BRB No. 09-0549 BLA

BENNETT MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TOPPER COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 03/24/2010
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
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 on Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, P.S.C., Pikeville, Kentucky, for claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (04-BLA-6482) of Administrative Law Judge Larry S. Merck (the administrative law judge), awarding benefits on a miner's claim filed on October 28, 2002, 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. Initially, the administrative law judge found that the claim was timely filed, because there was no evidence that claimant actually received the 1993 medical reports of Drs. Anderson and Baker that employer argued were medical determinations of total disability due to pneumoconiosis. The administrative law judge therefore found that there was no communication to claimant of a medical determination of total disability due to pneumoconiosis, more than three years before he filed this claim. *See* 20 C.F.R. §725.308. On the merits, the administrative law judge credited claimant with at least eighteen years of coal mine employment,[1] and found that the medical opinion evidence established that claimant's chronic lung disease is due in part to coal mine dust exposure and thus, constitutes legal pneumoconiosis.[2] *See* 20 C.F.R. §§718.202(a)(4); 718.201. The administrative law judge further found that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the claim was timely filed, and remanded the case for the administrative law judge to consider claimant's testimony suggesting that he received the 1993 reports of Drs. Anderson and Baker.[3] *B.M.* [*Mullins*] *v. Topper Coal Co.*, BRB No. 07-0623 BLA,

[1] The record indicates 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, 1-202 (1989)(*en banc*).

[2] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[3] Specifically, the Board directed the administrative law judge to claimant's testimony that he had the reports of Drs. Anderson and Baker in his possession as part of his state workers' compensation claim documents, and that he filed them with the district director. *B.M.* [*Mullins*] *v. Topper Coal Co.*, BRB No. 07-0623 BLA, slip op. at 4 (Apr. 30, 2008)(unpub.). The record reflects that claimant was awarded benefits pursuant to a settlement of his Kentucky claim for occupational disease on June 16, 1994. Director's Exhibit 6. The 1993 reports of Drs. Baker and Anderson are associated with the state claim documents. *Id*.

slip op. at 3-4 (Apr. 30, 2008)(unpub.). The Board further instructed the administrative law judge that, if he found that claimant received the 1993 reports of Drs. Anderson and Baker, he was to determine if either report constituted the reasoned opinion of a medical professional diagnosing claimant as totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §725.308. *Mullins*, slip op. at 4, *citing Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-298 (6th Cir. 2001); *Sturgill v. Bell County Coal Corp.*, 23 BLR 1-159, 1-166 (2006)(*en banc*).

Additionally, on the merits, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and instructed him to reconsider that issue, maintaining the burden of proof on claimant. *Mullins*, slip op. at 6-7. Further, the Board instructed the administrative law judge to more fully explain the bases for his determinations that the opinions of Drs. Hussain and Baker, diagnosing claimant with legal pneumoconiosis, were well-reasoned. *Mullins*, slip op. at 7. Finally, because the Board vacated the administrative law judge's finding that the existence of legal pneumoconiosis was established, the Board also vacated the finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instructed the administrative law judge to reconsider that issue, if reached, on remand.[4] *Mullins*, slip op. at 7-8.

On remand, the administrative law judge determined that the claim was timely filed pursuant to 20 C.F.R. §725.308. Specifically, he found that, although claimant received the 1993 medical reports of Drs. Anderson and Baker, neither report constituted a reasoned opinion that claimant was totally disabled due to pneumoconiosis. On the merits of entitlement, the administrative law judge found that the better reasoned medical opinion evidence established that claimant has legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) that is due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant's totally disabling respiratory impairment is due to legal pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the claim was timely filed. Employer further asserts that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging

[4] The Board affirmed, as unchallenged, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b). *Mullins*, slip op. at 2 n.2.

affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, arguing that substantial evidence does not support the administrative law judge's determination that Dr. Baker's 1993 report was unreasoned. The Director, therefore, requests that the Board remand this case for the administrative law judge to reconsider Dr. Baker's 1993 report with respect to the timeliness issue.

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).

Employer challenges the administrative law judge's finding that claimant's claim was timely filed pursuant to 20 C.F.R. §725.308.[5] As noted, the administrative law judge found that claimant received the 1993 medical reports by Drs. Anderson and Baker.[6] However, the administrative law judge found that neither report supported employer's

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[5] Section 725.308 provides in relevant part that:

> (a) A claim for benefits . . . shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner . . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, . . . the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

[6] In his report dated August 14, 1993, Dr. Anderson diagnosed category 2/2 pneumoconiosis by x-ray and stated that this diagnosis "carries an irrebuttable presumption of disability." Director's Exhibit 6 (Dr. Anderson's report at 2). Dr. Anderson further noted that a pulmonary function study reflected a "mild decrease" in function that equated to "AMA guide . . . Class 2." *Id.* In his report dated September 24, 1993, Dr. Baker diagnosed claimant with both clinical and legal pneumoconiosis, and stated that claimant was not physically able, from a pulmonary standpoint, to perform his usual coal mine employment, and would have difficulty doing sustained manual labor on an eight-hour basis, due to those conditions. *Id*. (Dr. Baker's 1993 report at 4).

burden to rebut the presumption that the claim was timely filed, because the reports were not well-reasoned.

We conclude that substantial evidence supports the administrative law judge's finding with respect to Dr. Anderson's opinion. The administrative law judge correctly noted that, contrary to Dr. Anderson's statement that an August 12, 1993 x-ray "carrie[d] an irrebuttable presumption of disability," the applicable regulation requires that an x-ray establish the presence of one or more large opacities, classified as Category A, B, or C, for there to be an irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.304(a). Since Dr. Anderson read claimant's 1993 x-ray as positive for simple pneumoconiosis only, and as negative for any large opacities, the administrative law judge properly discounted Dr. Anderson's conclusion of "an irrebuttable presumption of disability." *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). Further, the administrative law judge reasonably determined that, although Dr. Anderson diagnosed a "mild decrease in pulmonary function," Dr. Anderson did not address whether such an impairment would have prevented claimant from performing his usual coal mine employment, and therefore, did not provide sufficient reasoning to support a diagnosis of total disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We therefore reject employer's allegation of error, and affirm the administrative law judge's finding that Dr. Anderson's 1993 report was not a reasoned medical determination of total disability due to pneumoconiosis. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-298; *Sturgill*, 23 BLR at 1-166.

Both employer and the Director contend that substantial evidence does not support the administrative law judge's reasons for finding that Dr. Baker's 1993 report was not a reasoned diagnosis of total disability due to pneumoconiosis. The administrative law judge discredited Dr. Baker's opinion that claimant was totally disabled by a moderate obstructive impairment because (1) the record did not contain the tracings of the September 15, 1993 pulmonary function study upon which Dr. Baker relied; (2) Dr. Baker's pulmonary function study was "inconsistent with" Dr. Anderson's pulmonary function study performed only "weeks earlier;" and (3) Dr. Baker did not include a description of claimant's "effort and comprehension" during the pulmonary function study. Decision and Order on Remand at 7. Finding that Dr. Baker's pulmonary function study did not "fully conform" to the regulations, the administrative law judge discounted Dr. Baker's opinion as "inadequately reasoned." *Id.*

We find merit in the contentions of employer and the Director that substantial evidence does not support the administrative law judge's findings regarding Dr. Baker's opinion. As the Director states, contrary to the administrative law judge's finding, the tracings from Dr. Baker's September 15, 1993 pulmonary function studies are contained in the record. Director's Exhibit 6 at 10 (unnumbered). Further, we agree with the

Director that the administrative law judge did not explain the basis for his determination that Dr. Baker's pulmonary function study was unreliable because it was "inconsistent" with Dr. Anderson's earlier study.[7] Finally, although, as the administrative law judge stated, Dr. Baker's pulmonary function study report did not state the degree of claimant's effort and cooperation, we note that "substantial compliance" with the reporting requirements of 20 C.F.R. §718.103 (2000)[8] was required. 20 C.F.R. §718.103(c)(2000). The administrative law judge, however, found, without explanation, that Dr. Baker's study was unreliable because it did not "fully conform" with the regulation.[9] Decision and Order on Remand at 7. Because the administrative law judge did not address whether Dr. Baker's pulmonary function study was in "substantial compliance" despite the lack of a notation of effort and comprehension, we are unable to affirm his additional reason for finding the study unreliable.

Because the administrative law judge did not provide a valid reason for finding Dr. Baker's September 15, 1993 pulmonary function study to be unreliable, he erred in finding Dr. Baker's opinion to be unreasoned based on Dr. Baker's reliance on that pulmonary function study. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We must, therefore, vacate the administrative law judge's timeliness finding pursuant to 20 C.F.R §725.308, and remand this case for further consideration. On remand, the administrative law judge must reconsider whether Dr. Baker's 1993 opinion is a reasoned medical

[7] The Director compares the results of the pulmonary function studies administered by Drs. Anderson and Baker. He notes that the studies' FEV1 scores were within .02 cc of each other and thus, appear to be "similar," Director's Brief at 5, and he further notes that Dr. Baker's FVC results were higher than those obtained by Dr. Anderson. *Id.*

[8] Although the quality standards for the development of medical evidence were revised in 2001, those revisions apply only to clinical tests that are conducted after January 19, 2001. 20 C.F.R. §718.101(b). Because the former regulation remains applicable, we have cited to the 2000 version of the Code of Federal Regulations.

[9] Review of the record discloses no report by a physician that Dr. Baker's September 15, 1993 pulmonary function study was invalid because of insufficient effort or comprehension from claimant. Dr. Baker, who, the administrative law judge noted, is Board-certified in Internal Medicine and Pulmonary Disease, interpreted the study as revealing a "moderate obstructive ventilatory defect." Director's Exhibit 6 (Dr. Baker's report at 3).

determination of total disability due to pneumoconiosis.[10] *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009); *Kirk*, 264 F.3d at 607, 22 BLR at 2-298; *Sturgill*, 23 BLR at 1-166. Further, if the administrative law judge finds Dr. Baker's opinion to be reasoned, he must address whether claimant understood that he was totally disabled due to pneumoconiosis in 1993 for purposes of the Act. *See Adkins v. Donaldson*, 19 BLR 1-34, 1-42 (1993).

Although we are remanding this case to the administrative law judge for further consideration at Section 725.308, in the interest of judicial economy, we will address employer's arguments on the merits. In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge erred in crediting Dr. Baker's opinion, contained in his 2003 and 2006 reports, that claimant suffers from COPD due to both smoking and coal dust exposure, Claimant's Exhibits 4, 5, 7, over the opinions of Drs. Fino and Dahhan, that claimant's COPD is due to smoking alone.[11] Director's Exhibits 11, 16, 18; Employer's Exhibits 1, 4, 5. Employer asserts that the administrative law judge selectively analyzed Dr. Baker's opinion, which, employer alleges, is too equivocal to be considered a reasoned opinion. Employer further asserts that the administrative law judge failed to explain his credibility determinations in accordance with the Administrative Procedure Act (the APA). 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); Employer's Brief at 13-15. We disagree.

The administrative law judge accurately observed that Dr. Baker stated in his March 13, 2006 report that, "cigarette smoking has obviously contributed to [claimant's] obstructive airway disease, chronic bronchitis and mild resting arterial hypoxemia but it has probably been synergistic and/or additive with his coal dust exposure." Decision and Order on Remand at 11; Claimant's Exhibit 4. The administrative law judge

[10] The Director argues that there are flaws in Dr. Baker's 1993 opinion that the administrative law judge, on remand, should take into account in determining whether Dr. Baker's opinion was reasoned. Director's Brief at 5.

[11] In finding legal pneumoconiosis established on remand, the administrative law judge declined to rely on Dr. Hussain's opinion, because it was "inadequately reasoned" and therefore merited "little probative weight." Decision and Order on Remand at 14.

acknowledged that Dr. Baker's use of the term "probably" could imply "some equivocation." *Id*. However, the administrative law judge further found that Dr. Baker, "with no indication of uncertainty," attributed claimant's COPD to both cigarette smoking and coal dust exposure in his January 8, 2003 report; and that he specifically stated that claimant suffers from "legal pneumoconiosis" and "unequivocally opined that 'there has been a synergistic effect or an additive effect from [claimant's] cigarette smoking and his coal dust exposure,'" in his supplemental report, dated August 1, 2006. *Id*. Substantial evidence supports the administrative law judge's permissible assessment of the persuasiveness of Dr. Baker's opinion as a whole. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483-84 (6th Cir. 2007).

Further, contrary to employer's assertion that the administrative law judge violated the APA, the administrative law judge explained that he found Dr. Baker's diagnosis to be well-reasoned because Dr. Baker considered claimant's cigarette smoking and coal-mine-dust exposure histories, and because Dr. Baker based his opinion on a physical examination, claimant's pulmonary function and blood gas studies, the reports and depositions of other physicians, and a review of medical literature. Decision and Order on Remand at 11; *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Because it is supported by substantial evidence, we affirm the administrative law judge's permissible credibility determination. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer additionally contends that the administrative law judge erred in discounting the opinions of Drs. Dahhan and Fino, and that, in so doing, he impermissibly placed the burden of establishing the absence of legal pneumoconiosis on employer. Employer's Brief at 15. We disagree.

In considering the opinions of Drs. Dahhan and Fino, the administrative law judge accurately observed that both physicians opined that claimant does not have legal pneumoconiosis because coal dust exposure results in an irreversible impairment, and claimant's pulmonary function studies demonstrated significant reversibility after claimant received bronchodilators. Director's Exhibits 16 at 7, 18 at 10. Contrary to employer's assertion, the administrative law judge acted within his discretion as the fact-finder when he determined that the physicians did not adequately explain why claimant's response to bronchodilators necessarily eliminated coal dust exposure as a cause of claimant's obstructive lung disease.[12] *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Moreover, because the administrative law judge

[12] The administrative law judge had before him Dr. Baker's testimony that COPD related to coal dust may be "partially reversible" with the administration of bronchodilators. Claimant's Exhibit 5 at 13-15.

rationally credited Dr. Baker's opinion, we reject employer's assertion that the administrative law judge placed the burden of disproving the existence of legal pneumoconiosis on employer. Because employer raises no further challenges to the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that claimant established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to 20 C.F.R. §718.204(c), employer argues that the administrative law judge erred in crediting Dr. Baker's opinion, that claimant's totally disabling pulmonary impairment is due, in part, to coal mine dust exposure, over the contrary opinions of Drs. Dahhan and Fino, that coal dust exposure played no role in claimant's pulmonary impairment. Director's Exhibits 11, 16, 18; Employer's Exhibits 1, 4, 5. Specifically, employer asserts that the administrative law judge failed to provide valid reasons for his credibility determinations, and erred in crediting Dr. Baker's opinion, which, employer alleges, does not attribute claimant's totally disabling impairment to coal mine dust exposure. Employer's Brief at 17-22. We disagree.

Contrary to employer's assertion, the administrative law judge permissibly discounted the opinions of Drs. Dahhan and Fino as to disability causation, because the physicians did not diagnose pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). Further, the administrative law judge accurately found that Dr. Baker attributed claimant's total disability, in part, to coal mine dust exposure. Director's Exhibit 9; Claimant's Exhibit 5 at 11-12. Moreover, the administrative law judge rationally credited Dr. Baker's causation opinion as well-reasoned, because Dr. Baker considered claimant's cigarette smoking and coal-mine-dust exposure histories, and he based his opinion on a physical examination, claimant's pulmonary function and blood gas studies, the reports and depositions of other physicians, and a review of medical literature. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because it is supported by substantial evidence, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c).

In sum, we affirm the administrative law judge's findings on the merits of entitlement, but remand the case for the administrative law judge to consider whether this claim was timely filed pursuant to Section 725.308. If the claim is determined to be untimely, the administrative law judge must deny benefits. However, if the administrative law judge finds that the claim was timely filed, he should reinstate the award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge