

BRB No. 08-0726 BLA

S.J. )  
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 Claimant-Petitioner )  
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 v. )  
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 U.S. STEEL CORPORATION ) DATE ISSUED: 06/18/2009  
 )  
 Employer-Respondent )  
 )  
 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits (04-BLA-6381) of Administrative Law Judge Richard A. Morgan 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). This case has been before the Board previously, pursuant to claimant’s appeal of the denial of benefits.

In its prior decision, [*S.J.*] *v. U. S. Steel Corp.*, BRB No. 06-0628 BLA (Mar. 27, 2007)(unpub.), the Board affirmed the administrative law judge’s findings that the

existence of clinical pneumoconiosis<sup>1</sup> was established by the most recent x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and that all of the relevant evidence weighed together at 20 C.F.R. §718.202(a) established the existence of clinical pneumoconiosis. *See Island Creek Coal Co v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Additionally, the Board affirmed the administrative law judge's findings that a totally disabling respiratory impairment was established by the most recent blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii), and that total disability was established when all of the relevant evidence was weighed together pursuant to 20 C.F.R. §718.204(b)(2). The Board, however, vacated the administrative law judge's finding that claimant did not establish that his totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for the administrative law judge to reweigh the medical opinions of Drs. Hippensteel and Forehand. The Board specifically instructed the administrative law judge to reconsider the probative value of Dr. Hippensteel's opinion regarding the cause of claimant's respiratory disability pursuant to the standard enunciated in *Scott v. Mason Coal Co.* 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995), since Dr. Hippensteel opined, contrary to the administrative law judge's finding, that claimant does not suffer from clinical pneumoconiosis. The Board further instructed the administrative law judge to address all aspects of Dr. Forehand's opinion relevant to disability causation in determining whether it was sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c).

On remand, the administrative law judge reiterated that he had found that the most recent x-ray of record, dated August 5, 2005, established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. The administrative law judge further reiterated his finding that the exercise values of the most recent blood gas study, dated September 2, 2004, established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). With respect to the issue of disability causation, the administrative law judge found that *Scott* and *Toler* did not apply to Dr. Hippensteel's opinion regarding the cause of claimant's total disability, because the doctor's October 26, 1994 opinion, that claimant did not have pneumoconiosis, was consistent with the administrative law judge's finding that claimant established pneumoconiosis only as of August 5, 2005. Alternatively, the administrative law judge found that, even if he accorded little weight to

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<sup>1</sup> Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by [the] 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." 20 C.F.R. §718.201(a)(1).

Dr. Hippensteel's opinion, Dr. Forehand's September 17, 2003 opinion, that claimant was totally disabled due to pneumoconiosis, was not well-reasoned and thus did not establish that pneumoconiosis is a substantially contributing cause of claimant's total disability. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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.<sup>2</sup> 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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).

Pursuant to the Board's remand instructions, the administrative law judge reweighed the medical opinions of Drs. Forehand and Hippensteel.<sup>3</sup> Claimant contends

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<sup>2</sup> The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>3</sup> Dr. Forehand examined claimant, recorded a history of thirty-three years of coal mine employment, a forty-year smoking history ending in July 2003, and he conducted an EKG, chest x-ray, pulmonary function study and blood gas study. Director's Exhibit 9. Dr. Forehand diagnosed coal workers' pneumoconiosis due to coal mine dust exposure and chronic bronchitis due to smoking. *Id.* Dr. Forehand opined that claimant was totally disabled, and that [t]he [two] diseases-coal workers' pneumoconiosis and chronic bronchitis have had a combined effect on [claimant's] respiratory impairment." *Id.* Dr. Hippensteel examined claimant, recorded a history of thirty-three and one-half years of coal mine employment, a smoking history of forty-one to forty-two years at the rate of one-half pack per day ending in 2003; he conducted an EKG, chest x-ray,

that the administrative law judge erred in discrediting the opinion of Dr. Forehand. We disagree. In his report dated September 17, 2003, Dr. Forehand opined that claimant suffered from a totally disabling respiratory impairment due to pneumoconiosis and smoking. Director's Exhibit 9. However, the administrative law judge, on remand, explained that he found the existence of pneumoconiosis based only on the positive interpretations of the August 5, 2005 x-ray, and total disability based on a qualifying blood gas study dated September 2, 2004. Thus, the administrative law judge accorded little weight to Dr. Forehand's opinion of September 17, 2003, because as of that date, the probative evidence did not establish that claimant had pneumoconiosis or that he was totally disabled. The administrative law judge specifically noted that "the fact that [c]laimant established the presence of clinical pneumoconiosis as of August 5, 2005 does not retroactively make Dr. Forehand's positive reading of the September 17, 2003 x-ray accurate" and "the fact that [c]laimant established total disability based on the qualifying exercise blood gas study dated September 2, 2004 does not retroactively make Dr. Forehand's total disability finding on September 17, 2003 a well-reasoned one." Decision and Order on Remand at 10. Contrary to claimant's contention, the administrative law judge acted within his discretion to determine whether Dr. Forehand's opinion was well-reasoned. See *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 23, 2-31-32 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge's evaluation of Dr. Forehand's opinion is supported by substantial evidence, and the Board is not authorized to reweigh the medical evidence. *Anderson*, 12 BLR at 1-113. Thus, we affirm the administrative law judge's

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pulmonary function study and blood gas study, and reviewed Dr. Forehand's report. Employer's Exhibit 1. Dr. Hippensteel concluded that claimant did not have pneumoconiosis and that there was no reliable evidence that he had any impairment:

The kind of abnormalities that Dr. Forehand found on his chest x-ray are not typical for coal workers' pneumoconiosis and not corroborated by other expert interpreters of his chest x-rays. [Claimant] does not give consistent efforts on pulmonary function tests, which makes for difficulty in making a valid assessment of his lung function. He also has evidence of continued significant smoke exposure at [a] rate of approximately ½ pack per day, which he denies. These findings, in my opinion, show that he has impairment from his heart disease, obesity, smoking, and hypertension, for which he is on a beta blocker. . . . These problems are unrelated to his coal mine dust exposure. This man does not have valid evidence of pulmonary impairment from any cause, including his prior coal mine dust exposure.

Employer's Exhibit 1 at 4-5.

finding that Dr. Forehand's opinion did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Claimant contends that the administrative law judge erred in finding that *Scott* and *Toler* did not apply to Dr. Hippensteel's disability causation opinion, even though the physician's opinion that claimant does not have pneumoconiosis is contrary to the administrative law judge's findings. See *Scott*, 289 F.3d at 268, 22 BLR at 2-372. The administrative law judge noted that even if he accorded Dr. Hippensteel's disability causation opinion little weight based on *Scott* and *Toler*, it is claimant's burden to establish that his total disability is due to pneumoconiosis. Section 718.204(c) provides that "the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report." 20 C.F.R. §718.204(c)(2). As discussed, the administrative law judge permissibly found that Dr. Forehand's opinion was not well-reasoned, as the medical evidence the doctor relied upon in 2003 did not support pneumoconiosis or total disability as of that time. See *Underwood*, 105 F.3d at 946, 951, 21 BLR at 2-23, 2-31-32; *Clark*, 12 BLR at 1-155. Because the administrative law judge permissibly determined that Dr. Forehand's opinion was not sufficiently reasoned to establish that claimant's total disability is due to pneumoconiosis, any error in his finding that *Scott* and *Toler* did not apply to Dr. Hippensteel's opinion was harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because claimant failed to establish total disability due to pneumoconiosis, an essential element of entitlement in a miner's claim under 20 C.F.R. Part 718, entitlement thereunder is precluded. *Anderson*, 12 BLR at 1-112.

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

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