BRB No. 09-0288 BLA

RONALD PREECE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TAURUS COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCY EMPLOYERS' MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 02/26/2010
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Sarah M. Hurley (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2008-BLA-5117) of Administrative Law Judge Larry S. Merck issued on a miner's claim filed on January 8, 2007, 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 accepted the parties' stipulation that claimant worked twenty-six years in coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but that he failed to establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in rejecting Dr. Rasmussen's diagnosis of pneumoconiosis as poorly reasoned pursuant to 20 C.F.R. §718.202(a)(4). Claimant also contends that the administrative law judge erred in finding the blood gas study evidence to be inconclusive and in rejecting Dr. Rasmussen's opinion that he is totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that "while Dr. Rasmussen's diagnosis of pneumoconiosis may be insufficient to establish legal pneumoconiosis under [20 C.F.R §]718.202(a)(4), it is a valid diagnosis of clinical pneumoconiosis." Director's Letter Brief at 2. The Director also contends that the administrative law judge erred in relying on Dr. Rosenberg's opinion to find that the blood gas study evidence was inconclusive and, therefore, insufficient to establish total disability.[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

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

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address claimant's contention that the administrative law judge erred in failing to find that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). The record consists of two conflicting medical reports by Drs. Rosenberg and Rasmussen. Dr. Rosenberg examined claimant on February 17, 2007, and recorded a work history of twenty-seven years of coal mine employment and a smoking history of one pack of cigarettes a day since 1972. Director's Exhibit 19. He obtained a chest x-ray, pulmonary function study and a resting arterial blood gas study.[3] Dr. Rosenberg interpreted the chest x-ray as negative for pneumoconiosis and the pulmonary function study as showing no significant obstruction and no restriction. He noted that claimant's diffusion capacity measurement was mildly reduced, and "this undoubtedly has been adversely affected by his markedly elevated carboxyhemoglobin level." *Id*. Dr. Rosenberg opined that claimant did not have clinical or legal pneumoconiosis, and that he had no restriction or significant obstruction. According to Dr. Rosenberg, claimant "could perform his previous coal mine job or other similarly arduous types of labor." *Id*.

Dr. Rasmussen conducted an examination of claimant on March 20, 2007, at the request of the Department of Labor. Director's Exhibit 11. He recorded a work history of twenty-seven years of coal mine employment and a smoking history of "[one] pack of cigarettes a day at most to the present time." *Id*. Dr. Rasmussen obtained a positive chest x-ray, a pulmonary function study, and an arterial blood gas study. He noted that the pulmonary function study was essentially normal, but that claimant had moderate resting hypoxemia and "marked loss of lung function as reflected principally by [claimant's] impairment in oxygen transfer with exercise." *Id*. According to Dr. Rasmussen, "[t]his degree of impairment would prevent [claimant's] performance of his regular coal mine employment." *Id*. Dr. Rasmussen diagnosed coal workers' pneumoconiosis, based on claimant's history of coal mine employment and x-ray, and chronic bronchitis, based on claimant's history of productive cough. He opined that claimant's pneumoconiosis was caused by coal dust exposure and that his chronic bronchitis was due to smoking and coal dust exposure. Dr. Rasmussen opined that coal dust exposure and smoking "combined to cause [claimant's] disabling lung disease." *Id*. Dr. Rasmussen further opined that coal dust exposure was a significant factor in claimant's total disability, noting that "[c]oal mine dust in contrast to cigarette smoke also caused diffuse interstitial fibrosis . . . which is felt by some authorities to be responsible for the frequent finding of impaired oxygen transfer absent clinical ventilatory impairment in many impaired miners." *Id*. Dr.

[3] Dr. Rosenberg indicated that he was unable to obtain an exercise blood gas study due to claimant's back injury. Director's Exhibit 13.

Rasmussen concluded that claimant had "clinical pneumoconiosis which is a material contributing cause of his disabling lung disease." *Id*.

On April 11, 2007, the Department of Labor asked Dr. Rasmussen to clarify whether claimant suffered from legal pneumoconiosis. Director's Exhibit 20. In a letter dated April 23, 2007, Dr. Rasmussen stated, that he "made a diagnosis of chronic obstructive lung disease and emphysema . . . based on the history of cough with phlegm production." Director's Exhibit 21. He explained that coal dust exposure and cigarette smoking cause similar symptoms of chronic bronchitis and opined that claimant has "legal pneumoconiosis because his chronic obstructive lung disease was caused in significant part by his coal mine dust exposure." Director's Exhibit 21.

Dr. Rosenberg later reviewed the results of Dr. Rasmussen's examination and addressed the differences in their blood gas study results in a letter dated June 6, 2007. Director's Exhibit 17. Dr. Rosenberg specifically stated:

> With respect to the oxygenation abnormality as outlined by Dr. Rasmussen, it should be appreciated that Dr. Rasmussen's blood gases were performed at a barometric pressure of 702mmHg. In contrast, the barometric pressure in Pikeville, Kentucky at the time of my evaluation was 749mm Hg. This difference in barometric pressure of approximately 47mmHg accounts for an approximately 10mmHg difference in [claimant's] PO2 value at the time of Dr. Rasmussen's evaluation compared to the PO2 value I obtained. Taking this into consideration, Dr. Rasmussen's decrement on oxygenation to a disabling level would not be considered disabling if this same blood gas had been performed in Pikeville, Kentucky on March 20, 2007.

Id. Dr. Rosenberg therefore reiterated his opinion that claimant was not totally disabled.

In weighing the evidence for total disability, the administrative law judge found that the two pulmonary function studies produced non-qualifying[4] results, that there was no evidence of cor pulmonale and, therefore, found that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(i), (iii).[5] The administrative law judge next

[4] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the applicable table values set out in tables at 20 C.F.R. Part 718 Appendix B, C. A "non-qualifying" study exceeds the values listed therein. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii).

[5] We affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), as those findings are unchallenged by the parties on appeal. *Skrack*, 6 BLR at 1-711.

addressed the blood gas study evidence and found that the February 15, 2007 study by Dr. Rosenberg "produced non-qualifying resting results, and did not include a post-exercise study," while the March 20, 2007 study by Dr. Rasmussen "produced qualifying values under the regulatory standards for disability, both at rest and after eight minutes of incremental treadmill exercise." Decision and Order at 18. The administrative law judge further stated:

> In a letter dated June 6, 2007, Dr. Rosenberg responded to the medical report of Dr. Rasmussen, and addressed the differences in their arterial blood gas studies. Dr. Rosenberg, a Board-certified pulmonologist, noted the variance in barometric pressure between his own study and that of Dr. Rasmussen. He further stated that any oxygenation abnormality of [c]laimant relates to a long and active smoking history, and excessive weight. He maintained that his own arterial blood gas study illustrates that [c]laimant is not totally disabled. *Id*. Weighing the results of the two studies, the relative qualifications of the doctors who performed the studies, and the analysis by Dr. Rosenberg in his June 6, 2007 letter, I find that the blood gas study evidence is inconclusive, and therefore does not establish total disability under [20 C.F.R. §718.204(b)(2(ii)].

Id. (citations omitted).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the medical opinions of Drs. Rosenberg and Rasmussen were well-reasoned but conflicting as to whether claimant was totally disabled. He stated, that "[w]eighing the reports together, and considering the relative qualifications of the two doctors, I find the medical opinions inconclusive as to the issue of total disability." *Id*. at 19. Thus, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and denied benefits.

Claimant asserts that Dr. Rosenberg's opinion, that the barometric pressure in Beckley, West Virginia, indicates that the [blood gas study] results secured by Dr. Rasmussen do not represent total disability, is contrary to the Act, insofar as the table value provided at Appendix C for establishing total disability under the regulations, specifically account for variations in barometric pressure. Claimant's Brief at 13; see *Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed.Appx. 551, 2004 WL 720254 (4th Cir. Apr. 5, 2004)(unpub.). The Director argues that the administrative law judge erred in failing to recognize that Dr. Rasmussen's qualifying "post-exercise results are unrebutted and were validated by Dr. Mettu." Director's Letter Brief at 3. The Director maintains that "Dr. Rosenberg's statement that the March 20, 2007 test results would not have evidenced disability if the atmospheric pressure had been equal to the pressure that existed in Pikeville, Kentucky when [Dr. Rosenberg] conducted his test is

merely a bald conclusion without explanation or scientific support." *Id*. at 4 n.4. We agree that the administrative law judge erred in his consideration of the blood gas study evidence.

The regulations provide that a miner "shall be found to be totally disabled, in the absence of rebutting evidence," if the evidence meets the standards of the arterial blood gas study values listed in Appendix C to Part 718.[6] There are three tables found at Appendix C: 1) For arterial blood gas studies performed at test sites up to 2,999 feet above sea level; 2) For arterial blood gas studies performed at test sites 3,000 to 5,999 feet above sea level; and 3) For arterial blood gas studies performed at test sites 6,000 feet or more above sea level. *Id*.

In this case, Dr. Rasmussen check-marked a box on Form CM-1159, indicating that his blood gas study was performed at an elevation up to 2,999 feet above sea level, and that the barometric pressure was 702. Director's Exhibit 11. The parties do not dispute that Dr. Rasmussen's resting and exercise blood gas study results are qualifying for total disability, based on the first table values found at Appendix C for elevations up to 2,999 feet.

An administrative law judge may properly consider a medical opinion detailing factors, such as a medical condition suffered by the miner, or circumstances surrounding the testing, that render a particular blood gas study unreliable for assessing total disability. *See Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1056 n.4, 13 BLR 2-372, 2-378-80 n.4 (10th Cir. 1990); *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (4th Cir. 1985); *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Cardwell v. Circle B Coal Co.*, 6 BLR 1-788 (1984). However, the administrative law judge must provide a rationale for preferring the opinion of the consulting physician, over that of an administering physician, as to the validity of a test. *See generally Siegel v. Director, OWCP*, 8 BLR 1-156 (1985).

In this case, the administrative law judge failed to explain how he weighed Dr. Rosenberg's opinion regarding Dr. Rasmussen's blood gas testing, given that Dr. Mettu validated Dr. Rasmussen's blood gas study results. Because the administrative law judge has not explained the basis for his finding that the blood gas study evidence is inconclusive, his Decision and Order does not comport with the Administrative Procedure Act (APA), which requires that the administrative law judge set forth the specific basis for his findings, and the rationale underlying his conclusions. 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)

[6] Blood gas studies shall report the altitude and barometric pressure at which the test was conducted. 20 C.F.R. §718.105.

and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, we vacate the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Moreover, to the extent that the administrative law judge's analysis of the blood gas study evidence also influenced his determination that the medical opinion evidence is inconclusive, and thereby insufficient to establish total disability, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for further consideration as to whether claimant is totally disabled.

In light of our decision to remand this case, we further address, in the interest of judicial economy, claimant's assertion that the administrative law judge erred in finding Dr. Rasmussen's opinion to be insufficient to establish either the existence of clinical or legal pneumoconiosis.[7] Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that because Dr. Rasmussen stated in his medical report of March 20, 2007, and his letter of April 23, 2007, that he "expressly relied on a positive x-ray and work history in making a diagnosis of clinical pneumoconiosis," his opinion "regarding clinical pneumoconiosis [was] not sufficiently reasoned" and, therefore, was entitled to little weight. Decision and Order at 13; *see* Director's Exhibits 11, 12. The administrative law judge also found that Dr. Rasmussen's opinion as to the existence of legal pneumoconiosis was entitled to little weight because Dr. Rasmussen "did not correlate his finding of legal pneumoconiosis with objective medical evidence other than [c]laimant's symptom of chronic productive cough." Decision and Order at 14. Thus, the administrative law judge concluded that claimant failed to satisfy his burden of

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[7] Pursuant to 20 C.F.R. §718.201(a)(1):

> Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "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(b).

proving the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant contends that the administrative law judge erred in rejecting Dr. Rasmussen's opinion pursuant to 20 C.F.R. §718.202(a)(4), as Dr. Rasmussen's diagnosis of clinical pneumoconiosis is in accord with the administrative law judge's finding that the weight of the x-ray evidence established that claimant has clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[8] In addition, the Director asserts that the administrative law judge erred in rejecting Dr. Rasmussen's opinion and explains:

> Contrary to the [administrative law judge's] finding, Dr. Rasmussen's diagnosis of clinical pneumoconiosis is not undermined by the fact that it was based solely on x-ray evidence and work history. Section 718.202(a)(1) permits a finding of pneumoconiosis based on a positive x-ray reading . . . and an x-ray classified as category 1 or greater establishes the existence of pneumoconiosis, 20 C.F.R. §718.201(b). It is only when a doctor's diagnosis of pneumoconiosis is viewed under [20 C.F.R. §]718.202(a)(4) – the medical opinion provision allowing proof of legal pneumoconiosis – that courts and the Board have held "that a mere restatement of an x-ray should not count as a reasoned medical judg[]ment under [20 C.F.R. §]718.202(a)(4) . . . ." *See e.g. Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576[, 22 BLR 2-107, 2-120] (6th Cir. 2000). Thus, while Dr. Rasmussen's diagnosis may be insufficient to establish legal pneumoconiosis under [20 C.F.R. §]718.202(a)(4), it is a valid diagnosis of clinical pneumoconiosis.

Director's Letter Brief at 1-2.

While the administrative law judge permissibly found that Dr. Rasmussen based his diagnosis of clinical pneumoconiosis on a positive x-ray and claimant's history of

[8] The Sixth Circuit has held that 20 C.F.R. §718.202(a)(1)-(4) provides alternative methods of establishing pneumoconiosis. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Therefore, it was not necessary for the administrative law judge to further consider whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), once he found that claimant had established pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). However, because the administrative law judge rendered credibility determinations with regard to Dr. Rasmussen's diagnosis of pneumoconiosis that may ultimately affect his weighing of the physician's opinion on the issue of disability causation on remand, we provide clarification regarding the further consideration of Dr. Rasmussen's clinical pneumoconiosis finding.

coal dust exposure and that his opinion did not qualify as a well-reasoned medical opinion under 20 C.F.R. §718.202(a)(4), Dr. Rasmussen's finding of clinical pneumoconiosis is consistent with the administrative law judge's determination as to the existence of clinical pneumoconiosis based on the x-ray evidence. Thus, if the administrative law judge finds total disability on remand, he should consider Dr. Rasmussen's medical opinion as to total disability due to clinical pneumoconiosis at 20 C.F.R. §718.204(c).[9] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Cornett*, 227 F.3d at 576, 22 BLR at 2-120.

To summarize, on remand, the administrative law judge must determine whether claimant has established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). *See Collins v. J & L Steel*, 21 BLR 1-181 (1999). The administrative law judge must also determine, if necessary, whether claimant has established that he is totally disabled due to pneumoconiosis pursuant to 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). In addressing the issue of disability causation, the administrative law judge must specifically consider Dr. Rasmussen's opinion in determining whether claimant is totally disabled due to clinical pneumoconiosis. In reaching all of his findings on remand, the administrative law judge must examine each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based" and explain the bases for his credibility determinations in accordance with the APA. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see Wojtowicz*, 12 BLR at 1-162.

[9] Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Rasmussen failed to explain his diagnosis of chronic bronchitis in light of the objective evidence. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320 (6th Cir. 2002), cert. denied, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 14. Thus, we affirm the administrative law judge's finding that Dr. Rasmussen's diagnosis of chronic bronchitis is insufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Accordingly, we affirm in part, and vacate in part, the administrative law judge's Decision and Order - Denial of Benefits and remand this case 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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JUDITH S. BOGGS
Administrative Appeals Judge