BRB No. 14-0233 BLA

THOMAS J. JARVIS (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 10/02/2014
	)	
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 Awarding Benefits on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.[1]

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

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

PER CURIAM:

[1] Claimant died on June 16, 2011, when this case was previously before the Board. The Board issued an order acknowledging notice from claimant's counsel that claimant had died, and denying counsel's request to substitute claimant's widow as a party in this case. *Jarvis v. Peabody Coal Co.*, BRB No. 10-0695 BLA (Aug. 30, 2011) (Order).

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2008-BLA-05419) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This claim, filed on June 8, 2007, is before the Board for the second time.

In his initial decision, the administrative law judge credited claimant with twenty years of surface coal mine employment, and found that claimant's employment was substantially similar to underground coal mine employment.[2] The administrative law judge also determined that claimant had a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge thus found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Finally, the administrative law judge found that employer failed to rebut the presumption, because employer could not disprove the existence of legal pneumoconiosis, and could not establish that pneumoconiosis was not a contributing cause of claimant's totally disabling impairment. Accordingly, the administrative law judge awarded benefits.

Upon employer's appeal, the Board affirmed the administrative law judge's determination that claimant's twenty years of surface coal mine employment were substantially similar to underground coal mine employment, but vacated the administrative law judge's finding that claimant was totally disabled, pursuant to 20 C.F.R. §718.204(b)(2). *Jarvis v. Peabody Coal Co.*, BRB No. 10-0695 BLA (Sept. 27, 2011) (unpub.). Consequently, the Board also vacated the administrative law judge's

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 5, 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).

[3] 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 qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). Qualifying coal mine employment is employment in underground coal mines, or in conditions "substantially similar to conditions in an underground mine." *Id*. 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).

findings that claimant invoked the Section 411(c)(4) presumption, and that employer failed to rebut it. *Id*. Accordingly, the Board vacated the award of benefits. *Id*. The Board instructed the administrative law judge on remand to determine whether the June 2007 pulmonary function study that Dr. Simpao relied on was valid, and to reassess the credibility of Dr. Simpao's opinion that claimant was totally disabled, accordingly. *Id*. The Board also instructed the administrative law judge to reconsider the weight to which Dr. Simpao's opinion was entitled in comparison with the opinions of Drs. Fino and Repsher on the issue of total disability and, if necessary, rebuttal of the Section 411(c)(4) presumption. *Id*.

On remand, the administrative law judge first determined that the June 2007 pulmonary function study, administered by Dr. Simpao, was valid. The administrative law judge further found that the October 2007 pulmonary function study administered by Dr. Repsher was invalid, and that the March 2009 study administered by Dr. Baker was valid. Decision and Order at 12. Next, reconsidering the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge gave "full probative weight" to Dr. Simpao's opinion that claimant had a totally disabling respiratory impairment, and discounted the contrary opinions of Drs. Fino and Repsher. The administrative law judge therefore found that claimant was totally disabled, and that claimant invoked the Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer argues that the administrative law judge erred in his evaluation of the pulmonary function study and medical opinion evidence and in finding that claimant was totally disabled. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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 challenging the administrative law judge's finding of total disability, employer contends that the administrative law judge erred in finding Dr. Simpao's June 2007 pulmonary function study to be valid.[4] We disagree. In considering whether the

[4] Employer also challenges the administrative law judge's finding that the validity of the March 2009 pulmonary function study, administered by Dr. Baker, was uncontradicted, asserting that the administrative law judge overlooked Dr. Fino's opinion

evidence establishes that claimant suffered from a totally disabling respiratory impairment, the administrative law judge noted that while none of the pulmonary function or blood gas studies resulted in qualifying values,[5] Dr. Simpao concluded that the June 2007 pulmonary function study was valid and reflected "moderate restrictive and obstructive airway disease." Director's Exhibit 11 at 21; Decision and Order at 11. The administrative law judge further correctly noted, however, that the validity of the June 2007 pulmonary function study had been called into question by Dr. Fino, who opined that the study reflected premature termination to exhalation, a lack of reproducibility in expiratory tracings, and a lack of an abrupt onset to exhalation. Decision and Order at 11; Employer's Exhibit 3. Contrary to employer's contention, in finding the June 2007 pulmonary function study to be valid, the administrative law judge permissibly accorded greater weight to the first-hand observations of Dr. Simpao, who administered the study, that the study was "acceptable" and "reproducible," and that claimant's "effort, cooperation and comprehension [were] good." *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); Decision and Order at 11-12; Employer's Brief at 10-13; Director's Exhibit 11 at 3, 6. We therefore affirm the administrative law judge's finding that the June 2007 pulmonary function study was valid.[6]

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that the study was invalid. Decision and Order at 12; Employer's Brief at 13. However, because none of the physicians of record relied on the March 2009 pulmonary function study results when providing their opinions regarding total disability, any error regarding the validity of the March 2009 pulmonary function study is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985); Decision and Order at 13; Director's Exhibit 11; Employer's Exhibits 1, 3. Moreover, we affirm, as unchallenged, the administrative law judge's determination that the October 2007 pulmonary function study was invalid. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13.

[5] 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.

[6] Because the administrative law judge provided a valid reason for according more weight to Dr. Simpao's opinion that the June 2007 pulmonary function study was valid, we need not address employer's argument that the administrative law judge erred in discrediting Dr. Fino's opinion because Dr. Fino "attempted to invalidate the [pulmonary function study] using criteria other than those required by the regulations." *See Kozele v.*

Turning to the medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Simpao, Fino, and Repsher. Dr. Simpao opined that claimant was totally disabled from a respiratory standpoint, while Drs. Fino and Repsher opined that claimant retained the respiratory capacity to perform his usual coal mine work. The administrative law judge accorded the greatest weight to the opinion of Dr. Simpao, and discredited the opinions of Drs. Fino and Repsher, to find that claimant was totally disabled.

Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Fino and Repsher. Employer's Brief at 16-17. We disagree. The administrative law judge properly noted that the opinions of Drs. Fino and Repsher, that claimant was not disabled from performing his usual coal mine work, were based, in part, on their opinion that the record contains no objective evidence that claimant had a pulmonary impairment.[7] Decision and Order at 18; Employer's Exhibits 1, 3. The administrative law judge further noted, however, that in support of their opinions, Drs. Fino and Repsher both relied on the invalid October 2007 pulmonary function study "as evidence that Claimant did not have a respiratory or pulmonary impairment," while failing to account for the valid June 2007 pulmonary function study, which reflected moderate restrictive and obstructive airway disease. The administrative law judge observed that "[a]lthough [Drs. Fino and Repsher] also considered other medical evidence, such as Claimant's symptoms, medical history, [blood gas studies], and x-rays, they failed to consider one of the most important measurements of obstruction and restriction in Claimant's lungs." Decision and Order at 18; Employer's Exhibits 1, 3. Thus, contrary to employer's arguments, the administrative law judge permissibly found the opinions of Drs. Fino and Repsher to be not well-reasoned and entitled to little

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Rochester and Pittsburgh Coal Co., 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 11; Employer's Brief at 12-13.

[7] Dr. Repsher saw no evidence that claimant had pneumoconiosis or "any other pulmonary or respiratory disease or condition," and concluded that "[s]ince he has no objective pulmonary impairment, clearly from a respiratory point of view, he is fully fit to perform his usual coal mine work . . . ." Employer's Exhibit 1 at 3. Similarly, Dr. Fino concluded that "[t]here is no objective evidence of any respiratory impairment or pulmonary disability," and that "[t]here is no objective evidence to state that this man is either partially or totally disabled from returning to his last mining job or a job requiring similar effort." Employer's Exhibit 3 at 4.

weight.[8] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 17-18.

Employer also contends that the administrative law judge erred in finding that Dr. Simpao's opinion was sufficient to establish that claimant was totally disabled. Decision and Order at 16-18; Employer's Brief at 14-16.

Dr. Simpao acknowledged that claimant's "objective testing does not meet [the] criteria for federal disability standards," but concluded that the June 2007 pulmonary function study indicated "moderate restrictive and obstructive airway disease." Director's Exhibit 11 at 21. Based on the results of his physical examination and objective testing, Dr. Simpao opined that claimant "is totally disabled due to his pulmonary status" and would not be able to work as a groundman because of the job's "physical demands." *Id*.

Employer argues that in finding Dr. Simpao's opinion sufficient to establish total disability, the administrative law judge erred in considering Dr. Simpao's opinion in conjunction with the exertional requirements of claimant's job as a groundman. Employer's Brief at 13-14. Employer contends that the administrative law judge should have instead determined whether Dr. Simpao's opinion established claimant's inability to perform his last coal mine work, as a bulldozer operator.[9] *Id*.

Contrary to employer's contention that total disability must be determined in relation to "the coal mine work that the particular claimant was performing most recently

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[8] Employer also argues that the administrative law judge erred in discrediting the opinions of Drs. Fino and Repsher for failing to consider the exertional requirements of claimant's usual coal mine employment, and further erred in discrediting Dr. Fino's opinion because of his "conclusory" opinion regarding disability causation. Decision and Order at 17-18; Employer's Brief at 16-17. Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Repsher for failing to account for the valid June 2007 pulmonary function study, we need not consider these arguments. *See Kozele*, 6 BLR at 1-382 n.4.

[9] In his initial decision, the administrative law judge observed that although claimant's most recent coal mine work was as a bulldozer operator, "he was a [bull]dozer operator for only three months," and that "[t]he majority of his coal mine employment was as a groundman, a position that he held from 1977-1985." Initial Decision and Order at 13. Thus, the administrative law judge found that claimant's usual coal mine work was as a groundman. *Id.* The administrative law judge incorporated this determination into his Decision and Order on remand. Decision and Order at 14.

and regularly at the time of last employment," Employer's Brief at 13-14, a miner is totally disabled if a pulmonary or respiratory impairment prevents the miner from performing "his or her usual coal mine work." 20 C.F.R. §718.204(b)(1). To be considered a miner's "usual coal mine work," a job must be performed "regularly" and "over a substantial period of time." *See Bowling v. Director, OWCP*, 920 F. 2d 342, 344, 14 BLR 2-125, 2-128 (6th Cir. l990). Based on the record evidence that claimant was a groundman for several years and a dozer operator "for only three months," the administrative law judge permissibly determined that claimant's usual coal mine work was as a groundman. *See Bowling*, 920 F.3d at 345, 14 BLR at 2-128-29. Thus, because Dr. Simpao's report summarized and described claimant's job requirements as a groundman, the administrative law judge properly found that Dr. Simpao understood claimant's "substantial" exertional requirements.[10] Decision and Order at 16; Director's Exhibit 11 at 18.

Employer also contends that Dr. Simpao's opinion does not constitute sufficient evidence to meet claimant's burden of proof to establish total disability. Employer's Brief at 14-16. Employer asserts that Dr. Simpao could not say whether claimant's respiratory disease alone was totally disabling, and that Dr. Simpao failed to establish that he was qualified and that his opinion was reliable and based on "good science." *Id.* These arguments lack merit. Contrary to employer's characterization of Dr. Simpao's opinion, Dr. Simpao did not say that he could not determine whether claimant's respiratory disease alone was totally disabling. Employer's Brief at 14. Although Dr. Simpao opined that claimant's coal dust exposure, smoking history and congestive heart failure all contributed to claimant's pulmonary impairment, and that he could not determine the degree to which each of those factors contributed to claimant's impairment, he plainly concluded that claimant was "totally disabled due to his pulmonary status."[11]

[10] On remand, the administrative law judge incorporated his prior finding that claimant's work as a groundman required him to perform heavy manual labor, such as lifting 100 pounds on a daily basis, using a sledgehammer and other heavy tools, and climbing 100 steps. Decision and Order at 14.

[11] Dr. Simpao determined that claimant had 24.75 years of coal mine employment, which the administrative law judge noted in his initial decision was "slightly longer" than his finding of twenty years. Initial Decision and Order at 13; Director's Exhibit 11 at 18. Employer contends that the administrative law judge erred when he concluded that the discrepancy did not affect the credibility of Dr. Simpao's opinion "because the amount proven by Claimant is substantial (i.e., 20 years) and the difference is only a few years (i.e., 4.75 years)." Initial Decision and Order at 13; Employer's Brief at 26. This argument lacks merit. Contrary to employer's contention, it was within the administrative law judge's discretion to credit Dr. Simpao's opinion despite its reliance on a longer coal mine employment history. *See Clark v. Karst-Robbins Coal Co.*, 12

Director's Exhibit 11 at 21. Therefore, Dr. Simpao's opinion is sufficient to establish that claimant was totally disabled from a pulmonary standpoint, pursuant to 20 C.F.R. §718.204(b). We further reject employer's argument that Dr. Simpao is not a qualified expert, and that his opinion is unreliable and not based on science. Claimant selected Dr. Simpao to perform a complete pulmonary evaluation, as provided by the Act, 30 U.S.C. §923(b), from the Department of Labor's list of qualified providers, and the record reflects that Dr. Simpao properly linked his opinion to objective data when he concluded that the moderate restrictive and obstructive impairment shown in the June 2007 pulmonary function study prevented claimant from performing his usual coal mine work as a groundman. Director's Exhibits 10, 11. Moreover, it is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee 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. We, therefore, affirm the administrative law judge's finding that Dr. Simpao's opinion is well-reasoned and documented, and therefore "entitled to full probative weight." *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 16.

Because the administrative law judge examined the medical opinions of Drs. Simpao, Fino, Repsher "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We therefore also affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4); Decision and Order at 18. Finally, because it is unchallenged on appeal, we affirm the administrative law judge's finding that employer failed to rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20-23.

BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand 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