BRB No. 14-0192 BLA

JOHN W. RUBY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SIMCO PEABODY COAL COMPANY KNA PATRIOT COAL COMPANY	)	
	)	DATE ISSUED: 10/28/2014
Employer-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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits in an Initial Claim (2010-BLA-05817) of Administrative Law Judge Larry S. Merck rendered on a claim filed on September 4, 2009 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 5.44 years of underground coal mine employment,[1] and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of legal pneumoconiosis[2] arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge further found that claimant established that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in his evaluation of the pulmonary function study evidence, at 20 C.F.R. §718.204(b)(2)(i), and that these errors tainted his evaluation of the medical opinions relevant to the issues of legal pneumoconiosis, total disability, and disability causation, at 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv) and 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2013). 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).

We first address employer's contention that the administrative law judge erred in his evaluation of the pulmonary function studies, pursuant to 20 C.F.R. §718.204(b)(2)(i), as employer asserts that the administrative law judge's findings as to the validity of the

[1] The record reflects that claimant's coal mine employment was in Ohio. Director's Exhibits 3, 7. Accordingly, 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, 1-202 (1989) (en banc).

[2] "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).

pulmonary function study results impacted his findings on the issues of legal pneumoconiosis, total disability, and total disability causation.[3]

The administrative law judge considered the two pulmonary function studies of record. Decision and Order at 25-30. The study dated November 12, 2009, conducted in conjunction with Dr. Knight's examination of claimant, produced non-qualifying[4] values both before, and after, the administration of bronchodilators. Decision and Order at 26; Director's Exhibit 9. However, as noted by the administrative law judge, the 2009 study was interpreted by Dr. Knight as reflecting a moderate obstructive impairment and a mild to moderate restrictive impairment. Decision and Order at 26; Director's Exhibit 9. The study dated March 7, 2011, was conducted in conjunction with Dr. Rosenberg's examination of claimant. Employer's Exhibit 3. The 2011 pulmonary function study produced non-qualifying pre-bronchodilator values, and qualifying post-bronchodilator values. Decision and Order at 29; Employer's Exhibit 3.

The administrative law judge correctly noted that while Drs. Zaldivar and Rosenberg both opined that the 2011 study produced invalid results,[5] there was a conflict in medical opinion regarding the validity of Dr. Knight's 2009 pulmonary function study. Dr. Knight opined that his 2009 pulmonary function study produced valid results reflecting "moderate obstruction" and "mild to moderate restriction" to airflow. Director's Exhibit 9; Decision and Order at 11. The administrative law judge further noted that John Jarvie, the technician who administered the 2009 test, stated that claimant gave full effort, and Dr. Gerblich, who is Board-certified in Pulmonary Medicine, validated the study on behalf of the Department of Labor (DOL). Decision and Order at 25-27; Director's Exhibit 9. Additionally, Dr. Clapp, who is Board-certified in Internal Medicine, Critical Care Medicine, and Pulmonary Medicine, reviewed the spirometry data from Dr. Knight's 2009 pulmonary function study and opined that because the data met the DOL standards for acceptability, it is a valid study by DOL criteria. Decision

[3] The administrative law judge found, and employer does not contest, that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 30.

[4] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 21.

[5] The administrative law judge ultimately found that the 2011 pulmonary function study did not adequately assess claimant's disability, and was entitled to little weight. Decision and Order at 29-30.

and Order at 28; Claimant's Exhibit 6. The administrative law judge noted that, in contrast, both Drs. Zaldivar and Rosenberg opined that the 2009 pulmonary function study is invalid, due to poor effort and hesitation. Decision and Order at 28; Employer's Exhibits 4 at 2; 7 at 11-15, 41. Finally, the administrative law judge considered a supplemental report from Dr. Knight, who stated that he reviewed his test results in light of the criticisms by Drs. Zaldivar and Rosenberg, and had consulted with the administering technician, and further explained his opinion that the 2009 test results are valid under DOL criteria. Decision and Order at 26-27; Claimant's Exhibit 5. The administrative law judge credited the opinion of Dr. Knight, as supported by the opinions of Drs. Clapp and Gerblich and the administering technician, and found the 2009 pulmonary function study to be valid. Decision and Order at 29.

Initially, we reject employer's contention that, in finding the 2009 pulmonary function study to be valid, the administrative law judge "did not consider the opinions of [Drs. Zaldivar and Rosenberg] who opined that the tracings demonstrated hesitation and lack of effort." Employer's Brief at 10. Contrary to employer's assertion, the administrative law judge fully considered the opinions of Drs. Zaldivar and Rosenberg, that the 2009 test results were invalid due to poor effort, but accurately noted that, in contrast, the technician who administered the 2009 test had indicated that "[claimant] gave full effort on all maneuvers." Decision and Order at 29, *quoting* Director's Exhibit 9. The administrative law judge permissibly found that, in light of the contrary opinions of Drs. Knight and Clapp, and the administering technician, neither Dr. Zaldivar nor Dr. Rosenberg persuasively explained how the hesitation he saw reflected in the spirometry data would render the study invalid under DOL standards. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744, 21 BLR 2-203, 2-211-12 (6th Cir. 1997); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-297 (6th Cir. 1994); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Thus, the administrative law judge concluded, as was within his discretion, that the November 12, 2009 pulmonary function study, reflecting moderate obstruction and mild to moderate restriction to airflow, was in substantial compliance with DOL standards and entitled to full probative weight. *See* 20 C.F.R. §718.103*; Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 29. As substantial evidence supports this finding, it is affirmed. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

We next address employer's general contention that the administrative law judge's findings regarding the validity of the 2009 pulmonary function study tainted his evaluation of the medical opinion evidence relevant to the existence of legal pneumoconiosis. In determining whether claimant established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Knight, Conibear, Zaldivar and Rosenberg. Drs. Knight and Conibear diagnosed legal pneumoconiosis, in the form of chronic obstructive

pulmonary disease (COPD) due to coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibit 9; Claimant's Exhibit 2. Conversely, Drs. Zaldivar and Rosenberg opined that claimant does not suffer from legal pneumoconiosis. Employer's Exhibits 3, 4. Specifically, Dr. Zaldivar opined that "at worst" claimant has a minimal airway obstruction which "is best explained by asthma," and that coal mine dust exposure did not contribute to his impairment. Employer's Exhibit 4. Dr. Rosenberg opined that claimant "possibly" has a mild degree of airflow obstruction and "potentially" has a degree of hyperactive airways disease or asthma, but that any impairment claimant has is unrelated to coal mine dust exposure. Employer's Exhibit 3. Dr. Rosenberg also diagnosed chronic bronchitis, which he opined could not be attributed to coal mine dust exposure, due to the length of time since claimant last worked in the mines. Employer's Exhibit 7 at 21-22. The administrative law judge discredited the opinions of Drs. Zaldivar and Rosenberg, and credited the opinions of Drs. Knight and Conibear, to find that claimant established the existence of legal pneumoconiosis, at 20 C.F.R. §718.202(a)(4).

Contrary to employer's argument, having determined that the 2009 pulmonary function study is valid, the administrative law judge permissibly questioned the opinion of Dr. Zaldivar, that there is no evidence on which to base a finding of legal pneumoconiosis, because it is based, in part, on the conclusion that there are no valid pulmonary function studies of record, contrary to the administrative law judge's finding. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 23; Employer's Exhibit 8 at 40.

Additionally, the administrative law judge did not specifically rely on the pulmonary function study evidence to discredit Dr. Rosenberg's opinion, or to credit the opinions of Drs. Knight and Conibear. Rather, the administrative law judge permissibly discredited Dr. Rosenberg's opinion as equivocal, speculative and inconsistent with the regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure," 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); Decision and Order at 21. Further, the administrative law judge permissibly found that as Drs. Knight and Conibear based their diagnoses of legal pneumoconiosis on claimant's coal mine employment history, his lifelong non-smoking status, his physical examination results, and the results of the objective testing, including the valid 2009 pulmonary function study results, their opinions were well-reasoned and well-documented and entitled to full probative weight. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 14, 16. As the administrative law judge provided valid, independent reasons for discrediting the opinion of Dr. Rosenberg, and crediting

the opinions of Drs. Knight and Conibear, and as these specific credibility determinations are unchallenged on appeal, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD arising out of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24.

Turning to the issue of total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Knight, Conibear, Rosenberg and Zaldivar. Drs. Knight and Conibear opined that claimant is totally disabled from a respiratory standpoint, while Drs. Zaldivar and Rosenberg opined that claimant does not have a disabling respiratory impairment. The administrative law judge accorded the greatest weight to the opinions of Drs. Knight and Conibear, and discredited the opinions of Drs. Zaldivar and Rosenberg, to find that claimant is totally disabled from performing his usual coal mine work involving underground labor, shooting coal, electrical and maintenance work, and operating a cutting machine and coal buggy.

Employer contends that the administrative law judge's evaluation of the 2009 pulmonary function study tainted his weighing of the opinions of Drs. Zaldivar and Rosenberg. Employer's Brief at 5, 10. We disagree. The administrative law judge correctly observed that the opinions of Drs. Zaldivar and Rosenberg, that claimant is not disabled from performing his usual coal mine work, are based, in part, on their opinions that the record contains no valid pulmonary function study evidence reflecting that claimant has a pulmonary impairment. Decision and Order at 31-32; Employer's Exhibits 1, 3. Thus, contrary to employer's assertion, having resolved the conflict as to the validity of Dr. Knight's 2009 pulmonary function study, the administrative law judge permissibly concluded that the opinions of Drs. Zaldivar and Rosenberg, finding no valid evidence of a pulmonary impairment in the record, are not consistent with the objective evidence, and are entitled to little weight. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 31-32.

Employer also contends that the administrative law judge erred in finding the opinions of Drs. Knight and Conibear to be sufficient to establish that claimant is totally disabled from performing his usual coal mine work. Decision and Order at 4, 30-31, 33; Employer's Brief at 12-14. Employer specifically asserts that the administrative law judge's decision to credit their opinions as well-reasoned and well-documented is unexplained and irrational, in light of his findings that the pulmonary function study and blood gas study evidence does not support a finding of total disability. Employer's Brief at 12-13. We disagree.

Dr. Knight opined that the 2009 pulmonary function study, while non-qualifying under federal disability standards, still reflected "moderate obstruction and mild to moderate restriction." Director's Exhibit 9. Based on the results of his physical

examination, claimant's medical and work histories, and the pulmonary function study evidence, Dr. Knight opined that claimant's "impairment is quite significant and would be considered totally disabling for his last significant job in the coal mines . . . ." Director's Exhibit 9. Similarly, Dr. Conibear based her opinion on a review of claimant's medical and work histories, symptoms, physical examination results, and objective studies, including Dr. Knight's 2009 pulmonary function study reflecting moderate obstruction and mild to moderate restriction in airflow. Claimant's Exhibit 2. Further, Dr. Conibear explained that the level of impairment revealed by the objective testing would prevent claimant from performing the duties of his employment, which required heavy labor. Claimant's Exhibit 2.

Initially, we reject employer's contention that the opinions of Drs. Knight and Conibear are not well-reasoned because they are based, in part, on non-qualifying objective evidence. The regulations provide that a claimant may establish total disability with reasoned medical opinion evidence, even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability, even though the objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005).

Moreover, there is no merit to employer's contention that the administrative law judge erred in failing to consider that "Dr. Conibear found claimant was disabled using [the Hankinson] set of predicted values which are not in use by the Department of Labor." Employer's Brief at 14. Contrary to employer's argument, while Dr. Conibear referenced the Hankinson values in discussing the pulmonary function study results, Dr. Conibear did not state that the Hankinson values formed the basis for her opinion. Claimant's Exhibit 2. Rather, as the administrative law judge found, Dr. Conibear specifically stated that claimant's "[s]ymptoms of dyspnea on exertion with sedentary activities" and "[o]bjective findings on his spirometry, lung volumes, blood gasses, physical examination, and METS developed during the stress test" would preclude claimant from performing "the rigorous physical demands" of his usual coal mine work. Decision and Order at 31, *quoting* Claimant's Exhibit 2. Moreover, both Drs. Zaldivar and Rosenberg conceded that, if valid, as the administrative law judge found it to be, Dr. Knight's 2009 pulmonary function study would reflect a "severe," even "disabling," level of obstruction. Employer's Exhibits 7 at 44-45; 8 at 63. As Dr. Rosenberg drew this conclusion applying the standards utilized by DOL,[6] Employer's Exhibit 7 at 44-45, and

[6] In promulgating the regulations at 20 C.F.R. Part 718, the Department of Labor (DOL) derived predicted normal values for FEV1, FVC and MVV by gender, height, and age from a study published in *The American Review of Respiratory Disease*. 43 Fed. Reg.

as Dr. Zaldivar agreed with his conclusion, Employer's Exhibit 8 at 63, employer has not shown how Dr. Conibear's reference to the Hankinson values undermined her conclusion that claimant is totally disabled. Thus, the administrative law judge's error, if any, in failing to address Dr. Conibear's use of the Hankinson standards, is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The determination of whether a physician's opinion is reasoned and documented is within the discretion of the administrative law judge, as trier of fact. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103. Because the administrative law judge specifically found that Drs. Knight and Conibear set forth the rationale for their findings, based on their interpretations of the medical evidence of record, and explained why they concluded that claimant is unable to perform the duties of his usual coal mine work, Decision and Order at 26-27, 30-31, we affirm the administrative law judge's permissible finding that the opinions of Drs. Knight and Conibear are well-reasoned and well-documented and sufficient to satisfy claimant's burden of proof. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Finally, employer challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.204(c), that the medical evidence establishes that claimant's total disability is due to pneumoconiosis. Employer's contention is without merit. The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Rosenberg because they did not diagnose legal pneumoconiosis. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). Moreover, we have held that the administrative law judge permissibly credited the opinions of Drs. Knight and Conibear to find that claimant established the existence of legal pneumoconiosis. Therefore, the administrative law judge rationally relied on their opinions, that claimant's totally disabling impairment is due, in part, to coal mine dust exposure, to find that claimant is totally disabled due to legal pneumoconiosis. *See Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. We therefore affirm the administrative law judge's finding that

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17,729-31 (Apr. 25, 1978), *citing* R.J. Knudson, *et al*., *The Maximal Expiratory Flow-volume Curve: Normal Standards, Variability, and Effects of Age*, 113 Am. Rev. Respir. Dis. 587-660 (May 1976). The DOL determined that an acceptable benchmark for establishing total disability would be if a miner's pulmonary capacity was no more than 60% of these values. 45 Fed. Reg. 13,711 (Feb. 29, 1980).

claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[7]

Accordingly, the administrative law judge's Decision and Order-Award of Benefits in an Initial Claim 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

[7] Employer also asserts that the administrative law judge erred in finding the 2011 non-qualifying pulmonary function study to be not probative. Employer contends that "as a result, the [administrative law judge's] weighing of the medical opinions on the issue[s] of total disability, legal pneumoconiosis, and causation were all tainted, as his weighing of the medical opinions under each element was based significantly on his decision that the 2011 [pulmonary function study] was not probative evidence." Employer's Brief at 9-10. However, as set forth in our decision, the administrative law judge did not rely on his evaluation of the 2011 pulmonary function study in weighing the medical opinions, but provided valid, independent reasons for his credibility determinations. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Moreover, as both Drs. Zaldivar and Rosenberg also opined that the 2011 study was invalid, Employer's Exhibits 7 at 11; 8 at 60, employer has not shown how it was prejudiced by the administrative law judge's finding. Therefore, the administrative law judge's error, if any, in finding the March 2011 pulmonary function study to be invalid, is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).