BRB No. 11-0625 BLA

THOMAS TRAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 06/28/2012
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order *Re* Remand of Claim Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, 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 *Re* Remand of Claim Award of Benefits (2007-BLA-05771) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on May 25, 2006, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case is before the

Board for a second time.[1] In a Decision and Order dated August 18, 2009, the administrative law judge credited claimant with at least thirty-six years of coal mine employment. The administrative law judge found that the newly submitted evidence established that claimant is totally disabled at 20 C.F.R. §718.204(b)(2)(iv) and, thus, he found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Reviewing the claim on the merits, the administrative law judge found that claimant established the existence of clinical pneumoconiosis,[2] based on x-ray evidence, at 20 C.F.R. §718.202(a)(1) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[3] Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal, the Board rejected employer's argument that the administrative law judge erred in finding that the subsequent claim was timely filed. *Traylor v. Peabody Coal Co.*, BRB No. 09-0835 BLA, slip op. at 4-5 (Sept. 30, 2010) (unpub.). The Board affirmed, as unchallenged, the administrative law judge's finding of clinical pneumoconiosis. *Id*. at 3 n.4. However, the Board vacated the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b)(2)(iv) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Id*. at 8. Specifically, the Board held that, insofar as the administrative law judge found that claimant has at least a moderate respiratory impairment that would preclude work as a beltman, the administrative law judge erred by not addressing the significance, if any, of inconsistent descriptions in the record given by claimant with regard to the physical demands of that job. *Id*. at 7. The Board instructed the administrative law judge on remand to resolve the conflicts in claimant's testimony, determine the exertional requirements of claimant's usual coal mine employment, then compare those

[1] The procedural history of claimant's three prior claims is set forth in the Board's prior decision and is incorporated herein. *Traylor v. Peabody Coal Co.*, BRB No. 09-0835 BLA, slip op. at 2 n.1 (Sept. 30, 2010) (unpub.).

[2] 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).

[3] The administrative law judge found that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304.

requirements with the physicians' assessments and determine whether claimant established total respiratory disability. *Id*. at 7-8. The Board also vacated the administrative law judge's finding of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and instructed the administrative law judge, if necessary, to consider whether the disability causation opinions of Drs. Houser and Baker were based, in part, on their conclusions that claimant suffers from complicated pneumoconiosis and legal pneumoconiosis,[4] neither of which were specifically found established by the administrative law judge. *Id*. at 8. Moreover, the Board instructed the administrative law judge to consider whether claimant is entitled to the presumption at amended Section 411(c)(4), and to reopen the record, as necessary, for the development of additional evidence in light of the change in law. *Id*. at 8-9.

In his Decision and Order *Re* Remand of Claim Award of Benefits (Remand Decision), issued on May 5, 2011, the administrative law judge found that claimant provided credible hearing testimony with regard to the exertional requirements of his last coal mine job. The administrative law judge credited the opinions of Drs. Houser and Fino, that claimant is totally disabled by a respiratory or pulmonary impairment, at 20 C.F.R. §718.204(b)(iv), and further concluded that claimant satisfied his overall burden to establish total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge also determined that claimant established that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. [5]

On appeal, employer argues that the administrative law judge failed to follow the Board's remand instructions and erred by not specifically determining whether claimant's coal mine work requirements constituted heavy manual labor, prior to crediting Dr. Houser's opinion that claimant is totally disabled. Employer also challenges the

[4] Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) 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).

[5] Because the administrative law judge found that claimant established entitlement to benefits by establishing total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c), the administrative law judge declined to address the applicability of amended Section 411(c)(4) or remand this case for the development of additional evidence. Decision and Order *Re* Remand of Claim Award of Benefits at 4-5.

administrative law judge's credibility findings on the issue of disability causation at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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 applicable law.[6] 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).

If a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based."[7] 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

I. Total Disability – 20 C.F.R. §718.204(b)(2)(iv)

Employer contends that the administrative law judge failed to follow the Board's instructions. when finding that claimant is totally disabled. In his original Decision and Order, the administrative law judge found, based on claimant's August 26, 2008 hearing testimony, that claimant's last job as "beltman" required him to "shovel coal weighing

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because 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 1.

[7] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

about [twenty] pounds, lift multiple times per day . . . continuously carry a tool belt weighing about [thirty] pounds, [and] . . . perform a significant amount of walking . . . ." August 18, 2009 Decision and Order at 3, 9-10. Moreover, the administrative law judge credited the opinions of Drs. Houser and Fino as establishing that claimant suffers from a moderate obstructive impairment that prevents him from performing these job duties. *Id*. at 9-10.

On remand, in accordance with the Board's directive, the administrative law judge considered that claimant's *written* descriptions of his job duties varied from his hearing testimony.[8] Remand Decision at 3. Contrary to employer arguments, the administrative law judge permissibly found that, despite prior statements in the record, claimant's August 26, 2008 hearing testimony was credible with respect to the exertional requirements of his job. *See Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Zyskoski v. Director, OWCP*, 12 BLR 1-159, 1-161 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984). The administrative law judge specifically noted that claimant testified that he had a memory problem, but that claimant "was not impeached by the statements in the applications now referenced by [e]mployer, and in all other respects, [claimant's] demeanor and his candor seemed forthright." Remand Decision at 3. The administrative law judge's determination, that claimant's testimony was credible in light of his demeanor as a witness, and the fact that employer did not attempt to discount claimant's statements on cross-examination, was within his discretion. *See Napier*, 301 F.3d at 713, 22 BLR at 2-

---

[8] The Board summarized the conflicting statements as follows:

> In claimant's second claim, he indicated that his usual coal mine employment as a beltman required him to sit for one hour, stand for five hours, and crawl 250 feet twice a day, but did not require him to use tools. Director's Exhibit 2 at 122. Claimant did not indicate that there were any lifting or carrying requirements. *Id*. Claimant provided the same written description of his coal mine employment in this claim. Director's Exhibit 7 at 2. At the initial hearing held on June 10, 1999, in connection with his third claim, claimant testified that his last coal mine employment was "hard work" because it required him to shovel the coal that fell off of the belt. Director's Exhibit 3 at 528-29. At the modification hearing held on his third claim in 2002, however, claimant testified that he "spent very little time shoveling coal." *Id*. at 92-96.

Traylor, BRB No. 09-0835 BLA, slip op. at 7 n.8.

553. Because the administrative law judge is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony, we affirm the administrative law judge's decision to credit claimant's hearing testimony regarding the physical requirements of his job. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984).

We also reject employer's argument that the administrative law judge erred in relying on the opinions of Drs. Houser and Fino, in conjunction with claimant's testimony, to find that claimant established total disability. Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), employer maintains that the administrative law judge erred in relying on these opinions to find that claimant is totally disabled because they did not specifically state the exertional requirements of claimant's job as a beltman in their respective reports. Employer's Brief in Support of Petition for Review at 13-14. Contrary to employer's assertion, however, Dr. Houser testified that claimant worked as a "beltman . . . which [claimant] indicated was basically heavy manual labor." Claimant's Exhibit 1 at 6, 16. The administrative law judge noted that Dr. Houser specifically opined that claimant "cannot do heavy manual labor [and] can only *walk a block*." August 18, 2009 Decision and Order at 9-10 (emphasis added). The administrative law judge accepted claimant's testimony that he was required to walk frequently in his job, and "do lifting and shoveling" which was "incompatible" with Dr. Houser's restriction. *Id.*; Remand Decision at 3. Consequently, the administrative law judge's reliance on Dr. Houser's opinion to support a finding of total disability is supported by substantial evidence.

Furthermore, in *Cornett*, the United States Court of Appeals for the Sixth Circuit held that it is error for an administrative law judge to credit a physician's opinion that a miner is *not* totally disabled, if the physician has not indicated an awareness of the exertional requirements of the miner's usual coal mine job. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. The facts of *Cornett* may be distinguished from this case, insofar as Dr. Fino identified claimant's usual coal mine employment as "beltman/belt maintenance," indicated that claimant is totally disabled, based on his pre-bronchodilator pulmonary function testing, and specifically stated claimant is totally disabled from his usual coal mine work. Director's Exhibits 11, 12. Based on the facts of this case, we conclude that the administrative law judge permissibly relied on Dr. Fino's opinion to support a finding of total disability.[9] *See Napier*, 301 F.3d at 713, 22 BLR at 2-552.

[9] Dr. Baker diagnosed claimant as suffering from a moderate obstructive impairment and a mild restrictive impairment. Claimant's Exhibit 2. He was not aware of claimant's last coal mine employment, but opined that claimant is totally disabled from a respiratory standpoint. *Id.* The administrative law judge gave no indication that he was relying on Dr. Baker's opinion to find total disability established.

Lastly, employer resurrects an argument presented in the prior appeal, that the administrative law judge erred in giving no weight to Dr. Repsher's opinion that claimant is not totally disabled. Employer's Brief in Support of Petition for Review at 14-15. This argument was rejected previously by the Board. *Traylor*, BRB No. 09-0835 BLA, slip op. at 5-6. As employer has not shown that the Board's affirmance of the administrative law judge's credibility determination regarding Dr. Repsher was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior holding. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

In weighing the medical opinions, the administrative law judge permissibly found that claimant met his burden to establish total disability "based on a reasoned medical report," as he "attribute[d] significant weight to Dr. Fino's opinion as substantiation for Dr. Houser's opinion that [claimant] is totally disabled from a respiratory standpoint." Remand Decision at 2 n.1; *see Tenn. Consol. 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 (2003); *Clark*, 12 BLR at 1-155. Contrary to employer's argument on appeal, the administrative law judge's credibility findings satisfy the requirements of the Administrative Procedure Act (APA).[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge has discretion to assess the credibility of a medical opinion, we affirm, as supported by substantial evidence, the administrative law judge's finding that the medical opinions of Drs. Houser and Fino are sufficient to establish a totally disabling obstructive impairment at 20 C.F.R. §718.204(b).[11] *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

[10] The 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), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 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) and 30 U.S.C. §932(a).

[11] There is no merit to employer's assertion that the administrative law judge did not weigh all of the contrary probative evidence prior to finding that claimant established total disability. The administrative law judge properly found that, while there were no qualifying pulmonary function or arterial blood gas studies establishing total disability at 20 C.F.R. §718.204(b)(2)(i)-(ii), claimant met his burden to establish total disability, based on reasoned medical opinions. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987) (en banc).

F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We also affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309. *White*, 23 BLR at 1-3.

II. Disability Causation – 20 C.F.R. §718.204(c)

Employer also asserts that the administrative law judge erred in failing to follow the Board's instruction to reconsider the disability causation opinions of Drs. Houser and Baker, in light of the fact that they diagnosed both simple and complicated pneumoconiosis, while the administrative law judge found that the evidence established only the existence of simple pneumoconiosis.[12] Employer's Brief in Support of Petition for Review at 15-17; Claimant's Exhibit 1 at 9, 23-24, 26-27. Contrary to employer's argument, the administrative law judge specifically found that the "rationale" provided by Drs. Houser and Baker for attributing claimant's respiratory disability to coal dust exposure was not entirely dependent on their diagnoses of complicated pneumoconiosis by x-ray. Remand Decision at 4. As noted by the administrative law judge, Dr. Houser diagnosed chronic obstructive pulmonary disease (COPD) with a moderate to severe obstructive impairment, based on the pulmonary function testing, which he specifically attributed to claimant's coal dust exposure. *Id*. Similarly, Dr. Baker diagnosed that claimant was totally disabled by a moderate obstructive and mild restrictive respiratory impairment, demonstrated on pulmonary function testing, which Dr. Baker attributed to COPD caused by coal dust exposure. Claimant's Exhibit 2. Dr. Baker also specially testified that even if claimant *only suffers from simple pneumoconiosis*, he is still disabled from that condition based on the results of the pulmonary function studies. *Id*.

We reject employer's argument that the administrative law judge's analysis of the evidence does not satisfy the requirements of the APA. *See Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989); Employer's Brief in Support of Petition for Review at 17. Because the administrative law judge acted within his discretion in finding that Drs. Houser and Baker provided reasoned and documented opinions regarding the etiology of claimant's respiratory disability, we affirm, as supported by substantial evidence, the administrative law judge's conclusion that claimant established total disability due to

[12] Employer contends that the administrative law judge erred in failing to follow the Board's remand instruction that he render a finding as to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Because the administrative law judge's analysis with regard to the etiology of claimant's disabling obstructive respiratory impairment subsumes the issues of the existence of legal pneumoconiosis and disability causation, the administrative law judge's failure to render a specific finding at 20 C.F.R. §718.202(a)(4) is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

pneumoconiosis at 20 C.F.R. §718.204(c). *See Napier*, 301 F.3d at 713, 22 BLR at 2-553; *Stephens*, 298 F.3d at 511, 22 BLR at 2-495; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

Accordingly, the administrative law judge's Decision and Order *Re* Remand of Claim Award of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge