BRB No. 07-0636 BLA

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| J.C. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| PREMIER ELKHORN COAL COMPANY | ) | |
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| and | ) | |
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| GATLIFF COAL COMAPANY | ) | DATE ISSUED: 03/31/2008 |
| | ) | |
| 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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville Kentucky, for claimant.

James M. Kennedy (Baird & Baird), Pikeville, Kentucky, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-BLA-6775) of Administrative Law Judge Janice K. Bullard on a claim filed on August 19, 2003, 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). The administrative law judge accepted the parties' stipulation that claimant worked eighteen years in coal mine

employment,[1] and found that the evidence of record was sufficient to establish pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's weighing of the medical opinion evidence in finding total disability due to pneumoconiosis established pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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 into the Act 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv), employer asserts that the administrative law judge erred in crediting the opinions of Drs. Forehand and Rasmussen, that claimant suffers from a totally disabling respiratory impairment, over the contrary opinions of Drs. Broudy and Dahhan. Specifically, employer first contends that the administrative law judge erred in mechanically according controlling weight to the opinion of Dr. Forehand, as claimant's treating physician under 20 C.F.R.

[1] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc).*

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established eighteen years of qualifying coal mine employment, and pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(a). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

§718.104(d), because the record does not establish that Dr. Forehand had begun treating claimant by the time he wrote his July 21, 2004 report.[3] Employer's Brief at 12-13.

Initially, the record reflects that, while the administrative law judge accorded significant weight to Dr. Forehand's opinion based on his status as claimant's treating physician, pursuant to 20 C.F.R. §718.104(d), contrary to employer's assertion, the administrative law judge explicitly declined to accord controlling weight to Dr. Forehand's opinion in light of the other probative opinions of record. Decision and Order at 11. Moreover, while employer is correct that the record is unclear as to whether Dr. Forehand was, in fact, claimant's treating physician at the time he authored his July 1, 2004 report, the administrative law judge also specifically accorded significant weight to Dr. Forehand's opinion as "well-reasoned and documented," and further found his opinion supported by the "documented and inherently well-reasoned" opinion of Dr. Rasmussen. Decision and Order at 11. In addition, as discussed *infra*, the administrative law judge's conclusion that the opinions of Drs. Forehand and Rasmussen are well-reasoned is supported by substantial evidence. Therefore, as the administrative law judge has provided a valid reason for crediting the opinion of Dr. Forehand, any error made in attributing treating physician status to the opinion of Dr. Forehand is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Employer next contends that the administrative law judge erred in crediting the opinions of Drs. Forehand and Rasmussen as well-reasoned, because their diagnoses of a totally disabling respiratory impairment are unsupported by the blood gas study evidence of record, most of which are non-qualifying, including the most recent study of record. Employer's Brief at 15-17. Employer's arguments are without merit. Employer is asking for a reweighing of the evidence.

In finding well-reasoned the opinions of Drs. Forehand and Rasmussen diagnosing an exercise-induced arterial hypoxemia that prevents claimant from returning to his last coal mine job, the administrative law judge stated:

> [Dr. Forehand's] opinion is well-reasoned. Although the arterial blood gas study that Dr. Forehand administered did not produce qualifying results, he stated that the A-a gradient in Claimant's arterial blood gas showed

[3] As noted by the administrative law judge, claimant testified that he had been seeing Dr. Forehand four times per year since the "middle of [20]04." Decision and Order at 11. However, the only medical opinion from Dr. Forehand in the record is dated July 21, 2004, and Dr. Forehand did not indicate in this report whether he was seeing claimant for the first time, or whether he had treated him previously. Claimant's Exhibit 2.

> "exercise-induced arterial hypoxemia" which he described as "an abnormal response to exercise." This finding appears consistent with Dr. Rasmussen's findings that when exercising during the arterial blood gas study, Claimant showed "a marked impairment in oxygen transfer and he was moderately hypoxic." This conclusion is supported to some degree by Dr. Broudy's testimony that exercise blood gases could be a sign of disability in determining whether an individual can perform strenuous work, which he acknowledged that coal mining may be. . . .
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> . . . Of all the physicians, Dr. Rasmussen gave the most detailed description of Claimant's job requirements, and his opinion on total disability is entitled to additional weight because he appears to have a detailed understanding of what the claimant's coal mine employment actually entailed. In addition, Dr. Rasmussen's opinion is documented and inherently well-reasoned.

Decision and Order at 15; Director's Exhibit 12; Claimant's Exhibit 3.

Contrary to employer's assertion, the regulations explicitly provide that a doctor can make a reasoned medical judgment that a miner is totally disabled even where total disability cannot be shown under Section 718.204(b)(2)(i)-(iii). 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-123, (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744, 21 BLR 2-203, 2-211 (6th Cir. 1997). Here, both Dr. Forehand and Dr. Rasmussen diagnosed a pulmonary impairment based on the blood gas studies they performed, and, taking into consideration the physical demands of claimant's usual coal mine work, concluded that the impairment was totally disabling.[4] The administrative law judge fully discussed the opinions of Drs. Forehand and Rasmussen in light of the blood gas studies they performed, and explained why she found the abnormal arterial blood gas studies they

[4] Dr. Forehand noted that claimant worked in underground coal mining as a general inside laborer and [miner] operator. Claimant's Exhibit 3. Dr. Forehand diagnosed exercise induced hypoxemia, based on the blood gas study, and concluded that claimant has a "[w]ork-limiting respiratory impairment of a gas-exchange nature which would prevent [claimant] from returning to his last coal mining job." *Id*. Similarly, Dr. Rasmussen demonstrated a detailed understanding of what claimant's coal mine employment entailed. Director's Exhibit 12; Decision and Order at 15. Dr. Rasmussen diagnosed "[m]arked impairment in oxygen transfer during exercise" and moderate hypoxemia, based on blood gas studies, and concluded that claimant does not retain the pulmonary capacity to perform his coal mine work. *Id.*

cited, one of which was qualifying, supported their opinions.[5] Decision and Order at 15. Accordingly, we affirm the administrative law judge's determination to credit the opinions of Drs. Forehand and Rasmussen as well-reasoned.[6] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 552, (6th Cir. 2002)*; Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

We next reject employer's contention that the administrative law judge was required to accord greater weight to the opinions of Drs. Broudy and Dahhan, based on their qualifications. In evaluating Dr. Broudy's disability opinion, that claimant retains the respiratory capacity to perform his usual coal mine work, the administrative law judge permissibly found Dr. Broudy's conclusion compromised by the fact that he had not performed an exercise blood gas test, which he had conceded would be more significant than a resting study in determining whether an individual can perform strenuous work. *See* 20 C.F.R. §718.105(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 15. As Dr. Broudy's qualifications do not entitle his properly discredited opinion to greater weight, we reject employer's assertion that the administrative law judge erred in weighing his opinion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-187, 19 BLR 2-111, 2-117 (6th Cir. 1995).

With respect to Dr. Dahhan's opinion, the administrative law judge specifically considered Dr. Dahhan's qualifications and accorded substantial weight to his opinion that claimant was not totally disabled, finding it inherently consistent with and supported by the objective results of the underlying tests. Decision and Order at 15. The administrative law judge ultimately determined, however, that although Dr. Dahhan's

[5] In addition, the administrative law judge noted Dr. Broudy's testimony that exercise blood gas studies are more significant than resting studies in determining whether an individual can perform strenuous work. Decision and Order at 15; Employer's Exhibit 5 at 13.

[6] We additionally reject employer's argument that the opinions of Drs. Forehand and Rasmussen are unreasoned because they failed to account for their respective DLCO results. Employer does not allege that the administrative law judge failed to consider relevant evidence, nor has employer identified anything in the record that suggests the DLCO test results undermine the credibility of the opinions of Drs. Forehand and Rasmussen. As the interpretation of medical data is for the medical experts, and it is the province of an administrative law judge to evaluate medical opinions, we reject employer's contention. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

opinion was well-reasoned, it was outweighed by the reasoned opinions of Drs. Rasmussen and Forehand. *Id*.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6, and explained whether the diagnoses contained therein constituted reasoned medical judgments, we affirm the administrative law judge's finding that the preponderance of reliable medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) as supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-284 (6th Cir. 2005); *Cornett*, 227 F.3d at 576, 22 BLR at 2-120.

Employer lastly challenges the administrative law judge's finding, pursuant to 20 C.F.R. §718.204(c), that claimant's totally disabling respiratory impairment is due to pneumoconiosis. Employer argues that the administrative law judge failed to comparatively weigh the opinions of Drs. Dahhan and Broudy in conjunction with the opinions of Drs. Rasmussen and Forehand, and that the causation opinions of Drs. Rasmussen and Forehand are unreasoned. Employer's Brief at 17-18. Employer's assertions are without merit.

The administrative law judge properly found that Drs. Dahhan and Broudy did not diagnose a pulmonary disability and did not offer a causation opinion. Thus, the administrative law judge acted within her discretion in finding that the opinions were not probative pursuant to Section 718.204(c). Further, contrary to employer's assertions, the administrative law judge permissibly credited the causation opinions of Drs. Forehand and Rasmussen as well-reasoned, finding that each physician had adequately explained why they were able to conclude that claimant's pneumoconiosis had contributed to his disabling impairment.[7] *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 16. Finally, the administrative law judge permissibly concluded that as both Drs. Forehand and Rasmussen opined that claimant's coal workers' pneumoconiosis was more than an infinitesimal contributor to claimant's total disability, their opinions established claimant's burden of proof. *See Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 610-11, 22 BLR 2-288, 2-303 (6th Cir. 2001); Decision and Order at 16. We therefore affirm the administrative law judge's finding that claimant established total

[7] The administrative law judge properly stated that Dr. Forehand wrote that claimant had no other cardiopulmonary conditions that would contribute to his shortness of breath; and Dr. Rasmussen opined that the only known risk factor for claimant's total pulmonary disability was his coal workers' pneumoconiosis. Decision and Order at 16.

disability due to pneumoconiosis under 20 C.F.R. §718.204(c), as supported by substantial evidence. *See Martin*, 400 F.3d at 306, 23 BLR at 2-284; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge