

BRB No. 05-0241 BLA

E. J. RUDD)
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 Claimant-Respondent)
)
 v.)
)
 NFC MINING, INCORPORATED)
) DATE ISSUED: 11/30/2005
 and)
)
 AIG INSURANCE COMPANY)
)
 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 on Remand - Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Granting Benefits (01-BLA-0823) of Administrative Law Judge Joseph E. Kane rendered 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.¹ In its prior decision in *Rudd v. NFC Mining, Inc.*, BRB No. 03-0276 BLA (Oct. 14, 2003) (unpub.), the Board affirmed in part, and vacated in part, the administrative law judge's August 21, 2002 Decision and Order awarding benefits. Specifically, the Board affirmed the administrative law judge's findings of twenty-eight and one-half years of coal mine employment, that claimant established the existence of pneumoconiosis arising out of his coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).² The Board, however, remanded the case for further consideration of the evidence at 20 C.F.R. §718.204(b)(2)(iv). The Board indicated, "In this case, the administrative law judge stated at page 21 of his Decision and Order that Dr. Westerfield clearly opined that claimant was totally disabled and that he accorded the opinion probative weight on the issue of claimant's impairment level as it was thorough, clear, and demonstrated an above adequate understanding of claimant's physical conditions and the concomitant implications upon his usual coal mine employment." *Rudd*, slip op. at 4. The Board further noted, however, that the administrative law judge stated, at page 12 of his Decision and Order, that Dr. Westerfield had opined that claimant was totally disabled from his heart disease, but from a respiratory standpoint, claimant would be able to return to his previous coal mine employment. *Id.* Because of this discrepancy, the Board held that the administrative law judge erred by characterizing Dr. Westerfield's opinion as sufficient to establish a totally disabling *respiratory* impairment. *Id.* Because the administrative law judge erred in relying, in part, on Dr. Westerfield's opinion to establish total respiratory or pulmonary disability, the Board vacated the administrative law judge's finding that claimant is totally disabled. The Board remanded the case for the administrative law judge "to reconsider the medical opinion evidence along with the other relevant evidence at Section 718.204(b)." *Id.*

¹Claimant filed his claim for benefits on July 31, 2000. Director's Exhibit 1. The administrative law judge awarded benefits on August 21, 2002. Employer filed a Motion for Reconsideration on September 23, 2002, which was denied by the administrative law judge on November 19, 2002.

²In his original Decision and Order, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.203(b), total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i), (b)(2)(iv), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Administrative Law Judge's August 21, 2002 Decision and Order – Awarding Benefits.

On remand, the administrative law judge found that claimant established total disability based on the pulmonary function study and medical opinion evidence at 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(iv), respectively. The administrative law judge again found total disability due to pneumoconiosis established at 20 C.F.R. §718.204(c).³ Accordingly, benefits were again awarded.

On appeal, employer contends that the administrative law judge erred in his weighing of the evidence at 20 C.F.R. §718.204(b)(2). Specifically, employer contends that the administrative law judge failed to apply the correct legal standard when determining the total disability issue pursuant to 20 C.F.R. §718.204(b)(2)(iv), erred in finding Dr. Westerfield's opinion sufficient to support a finding of total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and selectively analyzed the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (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 has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). In the instant case, claimant has established the existence of pneumoconiosis at 20 C.F.R. §718.202(a), that the pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b), total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), and total disability due to pneumoconiosis

³In our prior discussion in *Rudd v. NFC Mining, Inc.*, BRB No. 03-0276 BLA (Oct. 14, 2002)(unpub.), the Board affirmed, as unchallenged, the administrative law judge's finding that claimant established disability causation at 20 C.F.R. §718.204(c). The administrative law judge's finding on remand at 20 C.F.R. §718.204(c) was, thus, outside the scope of the Board's remand order and is not before us on appeal. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Consequently, we need not address employer's pertinent arguments. Employer's Brief at 13-14.

at 20 C.F.R. §718.204(c). Thus, the only issue to be resolved is whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and at 20 C.F.R. §718.204(b)(2) overall.

Employer contends that the administrative law judge erroneously found that Dr. Westerfield's opinion supports a finding of total respiratory or pulmonary disability. Employer, however, mischaracterizes the administrative law judge's treatment of Dr. Westerfield's opinion on remand. In fact, the administrative law judge found that Dr. Westerfield's opinion does not support a finding of total disability. Dr. Westerfield diagnosed simple coal workers' pneumoconiosis, and a mild respiratory impairment which is restrictive in nature and due to both obesity and chest surgery for heart bypass. Employer's Exhibit 2. Dr. Westerfield further opined, "From a pulmonary perspective Mr. Rudd can return to his previous position in coal mining or a job with similar energy requirements. Unfortunately, he is totally disabled due to heart disease." *Id.* The administrative law judge, after noting the correct legal standard under Section 718.204(b)(2)(iv), stated:

Dr. Westerfield clearly opines that Claimant is totally disabled, and I find his opinion well reasoned and well documented. I previously accorded the opinion probative weight on the issue of Claimant's impairment level as the opinion was thorough, clear, and demonstrated an above adequate understanding of Claimant's physical conditions and the concomitant implications upon his usual coal mine employment. However, the Benefits Review Board has pointed out that Dr. Westerfield's opinion of disability was based on Claimant's heart condition and not on any pulmonary impairment. Instead, this doctor believed that Claimant suffered from a mild respiratory impairment. Furthermore, Dr. Westerfield stated that Claimant retained the respiratory capacity to return to his former coal mine employment. Consequently, this opinion does not support a finding of total disability due to pneumoconiosis.

Decision and Order on Remand at 6. Thus, employer's contention that the administrative law judge found Dr. Westerfield's opinion supportive of a finding of total respiratory disability is without merit. The administrative law judge reconsidered Dr. Westerfield's opinion, as instructed by the Board, and rationally found that it does not support a finding of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040, 17 BLR 2-16, 2-21 (6th Cir. 1993); *see Beatty v. Danri Corporation & Triangle Enterprises*, 49 F.3d 993, 1002, 19 BLR 2-136, 2-154 (3d Cir. 1995), *aff'g* 16 BLR 1-11, 1-15 (1991); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-5-6 (4th Cir. 1994).

Employer contends that the administrative law judge erred in finding the preponderance of the medical opinion evidence sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).⁴ The administrative law judge stated:

When I consider all of the evidence addressing Claimant's impairment level, I continue to find that the claimant has demonstrated total disability by a preponderance of the evidence. The probative value of the qualifying pulmonary function tests and physicians' opinions outweighs the evidentiary value of the non-qualifying pulmonary function tests and arterial blood gas studies. While some physicians' opinions demonstrated analytical deficiencies, I find their remaining probative value to be supportive of a finding of total disability. Only Dr. Mallampalli's and Dr. Westerfield's opinions failed to diagnose total disability, but, as stated, I granted Dr. Mallampalli's opinion little weight due to vagueness. Admittedly, Dr. Westerfield's opinion is

⁴The relevant medical opinions consist of the following: In a report dated May 4, 2001, Dr. Wright found claimant could not perform his usual coal mine employment and that the coal, rock, and sand dust was responsible, in large part, for the pneumoconiosis shown on x-ray and the dysfunction revealed by the pulmonary function test. Dr. Wright also found that smoking was a causal factor in the development of claimant's impairment. Claimant's Exhibit 1.

In a report dated November 12, 2001, Dr. Mallampalli stated, "Pulmonary function abnormalities are more likely related to prior cigarette smoking. However, [claimant's] years of coal dust exposure in the mining industry are a likely contributing cause of his chronic bronchitis." Employer's Exhibit 1. Dr. Mallampalli also diagnosed a "Class 2" impairment. *Id.* In his report, Dr. Mallampalli answered "No" to the following question: "Considering the nature of the patient's usual occupation, are the occupational implications greater than the above impairment?" *Id.*

In a report dated October 2, 2001, Dr. Cuevas opined that claimant's pulmonary complaints and impairment are due to his history of prolonged exposure to and inhalation of chemicals and coal dust. Claimant's Exhibit 2.

In a report dated August 28, 2000, Dr. Sundaram opined that claimant did not have the capacity to perform his usual coal mine work or comparable work based on physical symptoms, pulmonary function study, x-ray, and work history. Director's Exhibit 15. In a report dated December 28, 2000, Dr. Sundaram again found that claimant did not have the capacity to perform his usual coal mine employment. Director's Exhibit 30.

entitled to probative weight, however, I find that the weight I accorded the other narrative opinions, when combined with the qualifying pulmonary function tests, supports my determination that the claimant has demonstrated total disability by a preponderance of the evidence.

Decision and Order on Remand at 6-7. Employer specifically argues that the administrative law judge erred in finding that the weight of the medical opinions supports claimant's burden at 20 C.F.R. §718.204(b)(2)(iv).

Employer's contention lacks merit. The administrative law judge rationally accorded little weight to Dr. Mallampalli's opinion as he found it to be vague. Decision and Order on Remand at 6; *see* Employer's Exhibit 1. Specifically, the administrative law judge found, within his discretion, that Dr. Mallampalli's opinion is "cryptic" regarding the issue of claimant's level of impairment. Decision and Order on Remand at 6; *Justice v. Island Creek Coal Co.*, 11 BLR 1-19 (1988); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984). Further, the administrative law judge, within his discretion, rationally accorded less probative weight, rather than no weight, to Dr. Sundaram's finding of total disability as the physician relied on a pulmonary function study that the administrative law judge found to be invalid.⁵ Decision and Order on Remand at 5; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see* Director's Exhibit 10.⁶ The record also

⁵Dr. Michos invalidated Dr. Sundaram's pulmonary function study of August 28, 2000. Director's Exhibit 10.

⁶Contrary to employer's contention, the administrative law judge was not required to discredit Dr. Sundaram's opinion on the issue of total disability on remand because he accorded no weight to Dr. Sundaram's opinion on the issue of the existence of pneumoconiosis in his original Decision and Order. *See* Employer's Brief at 13. Specifically, on original consideration the administrative law judge assigned no weight to Dr. Sundaram's diagnoses of pneumoconiosis as they were improperly based solely on claimant's history of coal dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); August 21, 2002 Decision and Order at 16. Further, the Board, in *Rudd v. NFC Mining, Inc.*, BRB No. 03-0276 BLA (Oct. 14, 2003) (unpub.), specifically remanded the case for the administrative law judge "to reconsider the medical opinion evidence along with the other relevant evidence at Section 718.204(b)." *Rudd*, slip op. at 4. The record shows that the administrative law judge's reasons for according no weight to Dr. Sundaram's opinion at 20 C.F.R. §718.202(a)(4) do not affect his reasons for according this opinion less probative weight at 20 C.F.R. §718.204(b)(2)(iv) on remand.

supports the administrative law judge's finding that Dr. Cuevas did not address claimant's impairment level. Claimant's Exhibit 2; *see* Decision and Order at 6.

Further, employer refers to, but does not specifically challenge, the administrative law judge's weighing of Dr. Wright's opinion. *See* Employer's Brief at 12. The record shows that the administrative law judge rationally accorded probative weight to Dr. Wright's opinion that claimant does not have the respiratory capacity to return to his usual coal mine employment. Specifically, the administrative law judge found that Dr. Wright's opinion is well reasoned and well documented, and that Dr. Wright demonstrated that he was aware of "claimant's work history and work demands." Decision and Order on Remand at 6; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Based on the foregoing, we hold that substantial evidence supports the administrative law judge's weighing of the medical opinions pursuant to Section 718.204(b)(2)(iv). We, therefore, affirm the administrative law judge's finding on remand that the relevant evidence of record establishes total disability pursuant to 20 C.F.R. §718.204(b)(2).⁷ *Tussey*, 982 F.2d at 1040, 17 BLR at 2-21.

⁷We find no merit in employer's suggestion that the administrative law judge erred in finding the qualifying pulmonary function studies of record supportive of a finding of total disability, where he earlier concluded at 20 C.F.R. §718.204(b)(2)(i) that a preponderance of the pulmonary function study evidence does not establish total disability. Employer's Brief at 12; *see* Decision and Order on Remand at 5, 6. At 20 C.F.R. §718.204(b)(iv) the administrative law judge found, "The probative value of the qualifying pulmonary function tests and physicians' opinions outweighs the evidentiary value of the non-qualifying pulmonary functions tests and arterial blood gas studies." Decision and Order on Remand at 6. Because this statement does not directly contradict the administrative law judge's finding that the preponderance of the pulmonary function evidence does not establish total disability, we find no reversible error therein.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge