BRB No. 99-0569 BLA

LARRY GILKEY Claimant-Respondent v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Richard M. Joiner (Mitchell, Joiner & Hardesty, P.S.C.), Madisonville, Kentucky, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (96-BLA-1578) of Administrative Law Judge Thomas F. Phalen, Jr. 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 is before the Board for the second time. In an initial Decision and Order, dated August 27, 1997, the administrative law judge considered the instant claim, which was filed on February 6, 1994, under the applicable regulations at 20 C.F.R. Part 718. After accepting the parties' stipulation that claimant worked for twenty-one years in coal mine employment, the administrative law judge found the evidence

sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out coal mine employment under 20 C.F.R. §718.203(b), and that the evidence was insufficient to establish rebuttal of the presumption. The administrative law judge then found the evidence sufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c), (b) and, accordingly, awarded benefits. Employer appealed. The Board affirmed the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4), holding that the administrative law judge properly accorded greatest weight to Dr. Traughber's medical opinion that claimant suffers from the disease. *Gilkey v. Peabody Coal Co.*, BRB No. 97-1817 BLA (Sept. 22, 1998)(unpublished). The Board vacated the administrative law judge's finding of total disability under Section 718.204(c), however, because the administrative law judge failed to consider fully Dr. Gallo's opinion regarding the validity of the qualifying pulmonary function study administered by Dr. Traughber on April 12, 1994.[1] *Id*. The Board thus instructed the administrative law judge to reconsider all of the relevant evidence under Section 718.204(c) on remand. *Id*. The Board also vacated the administrative law judge's finding regarding total disability causation under Section 718.204(b) as a consequence of vacating the Section 718.204(c) finding, and instructed the administrative law judge to reconsider the evidence on that issue, if reached. *Id*.

On remand, the administrative law judge again found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), (b). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge ignored the Board's remand instruction to consider Dr. Gallo's opinion with regard to the validity of the April 14, 1994 qualifying pulmonary function study administered by Dr. Traughber. Employer further contends that the administrative law judge erred in finding the weight of the evidence sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), (b). In addition, employer requests that the Board reconsider its prior finding in this case that the administrative law judge properly found the existence of pneumoconiosis established under Section 718.202(a)(4). Finally, employer asserts that the administrative law judge denied the parties due process by failing to give them an opportunity to submit briefs on remand. Claimant responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates the contentions raised in its Petition for Review and brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not intend presently to participate in this appeal.

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[1]The Board also noted that the administrative law judge appeared to have mischaracterized as non-qualifying the pulmonary function study administered on January 11, 1994. *Gilkey v. Peabody Coal Co.*, BRB No. 97-1817 BLA (Sept. 22, 1998)(unpublished).

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. 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).

On appeal, employer contends that the administrative law judge ignored the Board's remand instruction to resolve the factual dispute as to whether the qualifying pulmonary function study administered on April 14, 1994 was valid in light of Dr. Gallo's deposition testimony with regard to the study. We disagree. The administrative law judge discounted Dr. Gallo's conclusion that the April 14, 1994 study was not valid on the basis that Dr. Gallo's testimony "contains oblique conclusions which I do not find probative on the issue of total disability, e.g., concluding that the 4-12-94 pulmonary function test results are indicative of total disability while also stating that they were influenced by variable effort and [claimant's] allergic condition." Decision and Order at 9. We agree with employer that the administrative law judge appears to have mischaracterized Dr. Gallo's testimony by finding that Dr. Gallo testified that the April 12, 1994 pulmonary function test results are indicative of total disability. Dr. Gallo in fact only testified that the results *would be* indicative of total disability *if one were to assume the results were valid*, but that because the results were not valid, they did not indicate that claimant is totally disabled. Employer's Exhibit 3 at 15, 19-24. We hold that this error was harmless, however, inasmuch as the administrative law judge provided a rational basis for rejecting Dr. Gallo's conclusion that the study was invalid; namely, that Dr. Gallo's conclusion was merely speculative as it was based only upon a comparison of the results of the April 12, 1994 study to the results of the pulmonary function study he administered six days later, on April 18, 1994, rather than upon any actual review of the tracings of the April 12, 1994 study.[2] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 9; Employer's Exhibit 3. The administrative law judge also properly found that the April 14, 1994 study was otherwise considered valid. Decision and Order at 9. The technician administering the test for Dr. Traughber noted good cooperation and understanding, and the test was validated by Dr. Kraman, a physician who is Board-certified in pulmonary medicine, and who reviewed the tracings. Director's Exhibit 10. Accordingly, we hold that the administrative law judge properly credited as valid the April 14, 1994 qualifying pulmonary function study.

[2]Dr. Gallo was merely apprised by counsel of the results of the April 12, 1994 pulmonary function study at his deposition, and there is no indication in the record that Dr. Gallo actually reviewed the tracings for the study either prior to or at the deposition. Employer's Exhibit 3.

Employer also argues that the administrative law judge erred in crediting Dr. Traughber's medical opinion as indicative that claimant is totally disabled pursuant to Section 718.204(c)(4). We disagree. Based upon his examination of claimant on April 12, 1994, Dr. Traughber opined that claimant has a severe obstructive ventilatory defect. Director's Exhibit 11. We reject employer's argument that Dr. Traughber's opinion should have been rejected in view of his reliance upon the April 14, 1994 pulmonary function study, since, as discussed *supra*, the administrative law judge properly found that the pulmonary function study upon which Dr. Traughber relied was a valid study. Furthermore, there is no merit to employer's contention that Dr. Traughber's opinion should have been rejected because the doctor did not indicate that he was aware of the specific physical requirements of claimant's coal mine employment. The ultimate finding regarding total disability is a legal determination to be made by the administrative law judge through consideration of exertional requirements of usual coal mine employment in conjunction with a doctor's opinion regarding physical capabilities.[3] *See Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). The administrative law judge properly compared Dr. Traughber's finding that claimant has a severe obstructive ventilatory defect to the exertional requirements of claimant's usual coal mine employment as a roof bolter, pinner and belt extensioner, and found that Dr. Traughber's opinion was sufficient to establish total disability.[4] *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *DeFore v. Alabama*

[3]Employer argues that Dr. Traughber's opinion is insufficient to establish total disability as a matter of law, relying upon the decisions of the United States Court of Appeals for the Fourth Circuit in *Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1990), and *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1990). This argument is misplaced. In *Lane* and *Walker,* the Fourth Circuit held that where a physician indicates that a miner *is able* to perform his usual coal mine employment, the doctor must state his knowledge of the physical requirements of the miner's usual coal mine employment and relate those requirements to the miner's impairment. In the instant case by contrast, Dr. Traughber did not state that claimant is able to perform his usual coal mine employment. Rather, Dr. Traughber opined that claimant has a severe obstructive ventilatory defect, a finding which the administrative law judge properly discussed in terms of the exertional requirements of claimant's usual coal mine employment. Decision and Order at 8-9; Director's Exhibit 11.

[4]The administrative law judge correctly noted that claimant testified at the hearing that his last usual coal mine employment entailed working primarily as a roof bolter, pinner and extensioner, and that these jobs required a lot of bending, straining, and pushing and pulling of heavy bolts, pins and metal. Decision and Order at 9; Hearing Transcript at 11-12, 15. The administrative law judge also noted that claimant testified that he would not be able to keep up the pace required in his job placing pins. Decision and Order at 9; Hearing Transcript at 20. Based upon claimant's testimony, the administrative law judge concluded that claimant's jobs as a roof bolter and pinner were physically demanding, and that, coupled with Dr. Traughber's finding that claimant has a severe obstructive ventilatory impairment, claimant demonstrated that he would not be able to sustain his prior coal mine employment duties. Decision and Order at 10.

By-Products Corp., 12 BLR 1-27 (1988); Decision and Order at 8-9; Director's Exhibit 11. Contrary to employer's contention, the administrative law judge properly credited Dr. Traughber's opinion as well documented and well reasoned because the opinion was consistent with the objective studies Dr. Traughber administered, as well as claimant's symptomatology. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Director, OWCP,* 10 BLR 1-19 (1987); Decision and Order at 8; Director's Exhibit 11. We, therefore, affirm the administrative law judge's decision to credit Dr. Traughber's opinion under Section 718.204(c)(4).

In addition, employer argues that the administrative law judge erred in concluding that Dr. Wright's medical opinion, that claimant has the respiratory capacity for his usual coal mine employment, was equivocal, and in rejecting it on that basis. Decision and Order at 8; Director's Exhibit 36; Employer's Exhibit 4. Any error the administrative law judge may have made in characterizing Dr. Wright's opinion as equivocal was harmless, however, as the administrative law judge properly discounted the doctor's opinion because it was not supported by the objective evidence of record. *See Clark, supra; King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Kozele, supra*; Decision and Order at 8. Specifically, the administrative law judge noted that Dr. Wright questioned the validity of the pulmonary function test obtained in his September 11, 1993 examination of claimant, and did not administer an arterial blood gas study. Decision and Order at 8; Director's Exhibit 36. The administrative law judge also noted that, in a subsequent report dated June 20, 1994, Dr. Wright changed his opinion with regard to the validity of his pulmonary function study, and also stated that his review of Dr. Lane's arterial blood gas study revealed moderate arterial hypoxemia. Decision and Order at 8; Director's Exhibit 36. We hold, therefore, that the administrative law judge properly discounted Dr. Wright's opinion under Section 718.204(c)(4).

Employer further argues that the administrative law judge erred in discounting Dr. Gallo's opinion that claimant is not totally disabled. This contention lacks merit. The administrative law judge properly discounted Dr. Gallo's opinion because the doctor based his opinion, in part, upon his speculation that the April 12, 1994 qualifying pulmonary function study was invalid, an assumption which, as discussed *supra*, the administrative law judge properly rejected. The administrative law judge further discounted Dr. Gallo's opinion because it was based, in part, upon pulmonary function study and arterial blood gas study results which the doctor obtained on April 18, 1994, and which the doctor himself opined were invalid. *See Clark, supra; Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); Decision and Order at 8-9. In addition, contrary to employer's contention, the administrative law judge properly found that Dr. Pope's opinion was not probative of the issue of total disability because the doctor did not address whether claimant had a pulmonary or respiratory impairment, or indicate any physical restrictions for the administrative law judge to compare with claimant's usual coal mine employment duties. Decision and Order at 9; Director's Exhibit 40. Had the administrative law judge inferred that Dr. Pope was of the opinion that claimant is not totally disabled, as employer suggests the administrative law judge should have, by interpreting the doctor's normal findings on a

physical examination and arterial blood gas testing, he would have impermissibly substituted his own opinion for that of a medical expert. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Furthermore, we reject employer's contentions that administrative law judge impermissibly found total disability established simply because claimant exhibited symptoms of coughing, shortness of breath and chest pain, received a state disability award, and lacked the educational background to secure other gainful employment. The administrative law judge did not base his ultimate conclusion of total disability on these factors, but merely found that these factors buttressed the medical evidence supporting a finding of total disability. The administrative law judge concluded that claimant is totally disabled because two of the three valid pulmonary function studies of record were qualifying studies, three of the arterial blood gas studies of record, although not qualifying, revealed hypoxemia, and because the administrative law judge found Dr. Traughber's opinion that claimant has a severe obstructive ventilatory impairment to be the most credible of record. Decision and Order at 10. The administrative law judge's finding that claimant established total disability is rational, supported by substantial evidence, and in accordance with law. We thus affirm the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(c).

We are unable to affirm, however, the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). We agree with employer's contention that the administrative law judge appears to have based his finding that claimant's total disability was due in part to pneumoconiosis on a mere head count, and thus failed to explain adequately his reasons for accepting or rejecting the conflicting evidence on the issue of disability causation. Moreover, the administrative law judge mischaracterized Dr. Wright's opinion as indicative that claimant is totally disabled due to pneumoconiosis. As the administrative law judge correctly found in discussing the doctor's opinion under Section 718.204(c)(4), Dr. Wright opined that claimant is not totally disabled. Thus, it was irrational for the administrative law judge to conclude that Dr. Wright's opinion established total disability due to pneumoconiosis pursuant to Section 718.204(b). Additionally, the administrative law judge erred in finding Dr. Pope's opinion sufficient to establish total disability due to pneumoconiosis. Dr. Pope did not address the issue of disability. Director's Exhibit 40. Furthermore, the administrative law judge's finding that Dr. Pope causally related claimant's disability to coal dust exposure is inconsistent with his finding under Section 718.204(c)(4) that Dr. Pope did not offer an opinion on the level of claimant's disability. For these reasons, we vacate the administrative law judge's finding that the preponderance of the evidence establishes total disability due to pneumoconiosis under Section 718.204(b), and remand the case for the administrative law judge to reconsider the issue of whether claimant's totally disabling respiratory impairment is due, at least in part, to pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997)*; Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Finally, we reject employer's request that the Board reconsider its previous holding that the administrative law judge properly accorded determinative weight to Dr. Traughber's medical opinion in finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4). *Gilkey v. Peabody Coal Co.*, BRB No. 97-1817 BLA (Sept. 22, 1998)(unpublished), slip op. at 2-3. We reaffirm this holding as the law of the case. *See Bridges v. Director, OWCP*, 6 BLR 1-988; *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983); *Whitlock v. Lockheed Shipbuilding and Construction Co.*, 15 BRBS 332 (1983). Additionally, there is no merit to employer's contention that it was denied due process because the administrative law judge did not provide the parties an opportunity to submit written briefs on remand. The administrative law judge has broad discretion in procedural matters. *See Clark, supra; Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985). Procedural due process requires that interested parties be notified of the pendency of an action and be afforded the opportunity to present their objections. *See generally Gladden v. Eastern Associated Coal Corp.*, 7 BLR 1-577 (1984). The parties were served with the Board's Decision and Order remanding the case to the administrative law judge on September 22, 1998. The administrative law judge issued his decision on remand on January 29, 1999. Employer thus had more than four months after receiving notice that the case was remanded to the administrative law judge in which to file a brief, but neither filed a brief nor requested time in which to do so. We reject, therefore, employer's contention that it was denied due process.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge