

BRB No. 09-0524 BLA

DAVID MITCHELL)
)
 Claimant-Respondent)
)
 v.)
)
 HARLAN CUMBERLAND COAL) DATE ISSUED: 09/21/2010
 COMPANY)
)
 and)
)
 EMPLOYERS INSURANCE OF WAUSAU)
)
 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—Denying Benefits on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order—Denying Benefits on Remand (04-BLA-6824) of Administrative Law Judge Ralph A. Romano rendered on a claim filed on September 3, 2003 pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with sixteen years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the x-ray evidence was insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but he found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and that the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Further, the administrative law judge applied the rebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305(a), and found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board vacated the administrative law judge's findings that the medical opinions of Drs. Simpao and Rosenberg were sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that Dr. Simpao's opinion, in conjunction with the miner's testimony and employment history, was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and remanded the case for further findings. As Dr. Simpao identified a positive x-ray as the basis for his diagnosis of pneumoconiosis at Section 718.202(a)(4), the Board instructed the administrative law judge, on remand, to explain his finding that Dr. Simpao's diagnosis was based on a coal mine employment history, a smoking history, a physical examination, and objective medical testing. The Board also instructed the administrative law judge to explain the effect of the discrepancy between the sixteen years of coal mine employment found by the administrative law judge and the twenty-three and one-half years relied upon by Dr. Simpao. Similarly, the Board directed the administrative law judge, on remand, to explain his conclusion that Dr. Rosenberg's diagnosis of simple pneumoconiosis was based on more than an x-ray reading. Regarding the issue of total disability at Section 718.204(b)(2)(iv), the Board held that the administrative law judge acted within his discretion in finding that the opinion of Dr. Broudy was not well-reasoned, but erred in finding that Dr. Rosenberg failed to explain the basis for his opinion that claimant could perform his usual coal mine employment or similar work from a pulmonary standpoint. Further, because the Board held that the administrative law judge mischaracterized Dr. Rosenberg's opinion, and did not explain why he found that Dr. Simpao's opinion that claimant has a "total impairment" was well-reasoned and

well-documented, the Board instructed the administrative law judge, on remand, to reconsider the medical opinions of Dr. Rosenberg and Dr. Simpao in determining whether total respiratory disability was established at Section 718.204(b)(2)(iv). Finally, the Board held that the rebuttable presumption of total disability due to pneumoconiosis at Section 718.305 was inapplicable, and instructed the administrative law judge, on remand, to determine whether the evidence was sufficient to establish disability causation at 20 C.F.R. §718.204(c), if reached. *D.M. [Mitchell] v. Harlan Cumberland Coal Co.*, BRB No. 07-0420 BLA (Feb. 29, 2008)(unpub.).

On remand, the administrative law judge reviewed the medical opinions of Drs. Simpao and Rosenberg at Section 718.202(a)(4). The administrative law judge found that Dr. Simpao failed to provide an adequate basis for his diagnosis of coal workers' pneumoconiosis. Specifically, the administrative law judge noted that Dr. Simpao, who used the Department of Labor (DOL) form, indicated only that the basis for his cardiopulmonary diagnosis was "CWP 3/2", which he found corresponded to Dr. Simpao's chest x-ray interpretation. Decision and Order on Remand at 2-3. Next, the administrative law judge noted that Dr. Simpao, in identifying the etiology of claimant's diagnosis, stated that "multiple years of coal dust exposure is medically significant in his pulmonary impairment." *Id.* The administrative law judge found that, while Dr. Simpao's statement might establish a diagnosis of legal pneumoconiosis, the physician failed to provide adequate supporting documentation or a rationale. Consequently, the administrative law judge found that, without more, Dr. Simpao's identification of objective symptoms and limitations did not support an inference that the findings are either specific to coal worker's pneumoconiosis or that they result from multiple years of coal dust exposure. The administrative law judge also observed that Dr. Simpao "relied upon a history of coal mine employment that is almost 30% greater than [the sixteen years] established in the record," and that claimant's health history included other factors that might affect his condition, such as smoking, multiple heart attacks, abnormal EKG results, and hip replacement surgery. *Id.* at 3. Finally, the administrative law judge noted that Dr. Simpao interpreted the pulmonary function testing as normal. The administrative law judge therefore concluded that Dr. Simpao's medical opinion failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

The administrative law judge next found that Dr. Rosenberg's diagnosis of pneumoconiosis was supported only by his x-ray interpretation, and that no explanation was provided to link his other findings to a diagnosis of coal workers' pneumoconiosis under 20 C.F.R. §718.201(a)(2). Furthermore, the administrative law judge referenced his previous determination that the weight of the x-ray evidence failed to demonstrate clinical pneumoconiosis, and reiterated his determination that the evidence did not establish the existence of pneumoconiosis under Section 718.202(a)(1). Decision and Order on Remand at 4. Additionally, because the other information listed in Dr. Rosenberg's report did not directly support a finding of coal workers' pneumoconiosis,

and he failed to otherwise provide an explanation linking those findings to a diagnosis of coal worker's pneumoconiosis or to any chronic lung disease or impairment and its *sequelae* arising out of coal mine employment, the administrative law judge concluded that Dr. Rosenberg's opinion failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

The administrative law judge next reconsidered the opinions of Drs. Simpao and Rosenberg with respect to the issue of total disability pursuant to 20 C.F.R. §781.204(b)(2)(iv). He determined that Dr. Simpao failed to provide a rationale or sufficient objective information to support his assessment that "total impairment" prevented claimant from performing his usual coal mine employment. Decision and Order on Remand at 5. He found that Dr. Simpao relied on a coal mine employment history of twenty-three years and failed to describe the exertional requirements of claimant's last coal mine job. Additionally, the administrative law judge found that, without further explanation, Dr. Simpao's objective findings and testing, which produced normal values, failed to support a determination of total disability. Similarly, the administrative law judge concluded that, absent further explanation, it is not known whether the objective symptoms reported by Dr. Simpao were caused by a condition that is respiratory or pulmonary in nature. Accordingly, the administrative law judge concluded that the medical opinion of Dr. Simpao was insufficient to establish total disability under Section 718.204(b)(2)(iv). Finally, the administrative law judge determined that Dr. Rosenberg explained the bases for his opinion that the miner could perform his previous coal mining job from a pulmonary perspective, namely, that the miner's pulmonary function testing failed to reveal any obstruction or restriction, the diffusion capacity was normal, and the blood gas testing revealed preserved oxygenation. *Id.* at 6. Accordingly, the administrative law judge concluded that the evidence failed to establish either the existence of pneumoconiosis at Section 718.202(a), or a totally disabling respiratory or pulmonary impairment at Section 718.204(b), and he denied benefits.

On appeal, claimant challenges the administrative law judge's conclusion that the evidence failed to establish either the existence of pneumoconiosis or total respiratory disability.¹ Claimant also asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation under the Act. Employer responds, asserting that claimant was provided with a complete pulmonary evaluation, as required under the Act, and urging affirmance of the denial of benefits. The Director filed a letter brief, arguing that the case must be

¹ Although claimant inaccurately cites to 20 C.F.R. §718.204(c), the Board will construe his arguments in the context of the administrative law judge's evaluation of the medical opinion evidence on the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv).

remanded to the district director to provide claimant with a supplementary pulmonary evaluation sufficient under Section 413(b) of the Act, 30 U.S.C. §923(b).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 supported by substantial evidence, is rational, and is in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address claimant's contention that the administrative law judge erred in finding that the evidence did not establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that he has established total disability because pneumoconiosis is a progressive disease and his pneumoconiosis, which was diagnosed a "considerable amount of time" ago, must have worsened and affected his ability to perform his usual coal mine employment. Claimant's Brief at 4. The Act provides no such presumption. Thus, because an administrative law judge's findings must be based solely on the medical evidence of record, claimant's assertion fails to provide a valid basis for review. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Claimant also asserts, without referring to any specific medical opinion, that the administrative law judge erred in failing to consider the physical requirements of claimant's usual coal mine work in evaluating medical opinions assessing disability. At Section 718.204(b)(2)(iv), the administrative law judge permissibly found that Dr. Simpao's opinion that claimant was totally disabled was insufficiently explained or documented with the exertional requirements of claimant's last coal mine employment to be credible. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*); Decision and Order on

² Subsequent to the issuance of the administrative law judge's Decision and Order, amendments to the Act, which became effective on March 23, 2010, were enacted, affecting claims filed after January 1, 2005. Employer and the Director, Office of Workers' Compensation Programs, responded to the Board's March 30, 2010 Order, which permitted the parties to submit supplemental briefing in this claim to address the impact, if any, of the 2010 amendments in this case. Because claimant's claim was filed before January 1, 2005, Director's Exhibit 2, the recent amendments to the Act do not apply in this case.

³ Because claimant's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibits 5, 6A, 17; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Remand at 5. The administrative law judge found that the pulmonary function studies and arterial blood gas studies were normal and non-qualifying, respectively, without further explanation by the physician. *Id.* Moreover, claimant does not contest the administrative law judge's conclusion that Dr. Rosenberg explained the basis for his disability opinion that claimant could perform his usual coal mining job. *Id.* at 6. Therefore, contrary to claimant's assertion, it was unnecessary for the administrative law judge to compare the exertional requirements of claimant's usual coal mine work with the medical opinion evidence at Section 718.204(b)(2)(iv).

Further, claimant generally contends that the administrative law judge erred in finding that the evidence did not establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. In this case, claimant fails to identify with specificity any substantive error of law or fact made by the administrative law judge in his weighing of the evidence on the issue of the existence of pneumoconiosis under Section 718.202(a)(1) or (a)(4), or the issue of total disability under Section 718.204(b). Rather, claimant's assertions regarding these issues are generalized. Thus, the Board has no basis upon which to review the administrative law judge's prior findings, respecting his evaluation of the x-ray evidence contained in his initial decision, which were uncontested when last before the Board, or his findings on remand with regard to the medical opinions of Drs. Simpao or Rosenberg, respecting either the existence of pneumoconiosis or total disability. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm the administrative law judge's findings that the evidence failed to establish the existence of pneumoconiosis under Section 718.202(a) and total disability under Section 718.204(b), as supported by substantial evidence.

Next, we address claimant's assertion that the DOL failed to provide him with a pulmonary evaluation sufficient to substantiate his claim. The Director agrees with claimant, asserting that the DOL-sponsored pulmonary evaluation provided by Dr. Simpao was inadequate, for various reasons, and requests that the Board remand this case to the district director for a supplementary evaluation that is legally sufficient under Section 413(b) of the Act. Specifically, the Director asserts that the credibility of Dr. Simpao's opinion on the issue of legal pneumoconiosis was diminished because he failed to provide an adequate basis for his diagnosis of the disease. Additionally, the Director asserts that Dr. Simpao's pulmonary evaluation is unreasoned and defective on the issue of total disability, given that "[n]ot only did Dr. Simpao fail to explain his statement, 'total impairment,' but he also failed to provide sufficient objective information from

which [the administrative law judge] could have drawn a reasonable inference concerning the [c]laimant’s pulmonary impairment.” Director’s Brief at 5.

The Act requires that “[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-88 n.3 (1984). Subsequent to the filing of the Director’s brief requesting that we remand this case for another pulmonary evaluation, the United States Court of Appeals for the Sixth Circuit set forth the standard for determining whether a pulmonary evaluation is complete:

In the end, the DOL’s duty to supply a “complete pulmonary evaluation” does not amount to a duty to meet the claimant’s burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of “complete[ness]” is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a “complete pulmonary evaluation” under 30 U.S.C. §923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, *i.e.*, based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009). In *Greene*, the court held that, while the physician who performed the DOL-sponsored pulmonary evaluation “could have explained his reasoning more carefully,” the miner received a complete pulmonary evaluation, given that the physician performed the required tests, and, “albeit briefly, linked his conclusions to those tests” in a medical report that addressed all of the elements of entitlement, “even if lacking in persuasive detail.” *Greene*, 575 F.3d at 641-642, 24 BLR at 2-200, 2-221.

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and that he addressed each element of entitlement on the DOL examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director’s Exhibit 10. The administrative law judge did not find, nor does claimant identify, any points in which Dr. Simpao’s report was incomplete. Nor did the administrative law judge reject Dr. Simpao’s opinion as not credible *per se*. Rather, the administrative law judge permissibly discounted Dr. Simpao’s opinion because it was not fully supported or explained, and therefore was unpersuasive as to the merits of entitlement. *See Clark*, 12 BLR at 1-155; *Tackett*, 12 BLR at 1-14. Moreover, the administrative law judge found that the contrary opinion of Dr. Rosenberg was convincingly supported and entitled to greater weight. *Id.* This conclusion by the fact-finder does not, however, establish a

violation of the Director's statutory duty. Rather, in these circumstances, the Director's statutory obligation is discharged. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.406(a); *see generally Greene, supra; Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Consequently, we conclude that, under the standard enunciated in *Greene*, the Director fulfilled his statutory obligation to provide claimant with a complete pulmonary evaluation. Therefore, we need not remand this case to the district director.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge