BRB No. 10-0492 BLA

LINCOLN KEITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOUBLE M COAL COMPANY, INCORPORATED	)	
	)	
	)	
Employer-Petitioner	)	
	)	DATE ISSUED: 05/11/2011
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 on Second Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Second Remand (03-BLA-6133) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the provisions of 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 involves a subsequent claim filed on January 7, 2002, and is before the Board for the third time.[1]

[1] The Board set forth the complete procedural history of this case in its prior decision. *L.K.* [*Keith*] *v. Double M Coal Co.*, BRB No. 07-0743 BLA (July 31,

The last time this case was before the Board, pursuant to employer's appeal, the Board vacated the administrative law judge's findings, on the merits,[2] of pneumoconiosis, total disability, and total disability due to pneumoconiosis under 20 C.F.R. §§718.202(a), 718.204(b)(2), 718.204(c). *L.K.* [*Keith*] *v. Double M Coal Co.*, BRB No. 07-0743 BLA, slip op. at 7-16 (July 31, 2008)(unpub.). The Board additionally vacated the administrative law judge's determination that claimant was entitled to benefits beginning on January 1, 2002, and remanded the case to the administrative law judge for further consideration. *Id*. at 17.

On remand, the administrative law judge credited claimant with thirty-one years of coal mine employment,[3] and found that he established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a), 718.203(b). The administrative law judge further determined that claimant established total disability due to pneumoconiosis under Section 718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits, effective January 1, 2002.

Employer argues on appeal that the administrative law judge did not properly weigh the medical opinion evidence under Section 718.202(a)(4). Employer also contends that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b)(2), (c). In addition, employer asserts that the administrative law judge erred in selecting January 2002, the month in which claimant filed his claim, as the date from which benefits commence. Claimant did not respond. The Director, Office of Workers' Compensation Programs, declined to file a response brief.[4]

2008)(unpub.). Our prior discussion of the procedural history is incorporated by reference.

[2] The Board previously affirmed the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b)(2), and that claimant thereby established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). *Keith v. Double M Coal Co.*, BRB No. 05-0562 BLA (Mar. 16, 2006)(unpub.).

[3] Because claimant's coal mine employment was in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

[4] The recent amendment to the Act, which became effective on March 23, 2010, and which applies to claims filed after January 1, 2005, does not apply to this claim, filed

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).

To establish entitlement 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).

After consideration of the administrative law judge's Decision and Order on Second Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Second Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In its last decision, the Board vacated the administrative law judge's finding under Section 718.202(a)(4),[5] holding that, although the administrative law judge permissibly found the opinions of Drs. Rasmussen and Forehand to be reasoned and documented diagnoses of legal pneumoconiosis, she applied a stricter standard in weighing Dr. Dahhan's contrary opinion. *Keith*, BRB No. 07-0743 BLA, slip op. at 7. The Board instructed the administrative law judge, on remand, to reconsider the medical opinions of Drs. Dahhan, Forehand, and Rasmussen, and "render a finding as to the probative value of each opinion based upon 'the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.'" *Id*. at 8, *quoting Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

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on January 7, 2002. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[5] The Board previously affirmed the administrative law judge's finding that claimant did not establish pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). *Keith*, BRB No. 07-0743 BLA, slip op. at 2, 4.

On remand, the administrative law judge found the opinions of Drs. Dahhan, Forehand, and Rasmussen[6] to be reasoned, and resolved the conflict in the evidence "by according the greatest probative weight to the opinion of Dr. Rasmussen," in light of his "vast experience in the area of coal workers' pneumoconiosis," and because his opinion was "the best explained and reasoned." Decision and Order on Second Remand at 17. In so finding, the administrative law judge explained that Dr. Rasmussen's opinion is supported by Dr. Forehand's opinion, and that Dr. Rasmussen's curriculum vitae shows that he has "authored many publications dealing with pulmonary impairment in coal miners and his most recent commentary was published in 2001." *Id*. In contrast, the administrative law judge found that Dr. Dahhan's curriculum vitae "does not indicate that he has written any articles regarding black lung and his most recent publication of the four listed was in 1981." *Id*. Thus, the administrative law judge found that claimant established the existence of legal pneumoconiosis under Section 718.202(a)(4). With regard to the administrative law judge's weighing of the opinions of Drs. Forehand and Rasmussen, the Board previously rejected employer's assertion that the opinions of Drs. Forehand and Rasmussen do not constitute reliable evidence sufficient to support a finding of legal pneumoconiosis.[7] *Keith*, BRB No. 07-0743 BLA, slip op. at 5-6. Because employer demonstrates no exception to the law of the case doctrine, we decline to reconsider our prior holding on this issue. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990). Further, employer does not challenge the administrative law judge's determination to assign greatest probative weight to Dr. Rasmussen's opinion based on his credentials. Consequently, we affirm the administrative law judge's finding under Section 718.202(a)(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer asserts that the administrative law judge erred in failing to set forth, in detail, the basis for her finding that, under Section 718.202(a), "the well-reasoned and documented medical opinions outweigh the negative x-ray readings, as the [medical opinions] are based on thorough clinical evaluations and objective testing." Decision and Order on Second Remand at 17. Employer, however, fails to explain how the x-ray evidence that the administrative law judge found to be negative for clinical pneumoconiosis would undermine her finding that claimant has established legal

[6] Dr. Forehand diagnosed a "significant impairment of a gas-exchange nature" due to coal mine dust exposure. Director's Exhibit 11. Dr. Rasmussen diagnosed a moderate loss of lung function due to coal mine dust-induced lung disease. Claimant's Exhibit 1. Dr. Dahhan opined that claimant does not have a pulmonary or respiratory impairment. Employer's Exhibit 4.

[7] "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).

pneumoconiosis, based on the medical opinion evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-174 (4th Cir. 2000). Consequently, we reject employer's allegation of error, and affirm the administrative law judge's finding under Section 718.202(a).

Employer additionally challenges the administrative law judge's findings that the blood gas study and medical opinion evidence establish total disability pursuant to Section 718.204(b)(2)(ii), (iv). In the last appeal, the Board held that the administrative law judge did not adequately explain her finding that total disability was established because two out of three exercise blood gas studies were qualifying,[8] and further held that the administrative law judge's error affected her analysis of the medical opinions. Therefore, the Board instructed the administrative law judge to reconsider the blood gas study evidence, and to then reconsider the medical opinions as to the extent of claimant's impairment, comparing those opinions to the exertional requirements of claimant's usual coal mine employment.

On remand, the administrative law judge found that claimant's job as a shuttle car operator involved heavy manual labor. The administrative law judge further found that the preponderance of the blood gas study evidence and the medical opinion evidence supported a finding of total disability under Section 718.204(b)(2)(ii),(iv). Weighing all of the relevant evidence together under Section 718.204(b)(2), the administrative law judge found that the non-qualifying pulmonary function studies did not contradict the blood gas study and medical opinion evidence and that, therefore, claimant established total disability.

Employer asserts that the administrative law judge erred in finding that claimant's job as a shuttle car operator required heavy manual labor. Employer's assertion lacks merit. The administrative law judge permissibly determined that claimant's last coal mine employment as a shuttle car operator required "some heavy labor." Decision and Order on Second Remand at 22. In so finding, she rationally credited Dr. Rasmussen's characterization of claimant's job duties, because she found it to be consistent with claimant's statement, on Form CM-913, that "if we were broke down, I had to rock dust,

[8] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values in Appendix C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values. 20 C.F.R. §718.204(b)(2)(ii). The Board noted that the most recent exercise blood gas study was non-qualifying, and that the issue before the administrative law judge was whether claimant was permanently and totally disabled at the time of the hearing. *Keith*, BRB No. 07-0743 BLA, slip op. at 10-11.

shovel, [and] work on the machinery."[9] Decision and Order on Second Remand at 21, *quoting* Director's Exhibit 5; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). Employer notes that Dr. Rosenberg stated that claimant's job as a shuttle car operator "didn't involve much lifting, but just moving various levers on the train in order to load and unloading [*sic*] coal." Employer's Exhibit 1. The administrative law judge, however, permissibly discounted Dr. Rosenberg's description, because Dr. Rosenberg "d[id] not adequately consider the [c]laimant's work hauling and shoveling coal, rock dusting, and working on the machinery." Decision and Order on Second Remand at 22; *see Hicks*, 138 F.3d at 528, 21 BLR at 2-326; Consequently, we affirm the administrative law judge's exertional requirement finding.[10]

Employer further maintains that the administrative law judge failed to "assess the [blood gas study] evidence in light of the fact that total disability is measured by the claimant's physical condition at the time of the hearing," Employer's Brief at 25, given that the most recent blood gas study was non-qualifying.[11] We disagree. Although the most recent exercise blood gas study of record, conducted by Dr. Dahhan, yielded normal results, the administrative law judge permissibly found that it was not entitled to greater

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[9] Contrary to employer's assertion, Dr. Rasmussen specifically stated that claimant's "last regular coal mine job" required "significant heavy manual labor." Claimant's Exhibit 1 at 3. Dr. Rasmussen also specified that claimant's "last job was that of shuttle car operator. He shoveled the tail piece. He loaded and unloaded supplies. He rock dusted lifting 50# rock dust bags. He set timbers when pillaring. He shoveled the belt. Thus, he did considerable heavy and some very heavy manual labor." *Id*. at 2. Further, claimant related his rock dusting, shoveling, and working on machinery to his last job of shuttle car operator. Director's Exhibit 5.

[10] We reject employer's assertion that the administrative law judge erred in failing to determine whether claimant's duties rock dusting, shoveling, and working on the machine "were frequent enough to constitute 'usual' work." *See Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982) (defining an individual's usual coal mine work as "the most recent job the miner performed regularly and over a substantial period of time").

[11] The exercise studies obtained by Dr. Forehand on May 5, 2002, and by Dr. Rasmussen on April 3, 2003 produced qualifying values. Director's Exhibit 11; Claimant's Exhibit 1. The resting and exercise studies that Dr. Dahhan obtained on September 23, 2003 were non-qualifying. Employer's Exhibit 4. The resting study obtained by Dr. Rosenberg on September 30, 2002 was non-qualifying; Dr. Rosenberg did not conduct an exercise blood gas study. Employer's Exhibit 1.

weight "based on its status as the most recent" study, because the three most recent blood gas studies were all conducted within a period of sixteen months. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; Decision and Order on Second Remand at 19. Because the preponderance of these three most recent exercise studies produced qualifying values, the administrative law judge determined that "the preponderance of the arterial blood gas study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)." Decision and Order on Second Remand at 20. Substantial evidence supports this finding. Thus, contrary to employer's assertion, the administrative law judge rationally found Dr. Dahhan's non-qualifying exercise blood gas study to be outweighed by the preponderance of qualifying exercise studies. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763 21 BLR 2-587, 2-605 (4th Cir. 1999). As employer raises no further challenge to the administrative law judge's weighing of the blood gas study evidence, we affirm her finding under Section 718.204(b)(2)(ii).

Employer argues that the administrative law judge erred in crediting the opinions of Drs. Forehand and Rasmussen, that claimant has a totally disabling lung impairment, over the contrary opinions of Drs. Dahhan and Rosenberg, pursuant to Section 718.204(b)(2)(iv). Employer's Brief at 21-31. We reject employer's argument. As the administrative law judge stated, Dr. Rasmussen considered the heavy manual labor that claimant was required to perform as a shuttle car operator, and both physicians' opinions are supported by the qualifying, exercise blood gas studies on which they are based. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; Decision and Order on Second Remand at 20-21. Thus, the administrative law judge permissibly relied on the opinions of Drs. Rasmussen and Forehand as reasoned opinions that claimant is totally disabled. Further, the administrative law judge acted within her discretion in discounting the opinions of Drs. Dahhan and Rosenberg, that claimant has no impairment, because, although both physicians reviewed Dr. Forehand's findings of total disability and a "significant impairment of gas exchange," they did not discuss how those findings affected their conclusions that claimant has no lung impairment. *See Gross v. Dominion Coal Corp.*, 23 BLA 1-8, 1-19-20 (2003); Decision and Order on Second Remand at 22-23. Substantial evidence supports the administrative law judge's finding that the opinions of Drs. Forehand and Rasmussen are "in better accord both with the evidence underlying their opinions and the overall weight of the medical evidence of record." *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; Decision and Order on Second Remand at 22-23. Consequently, we affirm the administrative law judge's finding under Section 718.204(b)(2)(iv). As employer raises no further challenge to the administrative law judge's weighing of the evidence pursuant to Section 718.204(b)(2), we affirm her finding that the preponderance of the blood gas study and medical opinion evidence establishes total disability under Section 718.204(b)(2).

Pursuant to Section 718.204(c), employer contends that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Forehand, that claimant is totally disabled due to pneumoconiosis, and in discrediting the contrary opinions of Drs. Rosenberg and Dahhan. We disagree. Substantial evidence supports the administrative law judge's finding that Drs. Rasmussen and Forehand provided documented and reasoned opinions that claimant is totally disabled due to pneumoconiosis, as they considered accurate coal mine employment and smoking histories, and explained their opinions in light of those histories.[12] *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Further, the administrative law judge permissibly discounted the disability causation opinions of Drs. Rosenberg and Dahhan, because the physicians opined that claimant does not have legal pneumoconiosis, contrary to the administrative law judge's finding at Section 718.202(a)(4). *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006). We, therefore, affirm the administrative law judge's finding under Section 718.204(c).[13] As claimant has established each element of entitlement, we affirm the award of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Finally, employer contends that, because the earliest evidence of total disability was obtained in May 2002, the administrative law judge erred in finding that benefits are payable from January 2002, the month in which claimant filed this claim. We disagree. If the medical evidence does not establish the date that a miner became totally disabled due to pneumoconiosis, benefits are payable as of the filing date of the claim, unless credited medical evidence indicates that the miner was not totally disabled at some point after that date. *See* 20 C.F.R. §725.503; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *see also Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In this case, the administrative law judge rationally found that the existence of a qualifying exercise blood gas study dated May 2, 2002 did not establish that claimant became totally disabled on

[12] As summarized by the administrative law judge, Drs. Forehand and Rasmussen opined that claimant's disabling impairment is due solely to his years of coal mine dust exposure, because his smoking history was brief and ended in the 1960s. Director's Exhibit 11; Claimant's Exhibit 1.

[13] Employer asserts that the administrative law judge erred in finding Dr. Kanwal's 1995 opinion supportive of the disability causation opinions of Drs. Rasmussen and Forehand, when Dr. Kanwal did not diagnose a totally disabling pulmonary or respiratory impairment. As the administrative law judge provided valid reasons for crediting the opinions of Drs. Forehand and Rasmussen, and for discrediting the opinions of Drs. Rosenberg and Dahhan, any error she may have made in considering Dr. Kanwal's opinion under Section 718.204(c) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

that date. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-108-109 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753, 1-757 (1985). Further, the administrative law judge found that there is no evidence in the record that establishes when claimant first became totally disabled, nor any credited evidence demonstrating that claimant was not totally disabled subsequent to filing this claim. Decision and Order on Second Remand at 26. Consequently, pursuant to 20 C.F.R. §725.503(b), the administrative law judge properly found that benefits are payable as of January 2002.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Second Remand 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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JUDITH S. BOGGS
Administrative Appeals Judge