BRB No. 12-0547 BLA

JOSEPH E. RUSSELBURG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 06/26/2013
	)	
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 on Third Remand 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 on Third Remand Award of Benefits (2006-BLA-05062) of Administrative Law Judge Daniel F. Solomon, with respect to a claim filed on October 25, 2004, 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

[1] The amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated, in pertinent part, Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The amendments do not apply to this claim, as it was filed before January 1, 2005.

Board for a fourth time.[2] In our most recent Decision and Order, we vacated the administrative law judge's findings that the pulmonary function studies and medical opinions were insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and that claimant did not establish the existence of legal pneumoconiosis or disability causation at 20 C.F.R. §§718.202(a)(4), 718.204(c). *Russelburg v. Peabody Coal Co.*, BRB No. 11-0271 BLA (Dec. 22, 2011)(unpub).

On remand, the administrative law judge determined that claimant established total disability at 20 C.F.R. §718.204(b)(2), based on the pulmonary function study evidence. The administrative law judge also found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that his disabling respiratory impairment was due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Consequently, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding legal pneumoconiosis, total disability, and disability causation established, as the administrative law judge improperly weighed the evidence and did not comply with the Board's instructions on remand. Therefore, employer requests that the case be remanded to a new administrative law judge. 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.[3] 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).

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[2] In the Board's initial decision, we vacated the administrative law judge's finding that claimant established a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c), because the administrative law judge did not adequately explain his weighing of the relevant evidence. *J.E.R.* [*Russelburg*] *v. Peabody Coal Co.*, BRB No. 07-0370 BLA (Jan. 31, 2008)(unpub.). The second time the case was before the Board, we vacated the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and disability causation at 20 C.F.R. §718.204(c), and remanded the case for additional consideration. *Russelburg v. Peabody Coal Co.*, BRB No. 09-0274 BLA (Dec. 9, 2009)(unpub.).

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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. §718.204(b)(2) – Total Disability

We will first address the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), as he relied on these findings to conclude that claimant proved that he has legal pneumoconiosis and is totally disabled by it. The record contains two qualifying[4] pulmonary function studies, which were administered by Dr. Simpao on November 18, 2004 and by Dr. Repsher on June 7, 2005. Director's Exhibit 12; Employer's Exhibit 1. On remand, the administrative law judge noted that he was required to "resolve the conflict among the physicians as to the validity of the pulmonary function study evidence." Decision and Order on Third Remand at 2. The administrative law judge indicated that Dr. Mettu had validated the 2004 study obtained by Dr. Simpao, but that Dr. Fino had opined that this study was invalid because of "premature termination to exhalation and a lack of reproducibility" in the expiratory tracings. *Id*. at 4, *quoting* Employer's Exhibit 2. The administrative law judge found that Dr. Fino's opinion was entitled to little weight, as he was unable to determine the basis of Dr. Fino's conclusion. Decision and Order on Third Remand at 4. The administrative law judge also stated that he could not ascertain the credibility of Dr. Fino's assertion that Dr. Simpao's testing did not comport with the medical literature, because none of the articles that Dr. Fino relied on were attached to his report. *Id*. The administrative law judge further indicated that, although Dr. Repsher did not offer an opinion as to the validity of Dr. Simpao's 2004 study, he stated that the 2005 pulmonary function study that he performed was "uninterpretable due to either extremely poor effort and cooperation with the testing or residua of his childhood paralytic poliomyelitis." *Id*., *quoting* Employer's Exhibit 1. However, the administrative law judge accorded little weight to Dr. Repsher's opinion, as "the issue at point of testing is whether [c]laimant has a respiratory deficit, regardless of cause." Decision and Order on Third Remand at 4.

[4] A "qualifying" pulmonary function study yields results that are equal to or less than the values set out in the table at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge similarly gave little weight to Dr. Fino's opinion, that the 2005 study was invalid, as he found that Dr. Fino did not identify the factors that he relied on in making his determination. *Id*. at 5.

The administrative law judge concluded that claimant established total disability based on the pulmonary function study evidence.[5] Decision and Order on Third Remand at 5. The administrative law judge did not address the medical opinion evidence relevant to total disability at 20 C.F.R. §718.204(b)(2)(iv), but relied on his findings with respect to the pulmonary function studies of record to find that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 7.

Employer argues that the administrative law judge erred in discrediting Dr. Fino's opinion concerning the November 18, 2004 pulmonary function study, as Dr. Fino provided an explanation for his opinion that the tests are invalid, unlike the contrary opinions of Drs. Simpao and Mettu. Employer maintains that because there is no requirement for a physician to attach the medical literature he relied on in order for his opinion to be reasoned, it was error for the administrative law judge to discredit Dr. Fino's opinion on this basis. Employer also states that the administrative law judge substituted his opinion for that of the experts when evaluating Dr. Fino's opinion, based on the administrative law judge's statement that he was required to "assess the evidence of record and draw my own conclusions and inferences from it." Employer's Brief at 13, *quoting* Decision and Order on Third Remand at 4. Employer contends that the administrative law judge relied on reasons previously rejected by the Board for discounting the opinions of Drs. Fino and Repsher. Further, employer asserts that the administrative law judge did not consider all of the evidence at 20 C.F.R. §718.204(b)(2) in determining that claimant established total disability.

Employer's contentions are without merit. The determination of whether an opinion is adequately reasoned and documented is a credibility finding reserved to the discretion of the administrative law judge as fact-finder. *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). In the present case, the administrative law judge acted within his discretion in according little weight to Dr. Fino's invalidation of the qualifying pulmonary function studies, as Dr. Fino did not adequately explain his findings of premature termination and lack of

[5] Although the administrative law judge actually indicated that "[c]laimant has established total disability based on arterial blood gas studies," the context in which he set forth this finding makes it clear that the administrative law judge meant to refer to the pulmonary function study evidence. Decision and Order on Third Remand at 5.

reproducibility.[6] *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-547; Decision and Order on Third Remand at 3-4. The administrative law judge also permissibly credited Dr. Mettu's validation report, despite its brevity, because the form Dr. Mettu completed "was supplied by the Department of Labor, appropriate to the pulmonary function study." Decision and Order on Third Remand at 3; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). In addition, when discounting Dr. Repsher's invalidation of the June 7, 2005 study, the administrative law judge rationally found that Dr. Repsher's statement, that the study was "uninterpretable due to *either* extremely poor effort and cooperation with the testing *or* residua of his childhood paralytic poliomyelitis," was insufficient to establish conclusively that the study was invalid due to poor effort.[7] Employer's Exhibit 1 (emphasis added); *see Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order on Third Remand at 4-5. We affirm, therefore, the administrative law judge's determination that the pulmonary function studies were sufficient to establish total disability at 20 C.F.R. §718.204(b)(2).

II. 20 C.F.R. §718.202(a)(4) – The Existence of Legal Pneumoconiosis

In considering whether claimant established the existence of legal pneumoconiosis[8] at 20 C.F.R. §718.202(a)(4), the administrative law judge gave greatest weight to Dr. Simpao's opinion attributing claimant's respiratory impairment to smoking

[6] Because the administrative law judge provided a permissible rationale for discrediting Dr. Fino's opinion invalidating the qualifying pulmonary function studies, we need not address employer's allegations of error regarding the administrative law judge's reference to the omission of the journal articles cited by Dr. Fino and the administrative law judge's consideration of Dr. Mettu's validation report. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[7] Although the administrative law judge appears to have stated incorrectly that the results of the pulmonary function study performed on June 7, 2005 are not attached to Dr. Repsher's report, this error does not require remand, as the administrative law judge provided a valid, independent rationale for discrediting Dr. Repsher's opinion. *See Kozele*, 6 BLR at 1-382 n.4; Employer's Exhibit 1.

[8] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

and coal dust exposure.[9] Decision and Order on Third Remand at 8. In contrast, the administrative law judge discredited the opinions of Drs. Repsher and Fino, that claimant had no discernible impairment, for reasons similar to those he relied on when discrediting their opinions at 20 C.F.R. §718.204(b)(2) and because their findings were inconsistent with "[c]laimant's testimony about his exertional capacity and his daily symptoms." *Id*. at 7.

Employer argues that the administrative law judge again neglected to follow the Board's instructions on remand and, therefore, repeated the errors that he made in his prior decisions. Employer contends specifically that the administrative law judge erred in determining that Dr. Simpao's opinion was reasoned when it is only seven sentences long. Employer also maintains that, to the extent the administrative law judge relied on Dr. Simpao's deposition testimony, his decision does not comply with the Administrative Procedure Act, as the portions of Dr. Simpao's testimony cited by the administrative law judge relate only to disability causation.[10] Employer further alleges that the administrative law judge did not adequately consider the respective qualifications of the physicians, particularly when Dr. Simpao had the weakest credentials of the experts and "[a] doctor's qualifications are based on his or her certification in the relevant medical field." Employer's Brief at 17. In addition, employer maintains that the administrative law judge improperly interpreted medical data by relying on a list of symptoms of pneumoconiosis in claimant's remand brief to find that claimant has the same symptoms and, therefore, has pneumoconiosis. Further, employer asserts that the administrative law judge erred in relying on claimant's testimony regarding his exertional capacity to find legal pneumoconiosis established.

Contrary to employer's contentions, the administrative law judge acted within his discretion in giving little weight to the opinions of Drs. Fino and Repsher, based on their failure to render well-reasoned opinions as to the existence of a respiratory impairment. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). Moreover, the administrative law judge permissibly determined that Dr. Simpao's diagnosis of legal pneumoconiosis, as set forth in both his report and his deposition testimony, was reasoned and, therefore, sufficient to satisfy

[9] The Board previously affirmed the administrative law judge's finding that claimant did not establish the existence of clinical pneumoconiosis. *Russelburg v. Peabody Coal Co.*, BRB No. 11-0271 BLA, slip op. at 9 n.17 (Dec. 22, 2011)(unpub).

[10] The Administrative Procedure Act 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 presented. . . ." 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).

claimant's burden at 20 C.F.R. §718.202(a)(4), as Dr. Simpao relied on claimant's work, smoking and medical histories, and explained why he identified coal dust exposure as a contributing cause of claimant's severe obstructive impairment. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-547; Decision and Order on Third Remand at 8. We also reject employer's argument regarding Dr. Simpao's credentials, as the Board previously held that "the administrative law judge did not err in considering Dr. Simpao's experience as the Director of the Coal Miner's Clinic at Muhlenberg Community Hospital since the 1970s, as a factor relevant to the credibility of the doctor's opinion." *Russelburg*, BRB No. 09-0274 BLA, slip op. at 7 n.10. In addition, contrary to employer's allegation, the administrative law judge did not rely on information in claimant's brief to establish the symptoms of coal workers' pneumoconiosis, but rather relied on the brief to identify the portions of Dr. Simpao's deposition testimony in which he opined that coal dust exposure was a contributing cause of claimant's respiratory impairment. *See* Decision and Order on Third Remand at 6-7; Claimant's Exhibit 1. Further, while employer is correct in asserting that claimant's testimony cannot be the sole basis of a finding that claimant established the existence of pneumoconiosis, the administrative law judge reasonably referred to this testimony when assessing the credibility of the medical opinion evidence. *See* 20 C.F.R. §718.202(c); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); Decision and Order on Third Remand at 7. Based on the foregoing, 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).[11]

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

Employer challenges the administrative law judge's determination that Dr. Simpao's opinion was sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), arguing that the administrative law judge repeated the errors that he made when considering the medical opinions relevant to 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2). We hold that the administrative law judge acted within his discretion in finding that Dr. Simpao's opinion identifying coal dust exposure as a contributing cause of claimant's severe obstructive impairment was reasoned, based on the valid rationale that he provided when crediting Dr. Simpao's opinion at 20 C.F.R. §718.202(a)(4). *See Stephens*, 298 F.3d at 522, 22 BLR at 2-513. Moreover, the administrative law judge

[11] Subsequent to the administrative law judge's decision, the United States Court of Appeals for the Sixth Circuit issued *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012), holding that all types of evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) must be weighed together to determine whether claimant has pneumoconiosis. Because the administrative law judge considered all of the evidence relevant to the existence of legal pneumoconiosis, we need not remand this case for application of the holding in *Hensley*.

reasonably found that Dr. Simpao's attribution of claimant's impairment to both coal dust exposure and smoking did not preclude a finding of legal pneumoconiosis or total disability due to legal pneumoconiosis. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Gross v. Dominion Coal Corp*., 23 BLR 1-18, 1-18-19 (2003). We further hold that the administrative law judge rationally determined that the opinions of Drs. Repsher and Fino were entitled to little weight on the issue of total disability causation because they did not diagnose pneumoconiosis, or any disabling respiratory impairment, contrary to the administrative law judge's findings. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(en banc). We affirm, therefore, the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c).

Accordingly, the Decision and Order on Third Remand Award of Benefits of the administrative law judge 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