

BRB No. 09-0123 BLA

F. B.)
)
 Claimant-Petitioner)
)
 v.)
)
 CONSOL OF KENTUCKY,)
 INCORPORATED)
) DATE ISSUED: 09/30/2009
 Employer-Respondent)
)
 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 Adele H. Odegard,
Administrative Law Judge, United States Department of Labor.

Leroy Lewis, Hyden, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for
employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2005-BLA-05777) of
Administrative Law Judge Adele H. Odegard denying benefits 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). This case is before the Board for the second
time. In a Decision and Order Awarding Benefits issued on February 28, 2007,
Administrative Law Judge Paul H. Teitler accepted the parties' stipulation to twenty
years of coal mine employment, as supported by the record, and considered the claim

under the regulations set forth in 20 C.F.R. Part 718.¹ Judge Teitler found, based upon employer's concession and the evidence of record, that the existence of pneumoconiosis arising from coal mine employment was established pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and that the medical opinion evidence was sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, he awarded benefits.

In response to claimant's appeal, the Board affirmed Judge Teitler's unchallenged findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718. 202(a), 718.203(b) and that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2)(i)-(iii). *F.B. v. Consol of Kentucky*, BRB No. 07-0547 BLA, slip op. at 2 n.2 (Mar. 25, 2008) (unpub.). The Board vacated, however, Judge Teitler's finding that Dr. Breeding's opinion is sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b)(2)(iv), (c). *Id.* at 5. The Board remanded the case for Judge Teitler to reconsider Dr. Breeding's opinion in conjunction with the factors set forth in 20 C.F.R. §718.104(d)(1), (d)(4) and (d)(5), and the other medical opinions of record. *Id.* at 6. The Board further instructed Judge Teitler to determine whether claimant's cardiopulmonary stress (CPX) test is admissible pursuant to 20 C.F.R. §718.107(b), evaluate the bases for each physician's opinion, and fully articulate the rationale underlying his conclusions regarding the weight to be accorded to their diagnoses. *Id.* The Board also instructed Judge Teitler that if claimant established total disability pursuant to Section 718.204(b)(2), he must reconsider whether claimant has proven that pneumoconiosis is a contributing cause of his total disability under Section 718.204(c). *Id.*

Due to Judge Teitler's unavailability, the case was assigned to Administrative Law Judge Adele H. Odegard (the administrative law judge) on remand. The administrative law judge found that claimant satisfied the requirements of Section 718.107(b) regarding the CPX testing administered by Dr. Alam. The administrative law judge further determined, however, that claimant failed to establish total disability pursuant to Section 718.204(b)(2), (c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish that he is totally disabled and that his disability is due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief unless specifically requested to do so.

¹ This is an initial claim for benefits filed on May 17, 2004. Director's Exhibit 2. When the district director issued a proposed Decision and Order awarding benefits, employer requested a formal hearing, which Administrative Law Judge Paul H. Teitler held on August 3, 2006.

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.² 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, 363 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Alam, Breeding, Baker, Wicker, Repsher and Castle. Dr. Alam opined that claimant is totally disabled based on a CPX that showed an oxygen exchange abnormality and an extensive amount of pneumoconiotic opacities visible on claimant's x-ray. Director's Exhibit 7; Employer's Exhibit 4. Citing Dr. Alam's conclusions, Dr. Breeding indicated that claimant is totally disabled due to pneumoconiosis. Director's Exhibit 17; Employer's Exhibit 3. Dr. Baker acknowledged that claimant's pulmonary function studies did not show any impairment, but stated that the exertional requirements of coal mining may be more than claimant can perform, as he may suffer from coughing and wheezing on exertion. Employer's Exhibit 6. Dr. Wicker, who examined claimant at the request of the Department of Labor, determined that claimant had the respiratory capacity to perform his usual coal mine job. Director's Exhibits 13, 15; Claimant's Exhibit 2. However, Dr. Wicker advised claimant to avoid dusty environments. *Id.* Drs. Repsher and Castle opined that claimant was not totally disabled. Director's Exhibit 27; Employer's Exhibits 1, 5, 7. Regarding the CPX test administered by Dr. Alam, Dr. Repsher testified that when adjusted for claimant's weight, claimant's oxygen exchange function was within normal range. Employer's Exhibit 5 at 25-26.

The administrative law judge considered the medical opinion evidence at Section 718.204(b)(2)(iv) and determined that the opinions in which Drs. Repsher and Castle stated that claimant is not totally disabled outweighed the contrary opinions of record. Decision and Order at 11. Claimant argues that the administrative law judge erred in finding the opinions of treating physicians, Drs. Alam and Breeding, were not well-reasoned and sufficient to establish that claimant is totally disabled. Claimant's contention is without merit.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 7, 3.

With respect to Dr. Alam's opinion, the administrative law judge permissibly found that it was not well-reasoned on the ground that Dr. Alam did not reconcile his conclusion that claimant's CPX testing demonstrated the presence of a totally disabling oxygen exchange abnormality with the non-qualifying pulmonary function and arterial blood gas testing. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); Decision and Order at 9. The administrative law judge further reasonably found that Dr. Alam's opinion on the issue of total disability was entitled to little weight because the record does not establish that Dr. Alam had an adequate understanding of the exertional requirements of claimant's job as a continuous miner operator.³ *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 9. Based upon these findings, the administrative law judge rationally determined that Dr. Alam's opinion is not well-reasoned and permissibly accorded it little weight. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Clark*, 12 BLR at 1-155; Decision and Order at 9.

Moreover, the administrative law judge acted within her discretion in declining to give any additional weight to Dr. Alam's opinion, pursuant to 20 C.F.R. §718.104(d), because Dr. Alam assessed the claimant's pulmonary condition at the request of Dr. Breeding on several occasions, but his treatment relationship with claimant was minimal. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); Decision and Order at 6. The administrative law judge's finding is supported by her correct determinations that there is no indication in the record that Dr. Alam ever prescribed medications for the claimant or, that claimant had follow-up visits after Dr. Alam administered various tests. Decision and Order at 6. We affirm, therefore, the administrative law judge's finding that Dr. Alam's opinion is insufficient to establish total disability at Section 718.204(b)(2)(iv).

Similarly, the administrative law judge permissibly found that Dr. Breeding's opinion was not well-reasoned because he relied primarily on Dr. Alam's conclusion that

³ The administrative law judge stated "[a]lthough Dr. Alam testified in his deposition [that] he was aware of the [c]laimant's specific coal mine job, the record before me does not establish that Dr. Alam knew that the [c]laimant worked as a continuous miner operator." Decision and Order at 9. Dr. Alam indicated that claimant's chart contained a "separate sheet . . . which deals with the employment," but acknowledged that he did not have it with him. Employer's Exhibit 4 at 16. The records from Dr. Alam do not contain any description of claimant's usual coal mine work. *See Director's Exhibit 17.*

claimant was disabled based on the CPX test and, like Dr. Alam, Dr. Breeding did not explain claimant's impairment in light of the non-qualifying pulmonary function and blood gas studies. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Clark*, 12 BLR at 1-155; Decision and Order at 9-10. In addition, the administrative law judge rationally determined that Dr. Breeding's status as the claimant's treating physician did not lend any additional weight to his conclusions. The administrative law judge noted correctly that Section 718.104(d)(5) provides that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Williams*, 338 F.3d at 514, 22 BLR at 2-648-49; Decision and Order at 11. Accordingly, we affirm the administrative law judge's finding that Dr. Breeding's opinion is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).

The administrative law judge also acted within her discretion in giving substantial weight to the opinions of Dr. Repsher and Dr. Castle because they are supported by physical examinations, non-qualifying pulmonary function and blood gas studies, treatment record, and their awareness of the exertional requirements of claimant's job as a continuous miner operator, including Dr. Castle's understanding that this job required heavy labor. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Cornett*, 227 F.3d at 576, 22 BLR at 2-123.; Decision and Order at 10-11. The administrative law judge properly concluded, therefore, that these opinions outweighed the opinions in which Drs. Alam and Breeding stated that claimant is totally disabled. *Id.*

Because substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2), an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge