BRB No. 06-0211 BLA

PAUL A. WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 11/20/2006
	)	
and	)	
	)	
PEABODY INVESTMENTS, INCORPORATED	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (04-BLA-6235) of Administrative Law Judge Robert L. Hillyard rendered 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). Based on the date of filing, February 7, 2003, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, observing that, *inter alia*, the parties agreed that claimant established twenty years of coal mine employment. Decision and Order at 4; Hearing Transcript at 9-10. On considering the evidence, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1),(4), 718.203(b), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of both clinical and legal pneumoconiosis and that claimant was totally disabled due to pneumoconiosis. Claimant responds that substantial evidence supports the award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter responding only to employer's argument concerning the administrative law judge's consideration of Dr. Fino's opinion.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grills 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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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*).

Employer first contends that the administrative law judge erred in finding the existence of clinical pneumoconiosis established at Section 718.202(a)(1) by x-ray evidence. Employer contends that the administrative law judge erred in crediting the positive reading of the May 28, 2003 x-ray by Dr. Brandon, a board-certified, B-reader, over the negative reading of the same x-ray by Dr. Wiot, based on the administrative law judge's mistaken belief that Dr. Wiot was only a B-reader when, in fact, Dr. Wiot, like Dr. Brandon, was both a B-reader and a board-certified radiologist. Employer similarly contends that the administrative law judge erred in finding Dr. Spitz's negative reading counterbalanced Dr. Baker's positive reading of the March 26, 2005 x-ray based on the administrative law judge's mistaken impression that both doctors were B-readers, when,

in fact, Dr. Spitz was both a B-reader and a board certified radiologist. Thus, employer contends that the administrative law judge erred in concluding that the x-ray evidence established the existence of pneumoconiosis based on his finding that there was one positive x-ray, one x-ray in equipoise, and one x-ray that was unreadable when, in fact, an accurate tally of the x-ray evidence, considering the qualifications of the physicians, would have shown one unreadable x-ray, one in equipoise, and one negative, and was, therefore, insufficient to carry claimant's burden of establishing the existence of pneumoconiosis. In addition, employer contends that the administrative law judge erred in ignoring x-rays taken during the course of claimant's treatment for nonrespiratory conditions on the basis that they were not taken for purposes of diagnosing pneumoconiosis. Rather, employer contends that because pneumoconiosis was not found on these x-rays, they should be considered negative for the existence of pneumoconiosis and considered along with the other x-ray evidence.

In considering the x-ray evidence, the administrative law judge observed that the May 28, 2003 x-ray was variously interpreted: as positive, 1/1, by Dr. Zachek, a Board-certified radiologist; for quality purposes only by Dr. Barrett; as negative by Dr. Wiot, a B-reader; and as positive, 1/1, by Dr. Brandon, a B-reader and Board-certified radiologist. The administrative law judge found this x-ray to be positive based on the positive readings by better qualified readers. The administrative law judge found the March 9, 2004 x-ray to be unreadable as both Drs. Repsher and Westerfield, B-readers, found it to be unreadable. Turning to the March 26, 2005 x-ray, the administrative law judge determined that because Dr. Spitz, a B-reader, found the x-ray to be negative and Dr. Baker, a B-reader, found it to be positive, the readings were in equipoise and the x-ray could not be considered positive for the existence of pneumoconiosis. In light of these findings, therefore, the administrative law judge concluded that claimant carried his burden of establishing the existence of pneumoconiosis.

Employer contends that the administrative law judge's analysis of the x-ray evidence was tainted by his failure to recognize that both Drs. Wiot and Spitz are dually qualified. We reject employer's contention because employer cites no evidence in the record to support it. Brief for Employer at 9; *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986); *Pruitt v. Amax Coal Co.*, 9 BLR 1-100 (1986); *Free v. Director, OWCP*, 6 BLR 1-450, 1-453 (1983) (party who wishes to rely on credentials of a reader, bears the burden of establishing those credentials). We also hold that the administrative law judge did not err in his consideration of the x-ray readings included in claimant's treatment records as these readings, with the exception of Dr. Stoke's positive reading of July 31, 1989, were not read for pneumoconiosis, were not classified according to the ILO-U/C system, and did not contain the physicians' qualifications. Because the aforementioned readings failed to conform to the quality standards at 20 C.F.R. §718.102 and such conformity is a prerequisite to consideration at 20 C.F.R. §718.202(a)(1), the administrative law judge properly excluded those readings. Decision and Order at 4; Employer's Exhibit 2; 20

C.F.R. §718.202(a)(1); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Anderson v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-152 (1984); *Sacolick v. Rushton Mining Co.*, 6 BLR 1-930 (1984). Accordingly, the administrative law judge's finding that pneumoconiosis was established at Section 718.202(a)(1) is affirmed. Because the administrative law judge found the existence of pneumoconiosis was established at Section 718.202(a)(1), we need not address employer's argument as to whether pneumoconiosis was established based on doctors' opinions at Section 718.202(a)(4). *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Pursuant to Section 718.204(b)(2)(i), employer contends that the administrative law judge erred by finding that the pulmonary function studies of record established a totally disabling respiratory impairment. Specifically, employer argues that the administrative law judge erred in automatically rejecting the study performed on May 28, 2003, due to poor effort by claimant, and the study performed March 9, 2004, due to the absence of tracings and statement of cooperation and comprehension accompanying the study. Employer asserts that the administrative law judge should have considered these studies since strict compliance with the quality standards at 20 C.F.R. §718.103 is not required. *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Gorman v. Hawk Contracting, Inc.*, 9 BLR 1-76 (1986). Employer argues that the administrative law judge may consider a non-conforming, non-qualifying pulmonary function study even though it lacks a statement of comprehension and cooperation.[1] Employer further argues that inasmuch as the aforementioned tests produced qualifying values before the administration of bronchodilators, but non-qualifying values after the use of bronchodilators, the administrative law judge should have determined whether, on balance, these tests were qualifying or non-qualifying. Employer contends that the administrative law judge erred by failing to explain how he extrapolated the values for claimant's pulmonary function studies since claimant's age exceeded the values contained in the table at 20 C.F.R. Part 718 Appendix B; furthermore, the pulmonary function study tables do not continue after age seventy-one because at that point claimant's age takes him out of the work force. Thus, employer argues that the

[1] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

The Board has held that it is reasonable for an administrative law judge to rely on a non-qualifying pulmonary function study which does not contain a statement of cooperation and comprehension since any existing deficiency in cooperation or comprehension could not render the test any more non-qualifying. *Crapp v. U.S. Steel Corp.*, 6 BLR 1-476 (1983).

administrative law judge failed to consider that claimant's qualifying pulmonary function studies reflect advanced age, not respiratory disability.

Contrary to employer's argument, the administrative law judge permissibly rejected the qualifying results of the May 28, 2003, pulmonary function study due to poor effort, based on Dr. Burki's invalidation opinion. Decision and Order at 6, 17-18; Director's Exhibit 11; *see Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). The administrative law judge, however, erred by finding that the March 9, 2004, pulmonary function study lacked tracings, as these are contained in the record. Decision and Order at 6, 17-18; Employer's Exhibit 1; *Tackett*, 7 BLR 1-703. Accordingly, the administrative law judge's finding of total disability must be vacated, and on remand, the administrative law judge must reconsider whether this non-qualifying study is reliable despite the lack of a statement of cooperation and comprehension. *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Gorman*, 9 BLR 1-76; *Anderson v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-152 (1984); *Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-479 (1983). Moreover, on remand the administrative law judge should explain the method used to extrapolate qualifying pulmonary function study values in light of claimant's advanced age. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see Hubbell v. Peabody Coal Co.*, BRB No. 95-2333 BLA (Dec. 20, 1996) (unpub.).

Regarding the administrative law judge's findings concerning the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), employer argues that the administrative law judge erred by failing to provide an explanation for his rejection of Dr. Zachek's opinion. Employer also argues that the administrative law judge erred in crediting the opinion of Dr. Baker: the doctor failed to provide any explanation for finding claimant disabled from work; he failed to indicate that he was aware of the physical demands of claimant's last usual coal mine employment; and he failed to explain how he reached his conclusion in light of claimant's pulmonary function studies, blood gas studies, and physical examination. Additionally, employer contends that the administrative law judge did not weigh all the evidence together before determining whether it established total disability.

We find no merit to employer's argument concerning the administrative law judge's treatment of Dr. Zachek's opinion as it was within the administrative law judge's discretion to find this opinion equivocal, vague, inconsistent and unreasoned, based on Dr. Zachek's statements that claimant could, with proper treatment, perform his previous coal mine work as a dozer operator, but also stated that claimant had a "[m]ild impairment of strenuous activities." Decision and Order at 7, 18, 19; Director's Exhibit 11; *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields*, 10 BLR 1-19; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67

(1986). In addition, it was also permissible for the administrative law judge to credit Dr. Baker's disability opinion even though the doctor did not discuss the physical requirements of claimant's coal mine work, or his functional limitations, and did not attach a copy of the Guides to the Evaluation of Permanent Impairment to his report, since Dr. Baker diagnosed a moderate impairment based upon a conforming and qualifying pulmonary function study and specifically found that claimant could not perform his previous coal mine work. Decision and Order at 8, 9, Claimant's Exhibit 3; *see Cornett*, 227 F.3d 569, 22 BLR 2-107; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-94 (2003); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).[2] In light of our remand of the case for reconsideration of the pulmonary function study evidence, however, we must also remand the case for the administrative law judge to resolve the issue of total disability after weighing together the pulmonary function studies, blood gas studies, and doctors' opinions. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987); *Gee v. W.S. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).

Regarding the issue of disability causation pursuant to Section 718.204(c), employer argues that the administrative law judge did not provide sufficient analysis of the evidence. Employer asserts that the administrative law judge erred: by automatically rejecting the opinions of Drs. Fino and Repsher because they did not diagnose the existence of pneumoconiosis; by rejecting Dr. Zachek's opinion because he failed to diagnose total respiratory disability, and by ignoring the medical treatment records altogether.[3] Employer further contends that the administrative law judge erred by crediting Dr. Baker's opinion finding causation without first determining whether it was documented and reasoned. Additionally, employer contends that the administrative law judge erred in relying on Dr. Baker's opinion because Dr. Baker failed to explain how claimant's qualifying pulmonary function study would support a finding of causation and because Dr. Baker's finding of causation is based on his presumption that claimant's pulmonary disease was caused by coal dust exposure because coal dust exposure is known to cause pulmonary disease.

In finding disability causation established, the administrative law judge accorded less weight to the opinions of physicians who opined that pneumoconiosis did not contribute to total disability because those same physicians also failed to diagnose the

[2] Because the miner last worked in Kentucky, 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 (1989)(*en banc*); Director's Exhibit 3.

[3] The administrative law judge did not ignore the medical treatment and hospital records. Rather, he stated that he was according that evidence no weight because they did not contain diagnoses of clinical or legal pneumoconiosis. Decision and Order at 16.

existence of pneumoconiosis. Thus, in this case, because the administrative law judge found that neither Dr. Repsher nor Dr. Fino diagnosed the existence of either clinical or legal pneumoconiosis, contrary to his own finding, he afforded their opinions little weight. This was rational. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *see Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-10 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLRA 2-372 (4th Cir. 2002). Likewise, the administrative law judge could reasonably accord Dr. Zachek's opinion little weight because he found that the doctor did not provide a reasoned opinion on total disability. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986).

Regarding Dr. Baker's opinion, the administrative law judge credited it because the doctor found that coal mine employment had a "material adverse effect" on claimant's respiratory system. We reject employer's arguments that Dr. Baker's opinion is unreasoned as the administrative law judge reasonably found it supported by its underlying documentation. Moreover, we reject employer's argument that Dr. Baker merely presumed that coal mine employment was a cause of claimant's total disability. Employer has pointed to no evidence which supports that contention. Accordingly, while we must remand the case for reconsideration of whether total disability has been established, *supra*, we affirm the administrative law judge's determination that the evidence supports a finding that pneumoconiosis had a material adverse effect on claimant's disability, if any. 20 C.F.R. §718.204(c); *see Adams v. Bethlehem Mines Corp.*, 816 F.2d 1116, 19 BLR 2-69 (6th Cir. 1987).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge