to the length of his coal mine employment. Director's Exhibit 26-5. Further, although the administrative law judge found that Dr. Alam's diagnosis of legal pneumoconiosis was based on a history of nine and one-half years of coal mine employment, Decision and Order at 13, it is unclear from the administrative law judge's decision how he reached this finding. *See* 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, we vacate the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4), and remand this case for further

consideration. On remand, the administrative law judge must address whether Dr. Alam's opinion is based on an accurate coal mine employment history, and explain his credibility determination. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

We further find merit in employer's assertion that the administrative law judge mechanically accorded "controlling weight" to Dr. Alam's opinion as that of a treating physician. Decision and Order at 12; Employer's Brief at 13. The administrative law judge did not credit Dr. Alam's opinion based on its power to persuade, nor did he address any of the criteria outlined in 20 C.F.R. §718.104(d) for assessing the opinion of a treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003); Employer's Brief at 13. Therefore, in considering the probative value of Dr. Alam's opinion on remand, the administrative law judge must reconsider whether Dr. Alam's opinion is entitled to additional weight based on the factors identified under Section 718.104(d), consistent with *Williams*. Further, the administrative law judge must explain his findings. *See Wojtowicz*, 12 BLR at 1-165.

Employer also validly contends that the administrative law judge erred in failing to explain his finding that Dr. Alam's opinion was well-documented. As employer states, Dr. Alam did not specify the date of the pulmonary function study that he relied on, and it is unclear whether the study is valid or contained in the record. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Employer's Brief at 14; Director's Exhibit 26. Consequently, the administrative law judge must also reconsider whether Dr. Alam's opinion is well-documented, and explain his findings.

Employer argues further that the administrative law judge erred in finding Dr. Baker's opinion to be reasoned, when the opinion may have been based on invalid pulmonary function studies. Employer's Brief at 11. We agree. Although the administrative law judge found the April 6, 2006 and May 25, 2006 pulmonary function studies that Dr. Baker relied upon to be valid, as will be discussed below, we must vacate the administrative law judge's findings regarding the validity of the pulmonary function studies pursuant to Section 718.204(b)(2)(i). Consequently, the administrative law judge must reconsider whether Dr. Baker's opinion is adequately reasoned and documented, and explain his findings on remand. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, in the interest of judicial economy, and to avoid any repetition of error, we instruct the administrative law judge to address whether Dr. Baker relied on an accurate coal mine employment history when he diagnosed claimant with legal pneumoconiosis. *See Creech*, 841 F.2d at 709, 11 BLR at 2-91.

We additionally find merit in employer's contention that the administrative law judge erred in discounting Dr. Jarboe's opinion for failing to explain how he ruled out coal dust exposure as a potential cause of claimant's bronchitis. It is not employer's burden to rule out the existence of pneumoconiosis. *Williams*, 338 F.3d at 515, 22 BLR

at 2-651; Employer's Brief at 16. Further, contrary to the administrative law judge's finding that Dr. Jarboe provided no explanation regarding the etiology of chronic bronchitis, the record contains Dr. Jarboe's explanation that "most coal miners will stop coughing after leaving the mining industry," while "a cigarette smoker with severe airflow obstruction[,] even though he has stopped smoking, can have persistent cough and mucus production." Employer's Exhibit 2 at 4; Employer's Brief at 14. The administrative law judge, on remand, must consider the probative value of Dr. Jarboe's reasoning, while maintaining the burden of proof on claimant to establish the existence of pneumoconiosis. *See Williams*, 338 F.3d at 515, 22 BLR at 2-651.

We reject, however, employer's assertion that the administrative law judge erred in failing to consider Dr. Naeye's report[4] as a medical report under Section 718.202(a)(4). Employer's Brief at 10. As claimant points out, employer designated and proffered Dr. Naeye's report as a biopsy report, not as a medical report. *See* 20 C.F.R. §725.414(a)(3)(i); Claimant's Brief at 10. The administrative law judge admitted and considered Dr. Naeye's report as a biopsy report pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 8; Claimant's Brief at 10. Contrary to employer's assertion, the administrative law judge did not abuse his discretion in considering Dr. Naeye's report in the manner in which employer designated it. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Relevant to Section 718.204(b)(2)(i), the administrative law considered four pulmonary function studies. Director's Exhibits 19, 21, 22. Because the April 16, 1991 pulmonary function study did not indicate claimant's height, the administrative law judge indicated that he was unable to determine whether the study was qualifying.[5] Decision and Order at 15. The remaining three studies, dated April 6, 2006, May 25, 2006, and June 2, 2006, were qualifying. Director's Exhibits 19, 22. Dr. Baker reported that claimant's effort was "fair" on the April 6, 2006 study and "good" on the June 2, 2006 study. Director's Exhibit 19. However, Dr. Burki reviewed the tracings for these studies,

[4] Dr. Naeye reviewed four biopsy slides along with additional medical evidence. Dr. Naeye stated that all of the biopsy slides contained "smeared cells" and that therefore it was not possible to identify the presence or absence of coal workers' pneumoconiosis by biopsy. Employer's Exhibit 3. Further, Dr. Naeye indicated that the lack of clinical pneumoconiosis on x-ray led him to conclude that coal workers' pneumoconiosis did not impair claimant's lung function, and that claimant's pulmonary impairment is likely due to smoking. *Id*.

[5] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(i),(ii).

and opined that the studies were invalid due to insufficient effort. *Id.* The administrative law judge credited Dr. Baker's opinion over that of Dr. Burki, because "Dr. Baker was present during the testing and actually observed Claimant's effort." Decision and Order at 15. Dr. Jarboe conducted the May 25, 2006 test, and opined that claimant's effort was "good." Director's Exhibit 22. Considering all of the pulmonary function studies together, the administrative law judge concluded that, "Because of the overwhelming majority of qualifying tests . . . the pulmonary function study evidence of record demonstrates total disability." Decision and Order at 15.

Employer contends that substantial evidence does not support the administrative law judge's determination to credit Dr. Baker's opinion over that of Dr. Burki pursuant to Section 718.204(b)(2)(i). Employer's Brief at 17. We agree. As employer contends, the administrative law judge did not explain his finding that Dr. Baker observed claimant's effort on the pulmonary function studies, where Dr. Baker's reports indicate that the tests were administered by a technician. Director's Exhibit 19; Employer's Exhibit 17. We therefore vacate the administrative law judge's finding that the pulmonary function study evidence established total disability. On remand, the administrative law judge must reconsider the validity of the April 6, 2006 and June 2, 2006 pulmonary function studies, and explain his findings. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge must then reconsider whether the pulmonary function study evidence as a whole demonstrates total disability under Section 718.204(b)(2)(i).

We additionally find merit in employer's assertion that the administrative law judge erred in finding that Dr. Alam's opinion established that claimant suffers from cor pulmonale with right-sided congestive heart failure under Section 718.204(b)(2)(iii). As employer asserts, the administrative law judge failed to explain his finding that Dr. Alam's diagnosis is reasoned and documented. Employer's Brief at 18. As employer further asserts, contrary to the administrative law judge's finding that Dr. Alam's diagnosis was based on "years of treatment," the record reflects that Dr. Alam treated claimant between May 2005 and August 2006. Director's Exhibit 26; Employer's Brief at 18. Consequently, we vacate the administrative law judge's finding under Section 718.204(b)(2)(iii). On remand, the administrative law judge must reconsider whether Dr. Alam's opinion constitutes a well-documented and reasoned diagnosis of cor pulmonale with right-sided congestive heart failure, and explain his findings. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability under Section 718.204(b)(2)(iv) because "[a]ll of the physicians opined that Claimant . . . is unable to work as a coal miner or [in] similar employment." Decision and Order at 16; Employer's Brief at 18. Employer's contention has merit. Contrary to the administrative law judge's finding, Dr.

Baker opined that claimant retains the respiratory capacity to return to his coal mine work. Director's Exhibit 19. Consequently, we must vacate the administrative law judge's finding and remand the case for him to properly characterize the medical opinion evidence, and reconsider whether claimant has established that he is totally disabled under Section 718.204(b)(2)(iv). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

On remand, after the administrative law judge considers whether the relevant evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), or (iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2).[6] *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*).

In light of our determination to vacate the administrative law judge's findings as to the existence of pneumoconiosis and total disability, we additionally vacate his finding that claimant established that pneumoconiosis is a substantially contributing cause of his total disability under Section 718.204(c). If reached on remand, the administrative law judge must again consider the relevant evidence on this issue and explain his credibility determinations pursuant to Section 718.204(c). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

[6] The administrative law judge determined that the blood gas study evidence did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 16.

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