BRB No. 14-0087 BLA

JOHN O. KINNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 09/18/2014
	)	
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 Third Remand – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Third Remand – Denial of Benefits (2007-BLA-5065) of Administrative Law Judge Richard T. Stansell-Gamm, with respect to a claim filed on November 2, 2005, 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 a fourth time.[1]

[1] In our initial decision, we affirmed, as unchallenged on appeal, Administrative Law Judge Daniel F. Solomon's determination that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). *J.O.K.* [*Kinney*] *v.*

In our most recent Decision and Order, we vacated Administrative Law Judge Daniel F. Solomon's findings that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), total disability at 20 C.F.R. §718.204(b)(2) and disability causation at 20 C.F.R. §718.204(c). *Kinney v. Peabody Coal Co.*, BRB No. 11-0609 BLA, slip op. at 3-7 (June 19, 2012)(unpub.). The Board also granted employer's request that the case be remanded for assignment to a different administrative law judge and instructed the new administrative law judge to consider whether claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] *Id*. at 7-9.

On remand, the case was assigned to Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge). In the Decision and Order issued on November 20, 2013, which is the subject of this appeal, the administrative law judge determined that claimant established seventeen years and eleven months of underground coal mine employment, or employment in conditions substantially similar to an underground coal mine, and the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). However, the administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) and, therefore, denied benefits.

On appeal, claimant asserts that the administrative law judge erred in determining that claimant did not establish total disability. Claimant further contends that the case should be remanded to Judge Solomon or, in the alternative, it should be remanded for a

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Peabody Coal Co., BRB No. 08-0382 BLA, slip op. at 1-2 (Feb. 19, 2009)(unpub.). The Board vacated, however, Judge Solomon's findings under 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), and the award of benefits, and remanded the case to Judge Solomon for reconsideration. *Id*. at 3-6. The second time that the case was before the Board, we vacated Judge Solomon's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and disability causation at 20 C.F.R. §718.204(c), and remanded the case for additional consideration. *Kinney v. Peabody Coal Co.*, BRB No. 09-0834 BLA (Sept. 30, 2010)(unpub.).

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

new hearing.[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this 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 supported by substantial evidence, is rational, and is 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).

On remand, the administrative law judge first addressed the issue of whether claimant could invoke the amended Section 411(c)(4) presumption by establishing total disability at 20 C.F.R. §718.204(b)(2). Decision and Order on Third Remand at 11. Relevant to 20 C.F.R. §718.204(b)(2)(i), the record contains pulmonary function studies dated February 13, 2006, August 1, 2006, May 2, 2007, October 20, 2010, January 16, 2012, and February 27, 2013.[5] Director's Exhibit 12; Claimant's Exhibits 3, 5, 8; Employer's Exhibits 1, 3. The administrative law judge observed that all of the studies were non-qualifying, with the exceptions of the February 13, 2006 study and the

[3] Claimant also argues that the administrative law judge erred in crediting him with only thirty-four and a half years of coal mine employment, as employer stipulated to forty-three years. Error, if any, in the administrative law judge's reconsideration of the total number of years of coal mine employment that claimant established is harmless, as the administrative law judge did not rely on his finding of thirty-four and a half years in weighing the evidence relevant to entitlement and found that claimant established at least fifteen years of qualifying coal mine employment, sufficient to invoke the amended Section 411(c)(4) presumption. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] The record indicates that the miner's coal mine employment was in Kentucky. 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 (1989)(en banc).

[5] Claimant argues that the administrative law judge erred in stating that three pulmonary function studies were performed by Dr. Sparks when they were actually performed by Dr. Chavda. However, contrary to claimant's contention, the administrative law judge accurately identified Dr. Chavda as the individual who performed the pulmonary function studies, dated October 20, 2010, January 16, 2012, and February 27, 2013. Decision and Order on Third Remand at 12-13.

February 27, 2013 study, which produced qualifying values prior to the administration of bronchodilators.[6] Decision and Order on Third Remand at 14; Claimant's Exhibits 5, 8.

Regarding the validity of the studies, the administrative law judge acknowledged Dr. Fino's statement that claimant did not give maximum effort during the February 13, 2006 study, but he gave more weight to the opinions of the technician who administered the study, and observed good cooperation and effort, and to Drs. Simpao and Mettu, who found that the study was acceptable. Decision and Order on Third Remand at 14; Director's Exhibit 12; Claimant's Exhibit 3 at 9-10; Employer's Exhibit 3. The administrative law judge further observed that Dr. Fino opined that claimant did not give maximum effort on the August 1, 2006 study, while Dr. Repsher indicated that the test was "medically invalid" due to claimant's morbid obesity. Employer's Exhibits 1, 3; *see* Decision and Order on Third Remand at 14. However, the administrative law judge gave more weight to the technician who performed the test and observed that claimant's effort was "good" and that the results were reproducible. Decision and Order on Third Remand at 14; Director's Exhibit 12. Consequently, the administrative law judge determined that the February 13, 2006 and August 1, 2006 studies were valid.[7] Decision and Order on Third Remand at 14.

The administrative law judge concluded that "the preponderance of the conforming and valid pulmonary function tests does not establish total disability." Decision and Order on Third Remand at 14. In so doing, the administrative law judge declined to give greatest weight to the most recent, qualifying pre-bronchodilator pulmonary function study, as claimant's pre-bronchodilator values had varied widely over the years. *Id*. Accordingly, the administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Claimant contends that several of the pulmonary function studies that the administrative law judge found to be non-qualifying are actually qualifying because they produced qualifying MVV or FEV1 values. However, as the administrative law judge accurately observed, pursuant to 20 C.F.R. §718.204(b)(2)(i), a pulmonary function study is qualifying when both the FEV1 value *and* the FVC value, or the MVV value or the

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §727.203(a)(2) and (3), respectively. A "nonqualifying" study yields values that exceed those values. 20 C.F.R. §727.203(a)(2), (3).

[7] Contrary to claimant's contentions in his reply brief, the administrative law judge found that the February 13, 2006 pulmonary function study is valid. Decision and Order on Third Remand at 14.

FEV1/FVC value are qualifying. Decision and Order on Third Remand at 12 n.24. In addition, there is no merit to claimant's assertion that the administrative law judge erred in failing to give controlling weight to the most recent, qualifying, pre-bronchodilator pulmonary function test. Although an administrative law judge may give more weight to more recent test results, he is not required to do so. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Accordingly, the administrative law judge acted within his discretion in finding that total disability was not established at 20 C.F.R. §718.204(b)(2)(i), as the preponderance of the pulmonary function studies were non-qualifying. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Relevant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that neither of the blood gas studies was qualifying, and claimant acknowledges in the present appeal that they were "normal."[8] Claimant's Brief at 4. Therefore, we affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).[9] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially determined that, "considering both the absence of any other type of physical exertion . . . and any time constraint associated with climbing the 15-step ladder [to the cab of the truck], I find [claimant's] last job as a coal miner required only occasional, light physical labor." Decision and Order on Third Remand at 15. The administrative law judge then considered the medical opinions of Drs. Sparks, Simpao, Repsher and Fino. The administrative law judge found that Dr. Sparks, claimant's treating physician, did not offer an opinion as to whether claimant is totally disabled. *Id*. at 20; Claimant's Exhibits 6, 9. The administrative law judge gave diminished weight to Dr. Simpao's opinion, that claimant is totally disabled, because he relied, in part, on a qualifying pulmonary function study, which was contrary to the administrative law judge's finding that the pulmonary function study evidence was insufficient to establish total disability. Decision and Order on Third Remand at 21; Director's Exhibit 12; Claimant's Exhibit 3. The administrative law judge determined that Dr. Simpao supported his diagnosis with a recitation of

[8] In his reply brief, claimant contends that the administrative law judge considered only whether the blood gas studies met the federal disability standards and did not discuss that they "do not reflect normalcy but rather reflect impairment regardless of cause." Claimant's Reply Brief at 3. However, in evaluating the medical opinion evidence, the administrative law judge discussed that there was some impairment evident on the blood gas studies. Decision and Order on Third Remand at 16-22.

[9] Because the record does not contain any evidence suggesting that claimant has cor pulmonale with right-sided congestive heart failure, he cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

claimant's physical symptoms, which "do not reasonably support a total disability determination considering that [claimant's] last job as a coal truck driver only required light manual labor associated with climbing into the coal truck cab four times during a seven-hour shift." Decision and Order on Third Remand at 21.

The administrative law judge gave less weight to Dr. Repsher's opinion because, after ruling out the presence of an intrinsic obstructive impairment, Dr. Repsher did not consider whether claimant had a restrictive impairment. Decision and Order on Third Remand at 21; Employer's Exhibit 1. The administrative law judge also indicated that Dr. Fino's opinion was entitled to less weight, as he initially found that claimant's morbid obesity was a "significant" cause of his respiratory impairment but then determined "that there was 'no' objective evidence of an abnormality in lung function and [claimant's] breathing issues were 'clearly' due to obesity." Decision and Order on Third Remand at 22, *quoting* Employer's Exhibit 3. The administrative law judge concluded, therefore, that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Third Remand at 22. The administrative law judge further found that, when weighed together, the evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2). Decision and Order on Third Remand at 22.

Claimant argues that the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) must be vacated, as he "ignore[d]" Dr. Simpao's opinion that coal dust and smoking could have a "synergistic" effect upon claimant's respiratory impairment and claimant cites numerous studies supporting this position. Claimant's Brief at 5-6. This argument has no merit, as it goes to the cause of claimant's respiratory impairment, which is considered at 20 C.F.R. §718.204(c), and not to whether a totally disabling respiratory impairment exists at 20 C.F.R. §718.204(b)(2).

Claimant also asserts that Dr. Simpao's opinion was sufficient to support an award of benefits, because he was the only physician to identify symptoms involving the distribution of carbon dioxide and oxygen in the blood, and to find that claimant could not climb in and out of a large truck, as required by his previous coal mine employment. Contrary to claimant's contention, the administrative law judge acted within his discretion in determining that Dr. Simpao's opinion was insufficient to establish total disability, as the physical symptoms he observed would not prevent claimant from performing the light manual labor required by his previous coal mine employment. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order on Third Remand at 21. The administrative law judge considered claimant's testimony that he had to climb twelve feet up a ladder and Dr. Simpao's notation that the ladder consisted of about fifteen steps that claimant had to climb approximately four times during his seven hour shift. Decision and Order on Third Remand at 15. Because there was no time constraint on claimant to complete his climb

up the ladder, the administrative law judge permissibly concluded that claimant's last coal mine employment as a truck driver only required "occasional, light physical labor."[10] Decision and Order on Third Remand at 15; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Therefore, we affirm the administrative law judge's finding that Dr. Simpao's opinion was insufficient to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv).

Regarding Dr. Sparks's opinion, claimant contends that the administrative law judge "look[ed] at Dr. Sparks['s] treatment records and [did] not connect the dots." Claimant's Brief at 11. Claimant acknowledges that Dr. Sparks did not state explicitly that claimant would be unable to return to his previous coal mine employment but that is because "family physicians do not make occupational analys[e]s but simply treat and diagnose." *Id*. With respect to Dr. Repsher's opinion, claimant contends that the administrative law judge erred in crediting Dr. Repsher's view that the objective studies do not support a diagnosis of a totally disabling respiratory or pulmonary impairment. Claimant makes a similar argument concerning the administrative law judge's weighing of Dr. Fino's opinion, asserting that the administrative law judge "relie[d] on the words of Dr. Fino without making any analysis of the opinion or conflicts in it." *Id*. at 10.

Contrary to claimant's allegation with respect to Dr. Sparks's opinion, it is not the administrative law judge's duty to "connect the dots" to discern a physician's opinion on an element of entitlement. Rather, the burden is on claimant to establish the existence of a totally disabling respiratory impairment, based on reasoned and documented medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); *see Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). It is then the administrative law judge's duty to evaluate the medical opinion evidence and render findings with respect to the credibility and probative value of each physician's opinion. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129. We affirm the administrative law judge's finding that Dr. Sparks's opinion was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) because, as claimant acknowledges, Dr. Sparks did not state that claimant is unable to perform his usual coal mine work, or comparable and gainful work,

[10] In claimant's reply brief, he argues that "[i]t is respectfully submitted that there is no such job in a coal mine[] classified as occasional light work" and that "[Judge] Solomon as the [trial] judge created the law of the case when he found that the claimant who had worked for 43 years in coal mines could not do his work as a truck operator." Claimant's Reply Brief at 5. However, claimant has offered no case law or statutory language in support of his assertion that coal mine employment cannot require occasional light work. Further, as the Board vacated Judge Solomon's findings at 20 C.F.R. §718.204(b)(2), the administrative law judge was not bound by them when conducting his analysis. *Dale v. Wilder Coal Co.* 8 BLR 1-119 (1985).

due to a respiratory or pulmonary impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(en banc); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987).

Additionally, the administrative law judge acted within his discretion in determining that the opinions of Drs. Repsher and Fino did not assist claimant in satisfying his burden under 20 C.F.R. §718.204(b)(2)(iv), as Dr. Repsher did not fully address the issue of total respiratory disability and Dr. Fino stated that claimant's objective test results did not support a diagnosis of a totally disabling respiratory or pulmonary impairment.[11] *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26. Consequently, we affirm the administrative law judge's finding that claimant did not establish the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2).

Claimant is also mistaken in arguing that employer did not rebut the presumption at amended Section 411(c)(4) and that the administrative law judge failed to properly analyze this issue. In order for the burden to shift to employer to rebut the presumption, the presumption must be invoked. In this case, the administrative law judge properly found that claimant did not invoke the presumption at amended Section 411(c)(4), based on his rational determination that claimant did not establish that he has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(a); Decision and Order on Third Remand at 22. We affirm, therefore, the denial of benefits.[12]

[11] Claimant also discusses Judge Solomon's weighing of the evidence and asserts that the administrative law judge should not have relied on the opinions of Drs. Repsher and Fino, as "[t]hey are hired guns for the purpose of destroying people[']s claim[s]." Claimant's Reply Brief at 4. Because the Board previously vacated Judge Solomon's findings at 20 C.F.R. §718.204(c), they are not relevant to the administrative law judge's weighing of the evidence on remand. *Dale*, 8 BLR at 1-120. In addition, claimant has not offered any support for his allegation that the opinions of Drs. Repsher and Fino are not credible because these physicians were paid by employer to provide an opinion. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 637 n.6, 24 BLR 2-199, 2-214 n. 6 (6th Cir. 2009).

[12] Because the Board has affirmed the denial of benefits, it is not necessary to address employer's arguments concerning the administrative law judge's weighing of the medical opinions of Drs. Repsher and Fino. *See Larioni*, 6 BLR at 1-1278.

Finally, we decline to grant claimant's request that the case be remanded to Judge Solomon[13] or, in the alternative, that there be a new hearing in this case. Contrary to claimant's argument, the Board acted within its authority in remanding this case to a different administrative law judge because Judge Solomon did not comply with the Board's prior remand instructions. *See Milburn Colliery Coal Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Further, because claimant has not explained why he is entitled to a new hearing, we are unable to consider his request. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[13] It is unclear whether claimant meant to state that the case be remanded to Judge Solomon, the prior administrative law judge, instead of Judge Stansell-Gamm, the administrative law judge. *See* Claimant's Brief at 17; Claimant's Reply Brief at 8. To the extent that claimant meant to request that the case be remanded to the administrative law judge, we also reject his request, as we have affirmed the denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Third Remand – Denial of 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