BRB No. 14-0092 BLA

MICHAEL D. HAYES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REEDY COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/06/2014
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and E. Shane Branham (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2008-BLA-05341) of Administrative Law Judge Theresa C. Timlin rendered on a claim filed on April 2, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the second time. In her initial Decision and Order, the administrative law judge credited claimant with

twenty-seven years of underground coal mine employment, based on the parties' stipulation, and she found that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to rule on the admissibility of Dr. Forehand's January 2010 medical opinion, based on the recent changes in law.[2] *Hayes v. Reedy Coal Co.*, BRB No. 11-0517 BLA, slip op. at 5 (Apr. 27, 2012)(unpub.). The administrative law judge was then instructed, once the content of the record was determined, to reconsider claimant's entitlement to benefits pursuant to amended Section 411(c)(4). *Hayes*, slip op. at 6.

On remand, prior to issuing her Decision and Order, the administrative law judge issued an evidentiary Order, *inter alia*, admitting Dr. Forehand's January 2010 medical opinion into the record as affirmative evidence on employer's behalf.[3] In her Decision

[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[2] The Board affirmed, as unchallenged by the parties, the administrative law judge's finding that claimant established twenty-seven years of coal mine employment. *Hayes v. Reedy Coal Co.*, BRB No. 11-0517 BLA, slip op. at 3 n.2 (Apr. 27, 2012) (unpub.).

[3] By Order dated May 31, 2013, the administrative law judge admitted Dr. Forehand's January 2010 medical opinion into the record, finding that no regulation prohibited employer from seeking to admit the medical opinion obtained by claimant but which claimant declined to offer. In addition, the administrative law judge excluded a majority of Dr. Vuskovich's February 24, 2009 medical report because employer offered

and Order, the administrative law judge again found the evidence sufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b) and, therefore, she found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to the implementing regulation at 20 C.F.R. §718.305. The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in finding that claimant established total respiratory disability pursuant to Section 718.204(b) and was entitled to invocation of the Section 718.305 presumption. Employer also argues that the administrative law judge's finding that employer failed to rebut the Section 718.305 presumption is inconsistent with her specific determination that claimant failed to affirmatively establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a). Employer further argues that the administrative law judge erred in her weighing of the medical opinion evidence relevant to rebuttal. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he is not responding to employer's appeal.

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.[4] 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).

Invocation of the Section 718.305 Presumption

Employer contends that the administrative law judge erred in relying on the blood gas study evidence and the medical opinion evidence to support her finding of total respiratory disability at Section 718.204(b). Specifically, employer contends that the administrative law judge erred in finding that all of claimant's blood gas studies produced qualifying values. Employer's Brief at 10-11. Noting that the post-exercise results from

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the report only as rebuttal for the blood gas study evidence and not as an entire medical record review. Consequently, the administrative law judge excluded all but the portion relevant to the blood gas studies within Dr. Vuskovich's medical report.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

Dr. Forehand's May 31, 2007 study and the pre-exercise results from Dr. Forehand's January 13, 2010 study yielded non-qualifying values,[5] employer maintains that the administrative law judge failed to consider all of the relevant blood gas study evidence. *Id*. Employer further argues that the administrative law judge's reliance on the blood gas study evidence is inconsistent with her finding that the medical opinion evidence is insufficient to affirmatively establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. at 11. Employer's arguments lack merit.

The administrative law judge reviewed the blood gas studies of record, dated May 31, 2007, October 9, 2007 and January 13, 2010[6] and, after determining that qualifying values were produced during each of the three studies, she concluded that the weight of the blood gas study evidence supported a finding of total respiratory disability. Decision and Order on Remand at 12-13. Contrary to employer's contention, the administrative law judge did not find that "the results of all of the blood gas tests" produced qualifying values, *see* Employer's Brief at 10-11, but rather, she reasonably exercised her discretion in finding that the weight of these studies yielded values supportive of a finding of total respiratory disability. 20 C.F.R. §718.204(b)(2)(ii); *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order on Remand at 13. Moreover, we reject employer's contention that the administrative law judge's reliance on the blood gas studies to establish total respiratory disability is inconsistent with her finding that the medical opinions offered in support of a diagnosis of pneumoconiosis were unpersuasive, notwithstanding the blood gas study evidence submitted into the record. Employer's Brief at 11. The Board has held that blood gas studies are not diagnostic of pneumoconiosis. *Morgan v. Bethlehem Steel Corp*, 7 BLR 1-226 (1984); *Burke v. Director, OWCP*, 3 BLR 1-410, 414 (1981). As blood gas study evidence constitutes one component in determining whether a medical opinion is reasoned and documented, and is not dispositive of a finding that claimant has established pneumoconiosis, the administrative law judge's findings herein are not inconsistent.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The May 31, 2007 blood gas study administered by Dr. Forehand yielded qualifying values pre-exercise, but non-qualifying values post-exercise. Director's Exhibit 10. The October 9, 2007 blood gas study, administered by Dr. Broudy, contained only pre-exercise values, which were qualifying. Director's Exhibit 13. Dr. Forehand administered a second blood gas study on January 12, 2010, which yielded non-qualifying values pre-exercise, but qualifying values post-exercise. Employer's Exhibit 6.

Fields v. Island Creek Coal Co., 10 BLR 1-19 (1989); *Hoffman v. B& G. Construction Co.*, 8 BLR 1-65 (1985).

Employer further contends that, in finding that the weight of the medical opinion evidence establishes total respiratory disability, the administrative law judge erred in rejecting the "most reliable" opinion, *i.e.*, Dr. Forehand's January 2010 opinion, and in according determinative weight to Dr. Rosenberg's opinion. Employer's Brief at 11-12. We disagree.

The administrative law judge, in her role as finder of fact, is charged with evaluating the relative value of conflicting medical evidence and assessing the credibility of the medical experts. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc). In this case, the administrative law judge considered the medical opinions of Drs. Forehand[7] and Rosenberg,[8] and permissibly accorded greater weight to Dr. Rosenberg's opinion, that claimant is not capable of performing his usual coal mine employment as a continuous miner operator from a respiratory standpoint. Decision and Order on Remand at 14. Contrary to employer's contention, Dr. Forehand's January 2010 medical opinion is not presumptively more reliable because it is the most recent

[7] Dr. Forehand initially performed the examination sponsored by the Department of Labor on May 31, 2007, at which time he opined that claimant suffered from coal workers' pneumoconiosis and was totally disabled from performing his usual coal mine work due to a severe impairment caused by coal dust exposure. Director's Exhibit 10. Pursuant to the district director's request, on July 1, 2008, Dr. Forehand clarified his understanding of claimant's smoking history, but reiterated that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 44. In his January 12, 2010 examination report, Dr. Forehand stated that claimant "appears to have a non-disabling, respiratory impairment causing shortness of breath on exertion and requiring daily inhaled anti[-]inflammatory agents and bronchodilator for relief of symptoms." Employer's Exhibit 6. He opined that claimant's coal mine employment, "as well as a smaller contribution from smoking cigarettes, and possibly asthma have all contributed to his impairment and complaints of shortness of breath on exertion." *Id*.

[8] Dr. Rosenberg reviewed the medical record, noting that claimant had a thirty year history of coal mine employment, running a continuous miner, as well as a thirty year history of smoking both cigarettes and marijuana. Employer's Exhibit 1. Based on his review of the medical record, Dr. Rosenberg opined that claimant does not have clinical pneumoconiosis, but does have a severe airflow obstruction due to claimant's history of smoking cigarettes and long-term marijuana use. *Id*. In light of the objective studies he reviewed, particularly the blood gas study results, Dr. Rosenberg opined that claimant cannot perform his usual coal mine employment, or similarly arduous work. *Id*.

medical opinion of record. The administrative law judge determined that claimant's job involved moderate to heavy labor, including heavy lifting, carrying equipment, crawling, and long periods of standing. *Id*. As Dr. Rosenberg considered the exertional requirements of claimant's usual coal mine employment in evaluating claimant's objective test results, the administrative law judge acted within her discretion in finding that Dr. Rosenberg's opinion was well-reasoned and entitled to greater weight. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 14. With regard to Dr. Forehand's January 2010 opinion, that claimant has a non-disabling respiratory impairment causing shortness of breath on exertion, the administrative law judge permissibly accorded it less weight because she found that the physician failed to adequately explain his findings. Specifically, the administrative law judge could not discern whether Dr. Forehand was referring to disability guidelines or claimant's actual ability to perform his usual coal mine employment.[9] *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). As the administrative law judge reasonably exercised her discretion, and substantial evidence supports her findings, we affirm her conclusion that the weight of the medical evidence, like and unlike, establishes that claimant suffers from a totally disabling pulmonary impairment pursuant to Section 718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc); Decision and Order on Remand at 14. Consequently, we further affirm her finding that claimant has established invocation of the Section 718.305 presumption.

Rebuttal of the Section 718.305 Presumption

In light of claimant's invocation of the Section 718.305 presumption, the burden of proof under the Department of Labor's implementing regulations shifted to employer to rebut the presumption by proving that claimant does not have pneumoconiosis, or by establishing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305, implementing 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).[10] In considering rebuttal, the administrative law judge found that

[9] The administrative law judge also noted that Dr. Forehand, in his May 2007 medical opinion, opined that claimant had insufficient residual capacity to return to his previous coal mine employment. Decision and Order on Remand at 14; Director's Exhibit 10.

[10] Employer does not challenge the application of these regulations.

employer failed to disprove the existence of legal pneumoconiosis. She also determined that employer failed to disprove a causal relationship between claimant's respiratory disability and his legal pneumoconiosis.

Employer maintains that it was not rational for the administrative law judge to find that claimant failed to establish the existence of either clinical or legal pneumoconiosis, and then to find that employer failed to rebut the Section 718.305 presumption. Employer further contends that the administrative law judge erred in weighing the medical opinion evidence relevant to rebuttal. We disagree.

As the Board set forth in its prior Decision and Order, once claimant has established invocation of the Section 718.305 presumption, employer bears the burden to provide affirmative and persuasive evidence to rebut that presumption. *Hayes*, slip op. at 6; *see Morrison*, 644 F.3d at 480, 25 BLR at 2-8. Therefore, the sufficiency of claimant's evidence, which is at issue at 20 C.F.R. §718.202(a), is not relevant to the question of whether employer has satisfied its burden to establish rebuttal of the Section 718.305 presumption. *Id*. The administrative law judge found the opinion of Dr. Rosenberg, the only opinion that could support employer's burden on rebuttal, was entitled to little weight because the physician failed to adequately explain his opinion that claimant's respiratory impairment is due solely to his smoking history, with no contribution from his twenty-seven years of coal dust exposure. Decision and Order on Remand at 15-16; *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). In so finding, the administrative law judge also determined that Dr. Rosenberg relied on a thirty-year smoking history, *see* fn. 8, which exceeded her finding of a twenty-five year smoking history. Further, the administrative law judge noted that Dr. Rosenberg did not discuss the significance of claimant's five pack-year cigarette smoking history and his twenty-year history of smoking one to two marijuana cigarettes per day, nor did he compare claimant's rate of marijuana smoking with that described in the studies he cited to show that respiratory complications result from smoking marijuana. Decision and Order on Remand at 9-10. As substantial evidence supports the administrative law judge's credibility determination, we affirm her finding that employer did not meet its burden to affirmatively establish the absence of legal pneumoconiosis. *See Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

Moreover, the administrative law judge rationally determined that the opinion of Dr. Rosenberg on the issue of the cause of claimant's totally disabling respiratory impairment was entitled to little weight for the same reasons that she discredited his opinion on the issue of legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order on Remand at 16. We, therefore, affirm the administrative law judge's finding that employer failed to rebut

the Section 718.305 presumption, and affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge