BRB No. 13-0552 BLA

MONROE SHARP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APPLE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/28/2014
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-05890) of Administrative Law Judge Adele Higgins Odegard with respect to a claim filed on July 20, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established 20.37 years of surface coal mine employment, with 14.40 years in conditions substantially similar to underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge determined that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), but established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and disability causation at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues, in its brief and reply brief, that the administrative law judge erred in weighing the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), (c), to find that claimant established all of the essential elements of entitlement. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are 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).

[1] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. Amended Section 411(c)(4) does not apply in this case, as the administrative law judge found that claimant did not establish at least fifteen years of qualifying coal mine employment.

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

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

I. 20 C.F.R. §718.202(a)(4)

In considering the medical opinion evidence at 20 C.F.R. §718.202(a)(4),[3] the administrative law judge evaluated the opinions of Drs. Vaezy, Splan, Klayton, Rosenberg, and Fino. Decision and Order at 35. Drs. Vaezy, Splan, and Klayton diagnosed claimant with legal pneumoconiosis. Director's Exhibit 10; Claimant's Exhibits 1, 2. The administrative law judge gave little weight to the opinions in which Drs. Vaezy and Klayton diagnosed legal pneumoconiosis, as she found that they were based on inaccurate coal mine employment and smoking histories.[4] Decision and Order at 35. However, the administrative law judge determined that Dr. Splan's diagnosis of legal pneumoconiosis was well-reasoned, well-documented, and persuasive:

> [I]n that Dr. Splan not only considered the Claimant's physical condition but accurately took into account the two important factors of the Claimant's coal mine employment history and smoking history.[5] As well, Dr. Splan was cognizant that the Claimant did not have indicia of clinical

[3] The administrative law judge determined that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), that there was no biopsy evidence in the record for consideration at 20 C.F.R. §718.202(a)(2), and that there were no applicable presumptions at 20 C.F.R. §718.202(a)(3). Decision and Order at 26-28.

[4] Dr. Vaezy determined that claimant had forty years of coal mine employment and an approximately seven pack-year smoking history. Director's Exhibit 10. Dr. Klayton relied on a thirty-five year coal mine employment history and a thirty pack-year cigarette smoking history. Claimant's Exhibit 2. The administrative law judge found that claimant has 20.37 years of coal mine employment and a fifty pack-year smoking history. Decision and Order at 35.

[5] The administrative law judge stated that she found "any difference between the 23 years of coal mine employment that Dr. Splan presumed and the 20.37 years I found to be immaterial." Decision and Order at 35 n.63.

> pneumoconiosis, based on chest X-ray, and took that evidence into consideration as well.

Id. at 36. The administrative law judge noted that the pulmonary function study that Dr. Splan administered on October 18, 2011, demonstrated minimal improvement after the administration of bronchodilators, which is not consistent with some of the other studies, which showed no improvement. *Id*. The administrative law judge indicated that, except for the results of the study performed by Dr. Fino on August 24, 2011, the pulmonary function studies showed a significant degree of impairment after the administration of bronchodilators. *Id*. The administrative law judge did not find any evidence to explain the "anomalous result" on the August 24, 2011 study, but determined "that an unexplained anomalous result on a test that was not before Dr. Splan for consideration, does not render Dr. Splan's opinion not well-documented or well-reasoned." *Id*. Therefore, the administrative law judge determined that Dr. Splan's opinion was entitled to substantial weight and supported a finding that claimant has legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 36.

The administrative law judge also considered the contrary opinions of Drs. Rosenberg and Fino, who found that claimant's respiratory impairment was due to cigarette smoking, but gave their opinions less weight because they relied on "positions that are not consistent with the Department of Labor's determinations regarding coal mine dust exposure as a causative factor for obstructive lung disease and emphysema." Decision and Order at 34. Accordingly, the administrative law judge found that claimant established the existence of legal pneumoconiosis, based on a weighing of the evidence as a whole at 20 C.F.R. §718.202(a). *Id*. at 36.

Employer challenges the administrative law judge's finding that Dr. Splan's opinion was well-reasoned and well-documented, as she failed "to consider the physician's reliance upon an inaccurate employment history" and gave "unwarranted probative value to his report[,] based upon his status as a treating physician." Employer's Brief at 8. Employer further maintains that, in light of Dr. Splan's statement that the respective contributions from smoking and coal dust exposure to claimant's COPD and emphysema were "probably of equal quantity," his opinion is nothing more than a statement that claimant "has a breathing impairment, and that claimant's smoking and coal mine employment are both risk factors for such impairment." *Id*. at 12, *quoting* Claimant's Exhibit 1. In addition, employer argues that the administrative law judge violated the Administrative Procedure Act (APA)[6] by failing to adequately explain why

[6] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must 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

she gave more weight to Dr. Splan's opinion, when she discounted the blood gas study that he relied on, and when Drs. Rosenberg and Fino "relied upon accurate smoking and employment histories, cited multiple items of medical evidence, and are Board-certified in pulmonary medicine." Employer's Brief at 13.

Contrary to employer's contention, the administrative law judge did not refer to Dr. Splan as a treating physician and did not give additional weight to Dr. Splan's opinion on that basis.[7] Further, there is no merit to employer's argument that there was a conflict between the administrative law judge's reliance on her finding of 20.37 years of surface coal mine employment when evaluating Dr. Splan's opinion, and her finding, for the purposes of the applicability of the amended Section 411(c)(4) presumption, that claimant had 14.40 years of employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. Because Dr. Splan was aware that all of claimant's coal mine employment was on the surface, it was not error for the administrative law judge to find that Dr. Splan's opinion was based on a "reasonably accurate" coal mine employment history. Decision and Order at 35; Claimant's Exhibit 1; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Employer also mischaracterizes Dr. Splan's opinion concerning the etiology of claimant's impairment. Although Dr. Splan used the term "probably" in stating that smoking and coal dust exposure were causes of claimant's pulmonary impairment, in equal measure, the administrative law judge was not required to find that Dr. Splan's opinion was equivocal and, therefore, unreasoned. The administrative law judge acted within her discretion in determining that Dr. Splan's conclusion that claimant's chronic bronchitis, chronic obstructive pulmonary disease, and emphysema were "related to cigarette smoking and coal dust, probably of equal quantity," supported a finding that Dr. Splan identified coal dust exposure as a significant contributing cause of claimant's impairment. *Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19-20 (2004).

Additionally, in compliance with the APA, the administrative law judge explained why she gave more weight to Dr. Splan's opinion and rationally concluded that, despite

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presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[7]There is no evidence in the record that Dr. Splan treated claimant.

the fact that Dr. Splan relied on a blood gas study that the administrative law judge had discredited, the additional objective evidence he relied on was sufficient to support his diagnosis of legal pneumoconiosis.[8] *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge discredited the opinions of Drs. Rosenberg and Fino, as contrary to comments to the preamble, and employer has not challenged those findings.[9] Therefore, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

II. 20 C.F.R. §718.204(b)(2)

The administrative law judge determined that claimant did not establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 16-19. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Vaezy, Splan, Klayton,

[8] Employer is incorrect in suggesting that an administrative law judge cannot accord probative weight to a diagnosis of a totally disabling respiratory or pulmonary impairment if it is based on nonqualifying objective studies. Provided that the administrative law judge determines that the physician has adequately explained how the objective studies support his or her opinion, the opinion can be credited. *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

[9] The administrative law judge gave less weight to Dr. Rosenberg's opinion, that claimant's reduced FEV1/FVC ratio indicated that claimant's impairment was not due to coal dust exposure and that it is possible to distinguish between emphysema caused by smoking and coal dust-induced emphysema, as she found that these statements are inconsistent with comments in the preamble to the 2001 revisions to the regulations. Decision and Order at 33, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000). Additionally, the administrative law judge determined that Dr. Fino's opinion, that claimant's chronic obstructive pulmonary disease and emphysema are due solely to cigarette smoking, is entitled to less weight as she found that Dr. Fino's statement, "that coal mine dust exposure does not result in a clinically significant loss of lung function," is contrary to the preamble to the regulations. Decision and Order at 33, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000). The administrative law judge also gave less weight to Dr. Fino's opinion because he indicated that emphysema due to coal dust exposure correlates to the existence of clinical pneumoconiosis, which the administrative law judge again determined was contrary to comments to the preamble, indicating that emphysema may exist independently of clinical pneumoconiosis. Decision and Order at 33, *citing* 65 Fed. Reg. 79,941, 79,939 (Dec. 20, 2000).

Habre, Rosenberg, and Fino, in addition to claimant's medical treatment records. *Id*. at 19-24. Dr. Vaezy diagnosed claimant with a mild obstructive impairment but did not indicate whether it was totally disabling. Director's Exhibit 10. Dr. Splan observed that, because claimant's pulmonary function study revealed a severe respiratory impairment, "it would be unwise for him to return to the mines." Claimant's Exhibit 1. Dr. Klayton diagnosed claimant with a severe obstructive impairment and indicated that "it would not allow him to return to his previous coal mine employment because of his shortness of breath with mild exertion." Claimant's Exhibit 2. In claimant's treatment records, Dr. Habre did not make a specific finding as to whether claimant has a totally disabling respiratory impairment. Claimant's Exhibit 3. Dr. Rosenberg found, in his January 27, 2011 report, that claimant has a totally disabling respiratory impairment. Claimant's Exhibit 9A. However, in a supplemental report dated March 5, 2012, Dr. Rosenberg concluded, based on his review of an additional pulmonary function study, that claimant "is not disabled from a pulmonary perspective." Employer's Exhibit 4. Dr. Fino determined that claimant "is disabled [from a respiratory perspective] from returning to his last mining job or a job requiring similar effort." Employer's Exhibit 3. There is nothing in claimant's additional treatment records that specifically addresses whether claimant has a totally disabling respiratory impairment. Director's Exhibit 12; Employer's Exhibits 7-11.

The administrative law judge noted that, with the exception of Dr. Rosenberg in his supplemental report, all of the physicians addressing total disability found that claimant has a totally disabling respiratory impairment. Decision and Order at 24. The administrative law judge found that Dr. Rosenberg's change of opinion was primarily based on his review of the pulmonary function study performed by Dr. Fino on August 24, 2011, which was nonqualifying.[10] *Id*. The administrative law judge indicated that Dr. Fino was aware of the exertional requirements of claimant's typical coal mine work and found that claimant has a disabling respiratory impairment, based on a review of this and other objective tests. *Id*. Therefore, the administrative law judge determined that Dr. Fino's opinion was well-reasoned and documented and gave it "significant weight." *Id*. In contrast, the administrative law judge gave little weight to Dr. Rosenberg's opinion, as she found that "Dr. Rosenberg's supplemental opinion appears to equate a non-qualifying pulmonary function test with a conclusion that total disability is not present," which the administrative law judge determined was contrary to the regulation recognizing that total disability may be established without a qualifying pulmonary function study. *Id*. The administrative law judge found that the remaining opinions did not specifically address

[10] A "qualifying" ventilatory study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables in Appendices B and C to 20 C.F.R. Part 718, respectively. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). A "nonqualifying" study yields values that exceed those values. *Id*.

total disability, so she gave them less weight. *Id*. at 24-25. Consequently, the administrative law judge concluded that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and, as a whole, at 20 C.F.R. §718.204(b)(2), based on a consideration of all of the evidence.

Employer argues that the administrative law judge mischaracterized Dr. Rosenberg's supplemental opinion, as "it is only rational that Dr. Rosenberg would conclude that claimant is not disabled when the preponderance of objective values are non-qualifying." Employer's Brief at 6. In addition, employer contends that Dr. Rosenberg performed an extensive review of all of the objective evidence in his initial report and, therefore, the administrative law judge erroneously characterized Dr. Rosenberg's opinion as equating one non-qualifying pulmonary function study with the absence of a totally disabling impairment. Further, employer asserts that the administrative law judge did not explain her decision to give significant weight to Dr. Fino's opinion when he did not identify the basis of his opinion, in light of the preponderance of non-qualifying objective evidence.

Employer's contentions are without merit. In his initial report, Dr. Rosenberg considered a pulmonary function study dated August 12, 2010, as well as two quality evaluations of the same study, and the pulmonary function study that he performed on January 27, 2011. Director's Exhibit 9A. Dr. Rosenberg found that these studies "revealed severe airflow obstruction with a bronchodilator response and a mildly reduced diffusing capacity measurement," and concluded that claimant is disabled from a pulmonary perspective. *Id*. In his supplemental opinion, Dr. Rosenberg reviewed results from the pulmonary function study obtained by Dr. Fino on August 24, 2011, and noted that "the absolute values have increased markedly compared to previous assessments." Employer's Exhibit 4. Dr. Rosenberg concluded that claimant "is not disabled from a pulmonary perspective." *Id*. However, as the administrative law judge noted, relying on the same August 24, 2011 study, and his knowledge of the exertional requirements of claimant's typical coal mine work, Dr. Fino concluded that claimant is totally disabled from a respiratory perspective. Decision and Order at 24; Employer's Exhibit 3. Thus, the administrative law judge acted within her discretion in giving less weight to Dr. Rosenberg's opinion, as he did not explain why the non-qualifying August 24, 2011 study changed his opinion concerning total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Further, contrary to employer's contention, the administrative law judge explained that she gave more weight to Dr. Fino's opinion because he relied on the objective medical evidence, and his knowledge of claimant's occupational history and job duties, to conclude that claimant has a totally disabling respiratory impairment. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26; *Cornett v.*

Benham Coal, Inc., 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *see* Decision and Order at 24-25. Consequently, we affirm the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2).

III. 20 C.F.R. §718.204(c)

With respect to the issue of total disability causation at 20 C.F.R. §718.204(c), the administrative law judge found that it was not necessary for Dr. Splan to specify the contribution from smoking and coal dust exposure to claimant's disabling respiratory impairment. Decision and Order at 37, *citing Gross*, 23 BLR at 1-19-20 and *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003). The administrative law judge determined that:

> Based on the evidence before Dr. Splan, including (but not limited to) the lack of significant reversibility on bronchodilation, the Claimant's lack of positive X-ray interpretations, and the clinical and X-ray evidence of emphysema, I find that Dr. Splan's conclusion regarding the etiology of the Claimant's impairment is well-reasoned. I also note that, as above, I would expect a Board-certified pulmonary physician to be able to make judgments regarding the cause(s) of respiratory impairments.

Decision and Order at 37-38. Therefore, the administrative law judge found that claimant established disability causation at 20 C.F.R. §718.204(c). *Id*. at 38.

Employer asserts that the administrative law judge made the same errors when weighing the evidence at 20 C.F.R. §718.204(c), as she did at 20 C.F.R. §718.202(a)(4). In addition, employer argues that the administrative law judge erred in crediting Dr. Splan, based on his status as a Board-certified pulmonologist, as "[t]he APA requires that the [administrative law judge] explain why the doctor's actual reasoning is adequate to determine essential elements of entitlement." Employer's Brief at 14.

As we have rejected employer's arguments at 20 C.F.R. §718.202(a)(4) concerning the existence of legal pneumoconiosis, we also reject employer's assertion that the administrative law judge made the same errors in weighing the evidence at 20 C.F.R. §718.204(c). The administrative law judge permissibly found that Dr. Splan's opinion was sufficient to establish disability causation as it was well-reasoned and well-documented and was consistent with case law, holding that a physician need not specify the extent to which each factor contributed to claimant's impairment as long as the miner's impairment is due, in part, to pneumoconiosis. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26; *Cross Mountain Coal*,

Inc. v. Ward, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996); Decision and Order at 37. In addition, although the administrative law judge's observed that Dr. Splan is a Board-certified pulmonologist, the administrative law judge relied on other factors to credit Dr. Splan's opinion. *See* Decision and Order at 37-38. Therefore, we affirm the administrative law judge's determination that claimant established disability causation at 20 C.F.R. §718.204(c), and further affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge