

BRB No. 13-0195 BLA

JESSIE C. BOWLES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WARRIOR COAL COMPANY)	
)	
and)	
)	
INTERNATIONAL BUSINESS & MERCANTILE REASSURANCE COMPANY)	DATE ISSUED: 01/07/2014
)	
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 on Remand Denying Benefits of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2007-BLA-5657) of Administrative Law Judge Christine L. Kirby rendered on a claim, filed on

February 8, 2002, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).¹ This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Jeffrey Tureck credited claimant with twenty-five years of coal mine employment, and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. Judge Tureck determined that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013), and, accordingly, denied benefits.

On appeal, the Board vacated Judge Tureck's findings at 20 C.F.R. §§718.202(a)(1), (a)(4) (2013), and the case was remanded for further consideration of the x-ray, CT scan, and medical opinion evidence. Judge Tureck was instructed to consider the comparative credentials of all of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments, in determining whether claimant has established the existence of either clinical or legal pneumoconiosis. *Bowles v. Warrior Coal Co.*, BRB No. 10-0348 BLA (Feb. 28, 2011)(unpub.).

On remand, the case was assigned to Administrative Law Judge Christine L. Kirby (the administrative law judge). The administrative law judge addressed the Board's instructions, reconsidered the evidence, and concluded that, while claimant failed to establish the existence of clinical pneumoconiosis, the evidence was sufficient to establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013). The administrative law judge further found, however, that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) (2013) and, accordingly, denied benefits.

In the present appeal, claimant challenges the administrative law judge's weighing of the evidence on the issues of clinical pneumoconiosis and total respiratory disability. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief.

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 1. The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

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).

Turning to the issue of total disability at Section 718.204(b)(2)(iv) (2013), claimant contends that the administrative law judge erred in crediting the opinions of Drs. Selby and Castle, that claimant retains the respiratory capacity to perform his usual coal mine employment as a shuttle car operator, over the contrary opinions of Drs. Simpao and Cohen, that claimant's mild loss of lung function is totally disabling. Noting that Section 718.204(b)(2)(iv) (2013) provides that total disability may be found in the absence of qualifying objective tests where a physician, exercising reasoned medical judgment, concludes that a miner's respiratory condition prevents him from engaging in relevant employment, claimant maintains that it was error for the administrative law judge to accord greater weight to the opinions of Drs. Selby and Castle. Claimant argues that the administrative law judge misunderstood the nature of his duties as a shuttle car operator and provided inadequate and improper reasons for discounting the opinions of Drs. Simpao and Cohen. Claimant asserts that the administrative law judge's treatment of the evidence fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Claimant's Brief at 4-9. Claimant's arguments are without merit.

In finding the medical opinion evidence insufficient to establish total disability at Section 718.204(b)(2)(iv) (2013), the administrative law judge relied on the well-reasoned and documented opinions of Drs. Selby and Castle, that claimant was able to perform his usual coal mining job from a respiratory standpoint, consistent with the non-

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, 1-202 (1989)(en banc); Director's Exhibit 3.

qualifying pulmonary function studies and arterial blood gas studies of record.³ Decision and Order at 13-14; Director's Exhibit 63; Employer's Exhibit 3. By contrast, the administrative law judge found Dr. Simpao's opinion to be "conclusory and vague," as the physician diagnosed a mild impairment and opined that claimant was unable to perform the work of a coal miner based on claimant's x-ray, pulmonary function studies, symptomatology and physical findings, yet "provided no explanation as to how these four factors supported a finding of total disability." Decision and Order at 12. The administrative law judge permissibly determined that Dr. Simpao's opinion was neither well-reasoned nor documented, as the doctor failed to elaborate on the symptomatology or physical findings he relied upon, and provided no explanation of how the non-qualifying pulmonary function study results supported a finding of total disability. Decision and Order at 12; Director's Exhibit 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). While Dr. Cohen also opined that claimant does not retain the pulmonary capacity to perform his last coal mine job, the administrative law judge thoroughly analyzed the opinion and permissibly found that it was insufficiently reasoned because Dr. Cohen characterized claimant's work duties as requiring much more heavy manual labor than the administrative law judge found, based on claimant's hearing testimony.⁴ Dr. Cohen also failed to explain why claimant's diffusion impairment and gas exchange abnormalities with exercise were disabling in light of claimant's non-qualifying objective test results with exercise. Decision and Order at 13; Claimant's Exhibits 4, 4a; *see Clark*, 12 BLR at 1-155; *cf. Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). Noting that the opinions of Drs. Selby and Castle were more consistent with the uniformly non-qualifying objective evidence of record, the administrative law judge acted within his discretion in finding that the opinions of Drs. Selby and Castle were

³ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii) (2013).

⁴ Claimant testified at the hearing that his job as a shuttle car operator involved "just hauling coal . . . going to the miner and back to dump it." Hearing Transcript at 22. He further testified that he did lifting, moving and sawing timber; that the timbers weighed 30 pounds; and that he also had to shovel the belt one day a week and build brattices about two days a week. Hearing Transcript at 22-24. As Dr. Cohen stated that claimant spent significant time doing general underground labor, including work as a pinner, roof bolter, setting timbers, building brattices, shoveling, and rock dusting, the administrative law judge concluded that "[i]t appears that Dr. Cohen may have considered duties that Claimant performed at earlier points in his career." Decision and Order on Remand at 13; Claimant's Exhibits 4, 4a.

better reasoned and documented than those of Drs. Simpao and Cohen, and that the weight of the medical opinions of record was insufficient to establish total disability. Decision and Order at 12-14; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Contrary to claimant's contention, the administrative law judge addressed the relevant evidence, assigned the evidence appropriate weight, and provided valid reasons for her credibility determinations. Thus, her Decision and Order comports with the requirements of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As substantial evidence supports the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv) (2013), they are affirmed.

Because claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv) (2013), an essential element of entitlement, we affirm the administrative law judge's denial of benefits, and need not reach claimant's remaining argument on the issue of the existence of clinical pneumoconiosis at Section 718.202(a) (2013). *See Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge