BRB Nos. 11-0556 BLA
and 11-0556 BLA-A

TIMOTHY HENSLEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 05/29/2012
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order on Second Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for claimant.

Ronald L. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Second Remand of Administrative Law Judge Adele H. Odegard, rendered on a claim filed on December 11, 2003, 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).[1] This case is before the Board for a third time.[2] The Board previously affirmed findings that claimant established twenty-seven years of coal mine employment, that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), but that the evidence established total disability at 20 C.F.R. §718.204(b). *T.H.* [*Hensley*] *v. Whitaker Coal Corp.*, BRB No. 07-0442 BLA, slip op. at 2 n.2, 3 (Feb. 29, 2008) (unpub.). Most recently, the Board vacated the administrative law judge's award of benefits because she failed to explain the weight accorded the conflicting evidence regarding the etiology of claimant's respiratory condition at 20 C.F.R. §718.202(a)(4). *Hensley v. Whitaker Coal Corp.*, BRB No. 09-0694 BLA (July 22, 2010) (unpub.). The Board held, *inter alia*, that the administrative law judge erred in giving additional weight to Dr. R. Alam's opinion, that claimant's respiratory condition is due to coal dust exposure, based on his status as claimant's treating physician, without addressing the factors set forth at 20 C.F.R. §718.104(d), and without making a specific determination as to whether Dr. R. Alam's opinion was reasoned. *Id*. at 7-8. The Board also held that the administrative law judge erred in failing to address equivocal statements made by Dr. M. Alam, as to whether claimant has legal pneumoconiosis,[3] and to consider whether the credibility of Dr. M. Alam's opinion was undermined by his reliance on a smoking history that was less than the smoking history determined by the administrative law judge. *Id*. at 10. Additionally, the Board held that the administrative law judge mischaracterized the evidence and erred in rejecting the contrary opinions of Drs. Broudy and Rosenberg, that claimant's respiratory condition is unrelated to coal dust exposure. *Id*. at 11. Thus, the Board vacated the administrative law judge's findings that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remanded the case for further consideration. *Id*. at 13-14.

[1] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005. Because the claim was filed before January 1, 2005, the recent amendments are not applicable to this case.

[2] A procedural history of the case is set forth in *Hensley v. Whitaker Coal Corp.*, BRB No. 09-0694 BLA (July 22, 2010) (unpub.), which is incorporated herein.

[3] 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).

In her Decision and Order on Second Remand dated April 18, 2011, which is the subject of this appeal, the administrative law judge found that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Because claimant was unable to establish that he has either legal or clinical pneumoconiosis,[4] she concluded that he was unable to prove total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant appeals, arguing that the administrative law judge erred in rejecting the opinion of his treating physician, Dr. R. Alam, and in finding that there was no reasoned medical opinion to establish that he suffers from pneumoconiosis and is totally disabled by the disease. Claimant asserts that, to the extent that the administrative law judge rejected the opinion of Dr. M. Alam, the physician who performed the Department of Labor (DOL) examination, he has not received a complete pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a brief, asserting that claimant received a complete pulmonary evaluation. Employer has also filed a cross-appeal, arguing that the administrative law judge erred in excluding relevant deposition testimony and in rejecting the opinions of Drs. Rosenberg and Broudy.

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.[5] 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that his

[4] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant generally asserts on appeal that the administrative law judge erred in failing to credit Dr. R. Alam's opinion relevant to whether he has legal pneumoconiosis. We disagree. Contrary to claimant's contention, although Dr. R. Alam is a treating physician, his opinion is not automatically entitled to controlling weight. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003). The administrative law judge is required to take into consideration to the relationship between the miner and any treating physician, including the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the administrative law judge's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded the treating physician's opinion shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). Moreover, the United States Court of Appeals for the Sixth Circuit has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

In accordance with the Board's remand instructions, the administrative law judge considered the rationale underlying Dr. R. Alam's opinion and found that, while he cited to objective evidence, he did not explain how that evidence supported his diagnosis of pneumoconiosis. Decision and Order on Second Remand at 5. As noted by the administrative law judge, Dr. R. Alam treated claimant from December 2000 through July 2004 and completed a questionnaire on September 7, 2004, in which he diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease and check-marked a box indicating that claimant's pulmonary disease was caused, in part, by coal mine employment. Decision and Order on Second Remand at 3; Claimant's Exhibit 2. In a section of the same questionnaire, where the doctor was asked to provide "detailed rationale, including objective and clinical findings" to support his diagnosis, Dr. R. Alam wrote, "See attached notes." Claimant's Exhibit 2. The notes that Dr. R. Alam attached were his office notes that included diagnoses of chronic obstructive pulmonary disease and stated, on occasion, that claimant has coal workers' pneumoconiosis, by history. Decision and Order on Second Remand at 3; Claimant's Exhibit 2. However, the

administrative law judge correctly found that the treatment records "do not record the basis for Dr. R. Alam's conclusions, or relate what characteristics of the medical testing led him to make his conclusions." Decision and Order on Second Remand at 5; s*ee Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, we see no error in the administrative law judge's determination that Dr. R. Alam's opinion is not sufficiently reasoned to satisfy claimant's burden to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

The administrative law judge also reweighed Dr. M. Alam's opinion in light of the physician's understanding of claimant's smoking history. As noted by the administrative law judge, Dr. M. Alam reported that claimant smoked from 1958 to 1994, and also believed that claimant smoked less than one cigarette per day, on average, from 1970 to 1994.[6] 2009 Decision and Order on Remand at 9. The administrative law judge, however, found that claimant "smoked up to two packs per day during the years he was smoking" and that he had a smoking history "of up to [sixty]-pack years ([thirty] years at [two] packs per day)." *Id*. at 10. In considering the credibility of Dr. M. Alam's opinion, the administrative law judge acknowledged that the smoking history that Dr. M. Alam considered was less than the smoking history she determined, based on claimant's testimony and her review of the record. Decision and Order on Second Remand at 6. She determined that, because Dr. M. Alam "did not fully explain" how he concluded that both smoking and coal dust exposure played roles in claimant's disabling respiratory condition, "it is impossible to discern how important Dr. M. Alam's misplaced assumption as to [claimant's] history was in the formulation of his medical opinion." *Id*. Therefore, the administrative law judge concluded that Dr. M. Alam's opinion was not well reasoned as to the existence of legal pneumoconiosis. *Id*. We hold that the administrative law judge's findings are rational.

[6] Dr. M. Alam examined claimant on April 14, 2007, at the request of the Department of Labor, and obtained a work history, smoking history, symptoms, physical findings, a chest x-ray, a pulmonary function study and an arterial blood gas study. Director's Exhibit 10. Dr. M. Alam diagnosed chronic bronchitis, dyspnea and cough. *Id*. He opined that claimant had a "mixed respiratory problem" related to coal dust exposure and smoking. *Id*. He stated that "[s]ince [claimant] quit smoking in 1994 [and] worked till [sic] 1995, [it is] possible that coal dust and [tobacco] abuse can be the major cause[s]" of his respiratory impairment. *Id.*

We consider claimant's arguments with respect to Drs. R. Alam and M. Alam to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge has discretion to determine the credibility of the medical experts, and her findings that the opinions of Drs. R. Alam and M. Alam are not well-reasoned, are rational, they are affirmed. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Thus, we affirm, as supported by substantial evidence, the administrative law judge's findings that claimant failed to establish the existence of clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Groves*, 277 F.3d at 836, 22 BLR at 2-325. As claimant failed to establish all of the requisite elements of entitlement, we affirm the denial of benefits.[7] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

As an additional matter, we reject claimant's contention that he did not receive a complete pulmonary evaluation.[8] The United States Court of Appeals for the Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, 24 BLR 2-202, 2-221 (6th Cir. 2009).

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[7] Because the administrative law judge's denial of benefits is affirmed, it is not necessary that we address employer's arguments on cross-appeal.

[8] The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1984).

Contrary to claimant's contention, the fact that the administrative law judge found Dr. M. Alam's opinion to be unpersuasive as to the etiology of his respiratory disease and impairment does not establish that claimant did not receive a complete pulmonary evaluation. Because Dr. M. Alam performed all of the necessary tests and addressed the requisite elements of entitlement, we agree with the Director that DOL satisfied its obligation to provide claimant with a complete pulmonary evaluation, as required by the Act. *See Greene*, 575 F.3d at 641-42, 24 BLR at 2- 221; *Hodges*, 18 BLR at 1-93. We also agree with the Director that, while the administrative law judge discredited Dr. M. Alam's opinion because he relied upon an inaccurate smoking history, "the fault lies with claimant," insofar as claimant may have mischaracterized the length and extent of his smoking habit during the DOL examination. Director's Letter Brief at 3. Because claimant has not shown that the error was attributable to Dr. M. Alam, we reject claimant's contention that he did not receive a complete pulmonary evaluation. *See Greene*, 575 F.3d at 641-42, 24 BLR at 2- 221; *Hodges*, 18 BLR at 1-93.

Accordingly, the administrative law judge's Decision and Order 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