U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0390 BLA

DONALD EDWARD OYLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 09/16/2015
	)	
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 on Second Remand Granting Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Granting Benefits (2008-BLA-05698) of Administrative Law Judge Stephen R. Henley rendered on a subsequent claim[1] filed on June 18, 2002, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act). This case is before the Board for the

[1] Claimant filed his initial claim on June 27, 1973, which was finally denied by the Department of Labor on January 30, 1980, as claimant did not establish any of the

third time. In its most recent decision, the Board rejected employer's contention that the administrative law judge erred in referring to the preamble to the 2001 revised regulations when evaluating the credibility of the medical opinion evidence at 20 C.F.R. §718.202(a)(4). *Oyler v. Peabody Coal Co*., BRB No. 13-0263 BLA, slip op. at 6 (Feb. 26, 2014) (unpub.). The Board affirmed the administrative law judge's determination that the opinions of Drs. Cohen and Istanbouly supported a finding of legal pneumoconiosis, and his rejection of Dr. Tuteur's contrary opinion that coal dust exposure did not contribute to claimant's chronic obstructive pulmonary disease (COPD). *Id*. at 6-7. However, the Board held that the administrative law judge erred in discrediting Dr. Repsher's opinion, that claimant does not have a respiratory or pulmonary impairment related to coal dust exposure, without considering Dr. Repsher's deposition testimony. *Id*. at 7-8. Consequently, the Board also vacated the administrative law judge's determination that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and his findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *Id*. at 8. The Board further vacated the award of benefits and remanded the case to the administrative law judge. *Id*.

On remand, the administrative law judge reconsidered Dr. Repsher's opinion, including the transcripts of his September 14, 2004 deposition and his June 3, 2009 deposition, and determined that it was entitled to less weight concerning the existence of legal pneumoconiosis than the opinions of Drs. Cohen and Istanbouly.[2] Based on the Board's previous affirmance of his credibility findings with regard to the opinions of Drs. Cohen, Istanbouly and Tuteur, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis, and a change in an applicable

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elements of entitlement. Director's Exhibit 1. Claimant did not take any further action until he filed the current claim on June 18, 2002. Director's Exhibits 1, 5.

[2] The Board remanded the case for the administrative law judge "to consider Dr. Repsher's 2004 deposition testimony, along with his 2003 medical report." *Oyler v. Peabody Coal Co.*, BRB No. 13-0263 BLA, slip op. at 8 (Feb. 26, 2014) (unpub.). The record also contains a transcript of Dr. Repsher's June 3, 2009 deposition, which the administrative law judge also did not address in his prior Decision and Order. Employer's Exhibit 23. The pagination of this transcript runs consecutively from the transcript of the September 14, 2004 deposition. *Id*. On remand, the administrative law judge considered the transcripts of both depositions and Dr. Repsher's 2003 medical report. Decision and Order on Second Remand at 5-6.

condition of entitlement at 20 C.F.R. §725.309. The administrative law judge also determined that claimant established that he has a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in failing to consider its request to reopen the record to develop evidence in response to his use of the preamble. Employer further asserts that, in evaluating Dr. Repsher's opinion rejecting the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), the administrative law judge repeated errors from his previous decision. In addition, employer contends that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Claimant responds, urging affirmance of the award of benefits, and contending that several of employer's arguments deal with issues beyond the scope of the Board's remand instructions. In its reply brief, employer alleges that the administrative law judge had the authority to render new findings at any point, even with respect to those previously affirmed by the Board, and reiterates the arguments from its initial brief. 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.[3] 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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because claimant's prior claim was denied for failure to establish any element of entitlement, claimant had to establish at least one element, based on the newly submitted evidence, in order to obtain

[3] Claimant's coal mine employment was in Illinois. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

review of the case on the merits. 20 C.F.R. §725.309(d)(2), (3); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

I. Existence of Legal Pneumoconiosis - 20 C.F.R. §718.202(a)(4)

Employer argues that, in finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge again failed to consider Dr. Repsher's complete opinion, that claimant does not have any impairment related to coal dust exposure. Employer also contends that the administrative law judge relied on a number of improper bases to determine that Dr. Repsher's opinion is entitled to little weight. Employer's arguments are without merit.

Contrary to employer's contention, the administrative law judge reviewed Dr. Repsher's deposition testimony in detail, noting the medical literature that he cited in support of his opinion.[4] Decision and Order on Second Remand at 5-6. Based on this review, the administrative law judge rationally found that Dr. Repsher's opinion was entitled to little weight because it is based on generalities rather than information specifically related to claimant.[5] *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22

[4] Employer states that, because the Board agreed in its prior decision that the administrative law judge erred in finding that Dr. Repsher did not explain his exclusion of coal dust exposure as a cause of claimant's hypoxemia, and cited to Dr. Repsher's depositions, the Board essentially held that Dr. Repsher sufficiently explained his opinion. *See Oyler v. Peabody Coal Co.*, BRB No. 13-0263 BLA, slip op. at 7-8 (Feb. 26, 2014) (unpub.); Decision and Order on Remand at 13. We disagree. In vacating the administrative law judge's finding, the Board merely observed that the administrative law judge was incorrect in finding that Dr. Repsher did not offer any support for his conclusions. *Oyler*, BRB No. 13-0263 BLA, slip op. at 7-8.

[5] The administrative law judge stated:

> Dr. Repsher cites to scientific literature in his deposition, and makes general conclusions concerning Claimant's condition. However, he does not specifically discuss the cause of Claimant's hypoxemia but focuses instead on his belief that Claimant did not cooperate during the PFTs [pulmonary function tests] and cites to literature attributing Claimant's conditions to smoking. Dr. Repsher does not adequately explain what specifically about Claimant's hypoxemia makes it unrelated to coal dust exposure, and he actually testified that any lung abnormality could cause it, which should include conditions caused by coal mine dust.

BLR 2-35, 2-37 (7th Cir. 2007); *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-409, 2-426 (7th Cir. 2002). We affirm, therefore, the administrative law judge's decision to accord diminished weight to Dr. Repsher's opinion on the issue of legal pneumoconiosis.

We also reject employer's allegation that the opinions of Drs. Istanbouly and Tuteur support Dr. Repsher's determination that claimant's impairments are in no way related to coal dust exposure. Employer states that Dr. Istanbouly found "that the mild hypoxemia was essentially normal for [claimant's] age and was inconsistent with a finding of pneumoconiosis." Employer's Brief at 18, *quoting* Claimant's Exhibit 1. However, Dr. Istanbouly actually stated that claimant's March 19, 2008 blood gas studies "revealed *mild hypoxemia* for the patient's age," and concluded that the "mild impairment of lung function [is] due to coal worker[s'] pneumoconiosis."[6] Claimant's Exhibit 1 (emphasis added).

We also hold that there is no merit in employer's contention that the administrative law judge should have treated Dr. Tuteur's opinion as supportive of Dr. Repsher's opinion. As we held in our most recent decision, the administrative law judge permissibly discredited Dr. Tuteur's opinion because he failed to "explain the basis for his opinion that coal-induced COPD is rare, and why, even if causality was rare, claimant's case could not be one of those cases where coal mine dust exposure was the cause of claimant's COPD." *Oyler*, BRB No. 13-0263 BLA, slip op. at 7, *citing* 65 Fed. Reg. 79,938 (Dec. 20, 2000); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 24 BLR 2-311, 2-318 (7th Cir. 2001). We decline to revisit the administrative law judge's weighing of Dr. Tuteur's opinion at 20 C.F.R. §718.202(a)(4), as the Board's holding constitutes the law of the case. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

We also reject employer's argument that the administrative law judge erred in relying on other cases in which the Board affirmed the discrediting of Dr. Repsher's opinion for failure to adequately explain his exclusion of coal dust exposure as a cause of

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Decision and Order on Second Remand at 6.

[6] In his deposition, Dr. Istanbouly testified that claimant's blood gas results are within normal range but were still "mildly low" or "low normal." Claimant's Exhibit 3 at 85-86, 114.

the claimant's impairment. Employer raised essentially the same argument in its prior appeal and the Board held that it was not error for an administrative law judge to consider Board precedent in rejecting the opinions of physicians whose views are inconsistent with that precedent. *Oyler*, BRB No. 13-0263 BLA, slip op. at 8 n.17. The Board's disposition of this issue constitutes the law of the case and will not be disturbed. *Braenovich*, 22 BLR at 1-246; *Brinkley*, 14 BLR at 1-150-51. In addition, the administrative law judge did not substitute the Board's holdings for his own weighing of Dr. Repsher's opinion. Rather, the administrative law judge relied on these decisions to illustrate the principle that it is permissible to give less weight to a physician's opinion when he does not adequately explain why a lengthy history of coal mine employment has not contributed to the miner's respiratory impairment. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103 (7th Cir. 2008); *McCandless*, 255 F.3d at 468-69, 24 BLR at 2-318; Decision and Order on Second Remand at 7.

There is also no merit to employer's assertion that the administrative law judge erred in relying on the preamble to the 2001 revised regulations when assessing the credibility of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).[7] In the

[7] Employer states that "the administrative law judge's refusal to even consider whether the record on remand should have been reopened to allow the employer to address the preamble as well as the administrative law judge's misstatement of the conclusions reached there violates the employer's right to a fair hearing under the Administrative Procedure Act ('APA')." Employer's Brief at 23. We disagree. On April 28, 2014, the administrative law judge issued a Briefing Order on Second Remand, permitting the parties forty-five days to submit briefs addressing the issues on remand. Employer did not formally file a motion to reopen the record, but rather, on May 6, 2014, sent a letter to the administrative law judge requesting that he notify the parties if he intended to rely on the preamble and allow the parties an opportunity to respond by reopening the record, indicating that "the Board has accorded employer a right to reopen the record and employer will seek to exercise that right." Employer's May 6, 2014 Letter. In its subsequent brief to the administrative law judge, employer also request[ed] that the record be reopened so that it may respond to portions of the preamble relied on by the [administrative law judge] with proof and challenge the validity of the preamble, if necessary." Employer's Brief on Remand Before the Administrative Law Judge at 25. Contrary to employer's characterization, the Board did not require the administrative law judge to reopen the record on remand if he intended to rely on the preamble. The Board specifically rejected employer's argument that the preamble constitutes evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond in accordance with the APA. *Oyler*, BRB No. 13-0263 BLA, slip op. at 6, citing *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Therefore, we reject employer's assertion that it has not been given the right to a

Board's most recent Decision and Order, it held that the administrative law judge did not treat the preamble as having the force of a regulation or a presumed fact, but rather "permissibly evaluated the medical opinions of record for consistency with the prevailing view of the medical community, and with the scientific literature relied upon by the [Department of Labor] in promulgating the 2001 revised regulations." *Oyler*, BRB No. 13-0263 BLA, slip op. at 6, *citing* 65 Fed. Reg. 79,938-39 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318. We decline to alter our prior determination. *See Braenovich*, 22 BLR at 1-246; *Brinkley*, 14 BLR at 1-150-51.

However, we will address employer's challenge to the administrative law judge's application of the preamble to Dr. Repsher's opinion. Contrary to employer's contention, the administrative law judge permissibly determined that:

> Dr. Repsher repeatedly indicated than any coal mine induced lung condition would cease after exposure stopped. This conclusion is contrary to the act, as the Department has long determined that pneumoconiosis is a latent and progressive disease, which may first become detectable only after the cessation of coal mine dust exposure.

Decision and Order on Second Remand at 8-9; 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,920, 79,937 (Dec. 20, 2000). Therefore, the administrative law judge rationally found that Dr. Repsher's opinion is inconsistent with the permanent nature of coal workers' pneumoconiosis and with the Department of Labor's comment in the preamble to the 2001 regulations. *See Stalcup*, 477 F.3d at 484, 22 BLR at 2-37; *Stein*, 294 F.3d at 895, 22 BLR at 2-426. Accordingly, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 998-99, 23 BLR 2-302, 2-318 (7th Cir. 2005); *White*, 23 BLR at 1-3.

II. Total Disability - 20 C.F.R. §718.204(b)(2)

Employer argues that, in finding that claimant established that he has a totally disabling respiratory impairment, the administrative law judge erred in relying solely on the medical opinion evidence, despite his recognition that the majority of the pulmonary

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full and fair hearing in this case. *See Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-200 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(en banc).

function studies and blood gas studies are non-qualifying.[8] Employer also contends that the administrative law judge's erroneous findings regarding Dr. Repsher's invalidation of the pulmonary function study evidence affected his weighing of Dr. Repsher's medical opinion at 20 C.F.R. §718.204(b)(2)(iv).[9] Employer further alleges that the administrative law judge did not properly weigh the conflicting evidence as to whether claimant's effort and cooperation were sufficient to produce a valid study pursuant to 20 C.F.R. §718.204(b)(2)(i). In addition, employer maintains that the administrative law judge mischaracterized the extent to which Dr. Repsher considered the pulmonary function studies performed by Dr. Harris and Dr. Cohen.

The pulmonary function studies performed on March 10, 2003 by Dr. Harris, October 13, 2003 by Dr. Repsher, March 19, 2008 by Dr. Istanbouly, and December 4, 2008 by Dr. Repsher, were non-qualifying both before and after the administration of bronchodilators. Director's Exhibit 12; Claimant's Exhibit 3; Employer's Exhibits 1, 26. The pulmonary function study performed by Dr. Cohen on August 16, 2005, was qualifying, both before and after the administration of bronchodilators, and the technician noted "[r]eproducible [s]pirometric results/efforts." Director's Exhibit 38. Regarding the nonqualifying March 10, 2003 study, the administering technician indicated that "patient demonstrated fair effort and cooperation." Director's Exhibit 12. On the nonqualifying October 13, 2003 study, a technician indicated that the "spirometry data is ACCEPTABLE and REPRODUCIBLE. Patient effort is good." Employer's Exhibit 1. The technician for the nonqualifying March 19, 2008 study stated that "[a] good effort was observed." Claimant's Exhibit 3. On the qualifying December 4, 2008 study, the technician noted "[g]ood [patient] effort and cooperation . . . . [Patient] very fatigued towards end of testing." Employer's Exhibit 26.

At his September 14, 2004 deposition, Dr. Repsher testified that the flow volume loop tracings on the nonqualifying pulmonary function study that he obtained on October 13, 2003, "suggest that [claimant] is cooperating, but particularly the lower [volume

[8] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The administrative law judge made findings concerning the validity of the pulmonary function studies, relevant to 20 C.F.R. 718.204(b)(2)(i), when discussing the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Decision and Order on Second Remand at 12-13. We will address the administrative law judge's findings, and the parties' arguments, under 20 C.F.R. §718.204(b)(2)(i).

curve], it shows just a gross lack of effort and cooperation. In fact, it shows positive, or it shows purposeful lack of cooperation." Employer's Exhibit 23 at 28-29. Dr. Repsher also stated that the significant decrease in claimant's FEV1 value after the administration of bronchodilators is proof that claimant did not cooperate. *Id.* at 27-29. At his subsequent deposition on June 3, 2009, Dr. Repsher indicated that claimant "has never cooperated fully with his pulmonary function tests. And since they're uninterpretable due to his poor effort and cooperation, we can't really say whether he has lung disease or not." *Id.* at 55. In addition, Dr. Repsher denied suggesting that claimant's lack of cooperation was "purposeful." *Id.* at 97. Dr. Repsher also testified that the technician who administered the October 13, 2003 pulmonary function study "never" notes a lack of cooperation or poor effort. *Id.* at 81. He later indicated, however, that prior to October 13, 2003, the same technician provided reports in which she stated that the patient was unable to produce comparable results on multiple trials. *Id.* at 86.

We hold that the administrative law judge's decision to discredit Dr. Repsher's opinion invalidating all of the pulmonary function study evidence is rational and supported by substantial evidence. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). As the administrative law judge indicated, Dr. Repsher's testimony regarding the technician's description of claimant's effort on the October 13, 2003 study as "good" was conflicting. Employer's Exhibit 1; Decision and Order on Second Remand at 7-8; Employer's Exhibit 23 at 81, 86. In addition, the administrative law judge considered Dr. Repsher's opinion in its entirety, including his initial testimony that the pulmonary function studies showed a "purposeful" lack of cooperation and his later testimony denying that he believed that claimant was intentionally exhibiting poor effort and poor cooperation. Decision and Order on Second Remand at 7; Employer's Exhibit 23 at 27-29, 86. Moreover, although the administrative law judge erroneously stated that Dr. Repsher did not review the report of Dr. Harris's March 10, 2003 examination of claimant, there is no indication that Dr. Repsher evaluated claimant's cooperation and effort on the non-qualifying pulmonary function study that Dr. Harris obtained on that date. *See* Employer's Exhibit 23 at 40-41 (discussing Dr. Harris's assessment of claimant's smoking history). Further, despite employer's allegations to the contrary, the administrative law judge did not indicate that a drop in post-bronchodilator FEV1 value was the sole reason that Dr. Repsher determined that claimant did not cooperate. *See* Decision and Order on Second Remand at 7-8. Rather, the administrative law judge considered the evidence of record relevant to the validity of the pulmonary function studies and permissibly determined that Dr. Repsher's opinion, that claimant did not fully cooperate, was not persuasive. *See Burns*, 855 F.2d at 501; *Lafferty*, 12 BLR at 1-192; *Justice*, 11 BLR at 1-94.

We next address employer's arguments at 20 C.F.R. §718.204(b)(2)(iv). Employer initially contends that the administrative law judge did not provide a valid reason for discrediting Dr. Repsher's opinion. In our prior Decision and Order, we affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant's usual coal mine employment required heavy manual labor. *Oyler*, BRB No. 13-0263 BLA, slip op. at 5 n.11. In the decision that is the subject of this appeal, the administrative law judge permissibly relied on this finding to determine that Dr. Repsher did not adequately explain why the mild hypoxemia that he diagnosed was not totally disabling, in light of the heavy exertional requirements of claimant's previous coal mine employment.[10] *See Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-260 (7th Cir. 2005); *Burns*, 855 F.2d at 501; Decision and Order on Second Remand at 12. Because the administrative law judge provided a valid reason for discrediting Dr. Repsher's opinion, that claimant does not have a totally disabling respiratory or pulmonary impairment, it is affirmed. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer also asserts that the administrative law judge mischaracterized Dr. Tuteur's opinion when he determined that it supported Dr. Cohen's diagnosis of a totally disabling impairment. Moreover, employer argues that the administrative law judge did not properly weigh the opinions of Drs. Cohen and Istanbouly. Employer's allegations of error are without merit, as the administrative law judge rationally determined that Dr. Cohen's opinion was well-documented and well-reasoned, and sufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(b)(2)(iv). *See Burns*, 855 F.2d at 501. Dr. Cohen diagnosed claimant with an obstructive and restrictive impairment, based on the qualifying August 16, 2005 pulmonary function study that he obtained. Director's Exhibit 38. He further indicated that claimant has a diffusion impairment and mild hypoxia, all of which are severe enough to prevent him from performing his previous coal mine employment, requiring heavy physical exertion. *Id.*

As discussed *supra*, the administrative law judge acted rationally in discrediting Dr. Repsher's invalidation of the pulmonary function study evidence. Additionally, although Dr. Repsher alleged that claimant did not exhibit adequate inhalation on Dr.

[10] Although employer points to Dr. Repsher's statements that claimant's blood gas studies show mild hypoxemia, but that the pO2 and pCO2 levels are above the "Department of Labor Table of Presumed Total Disability," blood gas and pulmonary function studies do not have to be qualifying to support a finding of total disability, as even a mild impairment can affect an individual's ability to perform his job functions depending on the exertional requirements of that job. Employer's Exhibit 23 at 32; *Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985).

Cohen's August 16, 2004 pulmonary function study, Dr. Repsher acknowledged that the two best trials from this study were within five percentage points of each other, which is one measure of validity. Employer's Exhibit 23 at 101-04. Finally, Dr. Repsher indicated there was a problem with claimant's flow volume loops, as reflected in his *restrictive* impairment, but did not point to any deficiencies in Dr. Cohen's diagnosis of an *obstructive* impairment, based on the pulmonary function study results. *Id*. at 102-104. Therefore, we affirm, as within his discretion, the administrative law judge's finding that Dr. Cohen's diagnosis of a totally disabling obstructive impairment was well-documented and well-reasoned, and sufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).[11] *See Burns*, 855 F.2d at 501.

III. Total Disability Due to Pneumoconiosis - 20 C.F.R. §718.204(c)

Although employer does not raise any specific arguments challenging the administrative law judge's determination that claimant established total disability causation at 20 C.F.R. §718.204(c),[12] implicit in the arguments that employer raised on the issue of legal pneumoconiosis is a challenge to the administrative law judge's finding at 20 C.F.R. §718.204(c). We affirm the administrative law judge's finding that claimant established that he is totally disabled due to legal pneumoconiosis, based on our affirmance of the administrative law judge's findings that claimant established the existence of legal pneumoconiosis, and that he is totally disabled.

The administrative law judge's determination that claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) encompassed a finding that claimant has a respiratory impairment arising out of coal mine employment. 20 C.F.R. §718.201(b)(2); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 596-99, 25 BLR 2-

[11] Employer's arguments regarding the administrative law judge's consideration of the opinions of Drs. Istanbouly and Tuteur are unavailing. Because the administrative law judge relied on these opinions merely as support for Dr. Cohen's diagnosis of total disability, error, if any, in the administrative law judge's weighing of these opinions would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] Under 20 C.F.R. §718.204(c), the administrative law judge gave less weight to the opinions of Drs. Tuteur and Repsher because they did not diagnose pneumoconiosis, which was contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). Decision and Order on Second Remand at 13. The administrative law judge also gave less weight to Dr. Repsher's opinion, because he determined, despite the administrative law judge's contrary determination, that claimant did not have a totally disabling respiratory impairment. *Id*.

615, 2-620-24 (6th Cir. 2014); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). The administrative law judge's finding at 20 C.F.R. §718.204(b)(2) establishes that claimant's respiratory impairment is totally disabling. *Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-260 (7th Cir. 2005). Together, these findings satisfy claimant's burden to demonstrate that he is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Kennellis Energies v. Director, OWCP* [*Ray*], 333 F.3d 822, 22 BLR 2-591 (7th Cir. 2003). Therefore, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c), and his conclusion that claimant is entitled to benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge