BRB No. 09-0324 BLA

D.A.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY, LLC	)	DATE ISSUED: 10/15/2009
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY c/o AIG CLAIMS SERVICES	)	
	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (2005-BLA-06306) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed on September 22, 2004 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. In his original Decision and Order, the administrative law judge accepted the parties' stipulation that claimant worked for twenty-nine years in coal mine employment, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). However, the administrative law judge found that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal and employer's cross-appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge for further consideration at 20 C.F.R. §718.204(b)(2)(ii) and (iv) on the issue of total disability.[1] *D.S. v. South Akers Mining Co.*, BRB Nos. 07-0699 BLA/A (Apr. 29, 2008)(unpub.). Initially, the Board vacated the administrative law judge's weighing of the blood gas study evidence pursuant to Section 718.204(b)(2)(ii) and remanded the case for the administrative law judge to reweigh the blood gas study evidence and to more fully explain his credibility findings thereunder. *D.S.*, slip op. at 4. In addition, the Board vacated the administrative law judge's Section 718.204(b)(2)(iv) findings and remanded the case for the administrative law judge to evaluate the probative value of Dr. Forehand's medical opinion. The Board also instructed the administrative law judge to consider the probative value of Dr. Dahhan's opinion on total disability, independently of the doctor's finding on pneumoconiosis. *D.S.*, slip op. at 5, 6. Additionally, the Board instructed the administrative law judge to compare the exertional requirements of claimant's usual coal mine employment with the diagnoses of disability contained in the opinions of Drs. Forehand and Dahhan. *Id.*

[1] The Board, however, affirmed the administrative law judge's finding crediting claimant with twenty-nine years of coal mine employment, and his finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). The Board did not address the administrative law judge's findings that total disability was not established at 20 C.F.R. §718.204(b)(2)(i) and (iii), because those findings were unchallenged on appeal. *D.S. v. South Akers Mining Co.*, BRB Nos. 07-0699 BLA/A, slip op. at 2 n.2 (Apr. 29, 2008)(unpub.).

On remand, the administrative law judge noted the Board's instructions and considered the blood gas study and medical opinion evidence pursuant to Section 718.204(b)(2)(ii) and (iv). The administrative law judge found the blood gas study evidence, on its own, insufficient to demonstrate total disability pursuant to Section 718.204(b)(2)(ii). However, the administrative law judge found the medical opinion evidence sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), and the weight of the evidence sufficient to establish total disability pursuant to Section 718.204(b). The administrative law judge further found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability, arguing that the administrative law judge erred in crediting Dr. Forehand's opinion pursuant to Section 718.204(b)(2)(iv). Employer also contends that the administrative law judge again erred in finding that Dr. Dahhan's opinion was not credible on the issue of total disability because the doctor did not diagnose pneumoconiosis, contrary to the administrative law judge's finding on the issue. Claimant responds, urging affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive response unless requested to do so by the Board.[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.[3] 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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

[2] We affirm the administrative law judge's finding that the blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R §718.204(b)(2)(ii), and his finding that the evidence is sufficient to establish disability causation pursuant to 20 C.F.R §718.204(c), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mining employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

totally disabling. 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. *Trent*, 11 BLR at 1-27.

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision awarding benefits is rational, supported by substantial evidence, and in accordance with law. It is, accordingly, affirmed.

In considering the issue of total disability at Section 718.204(b)(2)(iv), the administrative law judge initially found that claimant's last coal mine employment was as a section foreman, which required claimant to supervise other miners and also maintain the mine. Decision and Order on Remand at 4. As part of his job duties as a section foreman, claimant testified that he helped drag bags of rock dust, weighing at least fifty pounds, and helped spread the rock dust. Hearing Transcript at 11-12. In addition, claimant testified that he would assist the mechanics, which consisted of helping to lift buckets of oil weighing forty pounds and change tires. *Id*. at 12-13. Based on claimant's testimony, which the administrative law judge found credible, the administrative law judge reasonably found that claimant's last coal mine employment as a section foreman was heavy work because claimant had to lift/pull in excess of fifty pounds and had to stoop and bend to perform his job. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); Decision and Order on Remand at 6.

Weighing the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinion of Dr. Forehand, that claimant is totally disabled from performing his usual coal mine employment, and the contrary opinion of Dr. Dahhan, that there are no objective findings to indicate any pulmonary impairment or disability. Considering these medical opinions, in light of the exertional requirements of claimant's usual coal mine employment, the administrative law judge rationally found that Dr. Forehand's opinion is sufficient to establish total respiratory disability. Decision and Order on Remand at 6. The administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding Dr. Forehand's opinion to be more credible than Dr. Dahhan's opinion, because it was the only opinion that addressed claimant's hypoxemia and its effect on claimant's ability to perform the duties of his usual coal mine employment. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); Decision and Order on Remand at 6. Specifically, the administrative law judge found that Dr. Forehand considered the exertional requirements of claimant's coal mine employment and concluded that claimant's hypoxemia would prevent him from returning to this work. *Id*. Moreover, contrary to employer's contention, the

administrative law judge did not rely upon Dr. Dahhan's failure to diagnose pneumoconiosis in according his opinion less weight on the issue of total disability. While the administrative law judge noted that Dr. Dahhan's failure to consider the positive x-ray evidence is a factor for consideration, he nonetheless properly accorded the opinion less weight because Dr. Dahhan did not discuss whether his diagnosis of mild impairment/disability would affect claimant's ability to perform his usual coal mine employment. Decision and Order on Remand at 6; Employer's Exhibits 1, 3. Consequently, the administrative law judge properly credited the opinion of Dr. Forehand as better reasoned. *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order on Remand at 6; Director's Exhibit 11. The administrative law judge therefore properly concluded that total disability was established by the medical opinion evidence at Section 718.204(b)(2)(iv).

Further, on weighing all of the evidence together at Section 718.204(b)(2)(i)-(iv), the administrative law judge properly found that total disability was established at Section 718.204(b). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co*., 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's determination that claimant has established total disability pursuant to Section 718.204(b), as rational, supported by substantial evidence, and in accordance with law.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits 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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BETTY JEAN HALL
Administrative Appeals Judge