BRB No. 98-0288 BLA

BENJAMIN WITMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
BARREN CREEK COAL COMPANY	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand and Supplemental Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Maureen Hogan Krueger, Jenkintown, Pennsylvania, for claimant.

Thomas H. Odom (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Supplemental Decision and Order (87-BLA-0991) of Administrative Law Judge Ralph A. Romano awarding benefits and an attorney's fee 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. Initially, the administrative law judge accepted the parties' stipulation to nineteen years of coal mine employment, found the existence of pneumoconiosis and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §§718.202(a)(1),

718.203(b), 718.204, and concluded therefore that modification of the district director's initial denial was appropriate. *See* 20 C.F.R. §725.310. Accordingly, he awarded benefits.

On appeal, the Board affirmed the administrative law judge's findings at Section 718.204 as supported by substantial evidence and therefore affirmed the award of benefits.[1] *Witmer v. Barren Creek Coal Co*., BRB No. 89-3412 BLA (Apr. 28, 1993)(unpub.). Pursuant to employer's appeal, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held that the administrative law judge's findings regarding total disability due to pneumoconiosis did not comply with the Administrative Procedure Act and therefore vacated his findings and remanded the case for him to reweigh the evidence and provide a sufficient rationale for his decision. *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997).

[1] The administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) were unchallenged on appeal and were therefore affirmed. *Witmer*, slip op. at 2 n.1.

On remand, the administrative law judge reconsidered the disability evidence. At Section 718.204(c)(1), based on the qualifications of reviewing physicians the administrative law judge found that five of the eight pulmonary function studies in the record were invalid.[2] Of the three remaining pulmonary function studies, two were qualifying[3] but the third and most recent test was non-qualifying. In the administrative law judge's view this most recent test yielded disparately higher values, so he deemed it a better indicator of claimant's pulmonary status and therefore found that total disability was not established at Section 718.204(c)(1). Pursuant to 718.204(c)(2), the administrative law judge found that since all four blood gas studies were non-qualifying, total disability was not established, adding, without further explanation, that "such tests play no role in this decision." Decision and Order on Remand at 4. There was no relevant evidence to be considered at Section 718.204(c)(3).

Pursuant to Section 718.204(c)(4), the administrative law judge weighed the opinions and qualifications of three physicians. Dr. Kraynak, Board-eligible in Family Medicine and claimant's treating physician, opined that based on examinations, history, and review of diagnostic tests, claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 1. Dr. Kraynak further explained his opinion at his deposition. Claimant's Exhibit 20. Dr. Kruk, Board-certified in Internal Medicine, examined and tested claimant at Dr. Kraynak's request to determine if there was any cardiac etiology for claimant's respiratory complaints. Dr. Kruk found no evidence of heart disease and opined that claimant was totally disabled due to pneumoconiosis. Claimant's Exhibit 8. Dr. Dittman, Board-certified in Internal Medicine, examined and tested claimant and reviewed some of the medical evidence of record. In contrast to the other two physicians, Dr. Dittman concluded that claimant did not have pneumoconiosis, that his respiratory system was normal, and that claimant could perform his usual coal mine employment as he described it. Employer's Exhibit 3. The only abnormalities Dr. Dittman found were atherosclerotic disease and angina pectoris. Dr. Dittman was also deposed. Employer's Exhibit 5.

The administrative law judge concluded that although Dr. Dittman had superior

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[2] On appeal, claimant does not challenge the administrative law judge's reliance upon Dr. Cander's June 15, 1986 invalidation report, which the administrative law judge excluded from the record in 1989. Director's Exhibit 14; [1989] Decision and Order at 2.

[3] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

qualifications, his opinion was outweighed by that of Dr. Kraynak, as supported by the opinion of Dr. Kruk. The administrative law judge reasoned that Dr. Kraynak, as claimant's treating physician for a period of two years by the date of his deposition, had the opportunity to observe claimant over an extended period of time and was thus more likely to be familiar with his condition. Decision and Order on Remand at 6-7. The administrative law judge also found Dr. Kraynak's opinion to be "well-reasoned and well-documented and therefore entitled to great weight." Decision and Order on Remand at 7. The administrative law judge found that Dr. Dittman lacked the opportunity to observe claimant over time and did not "have the opportunity to review a valid pulmonary function study." *Id*. Thus, the administrative law judge found total disability established pursuant to Section 718.204(c)(4).

Pursuant to 718.204(c), which requires the administrative law judge to weigh together all of the disability evidence, the administrative law judge found that "upon review of the evidence as a whole regarding total disability, . . . claimant has established total disability due to a respiratory or pulmonary impairment." *Id*. The administrative law judge made no mention of the non-qualifying pulmonary function study credited at Section 718.204(c)(1) or of the non-qualifying blood gas studies at Section 718.204(c)(2).

Turning to disability causation pursuant to Section 718.204(b), the administrative law judge "afford[ed] little weight" to Dr. Dittman's opinion because Dr. Dittman did not diagnose pneumoconiosis and opined that claimant has no pulmonary impairment. *Id*. The administrative law judge found that the opinions of Drs. Kraynak and Kruk established that pneumoconiosis substantially contributed to claimant's total disability and awarded benefits as of May, 1986. In his Supplemental Decision and Order, the administrative law judge rejected all of employer's objections to claimant's counsel's fee petition and awarded claimant's counsel a fee of $3,138.75 for services performed before the administrative law judge.

On appeal, employer contends that the administrative law judge failed to provide a sufficient rationale for his weighing of the medical opinions pursuant to Section 718.204(c)(4) and failed to weigh the contrary probative evidence pursuant to Section 718.204(c). Employer further asserts that the administrative law judge erred in his weighing of the medical evidence pursuant to Section 718.204(b). Employer also challenges the attorney's fee award. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[4]

[4] We affirm as unchallenged on appeal the administrative law judge's findings

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 law. 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).

Pursuant to Section 718.204(c)(4), employer contends that the administrative law judge failed to explain his finding that Dr. Kraynak's opinion was well reasoned and thus entitled to great weight, and offered no reason for his apparent conclusion that Dr. Kruk's opinion was reasoned. Employer's Brief at 19-22. We conclude that the administrative law judge's one-sentence analysis of the reasonedness issue is too cursory to be affirmed.

Section 718.204(c)(4) provides in part that a physician's opinion regarding total disability must be a reasoned medical judgment based upon medically acceptable evidence. 20 C.F.R. §718.204(c)(4); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1319, 10 BLR 2-220, 2-222 (3d Cir. 1987). In stating that Dr. Kraynak's opinion was well reasoned, the administrative law judge did not address whether the underlying objective data supported Dr. Kraynak's opinion. Decision and Order on Remand at 6-7. The administrative law judge did note Dr. Kraynak's general statement that he based his opinion on claimant's medical and work histories, complaints, and objective studies. Decision and Order on Remand at 7. However, "[t]he mere fact that an opinion is asserted to be based upon medical studies cannot by itself establish as a matter of law that it is documented and reasoned. Rather, that determination requires the [administrative law judge] to examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259, 2-267 (3d Cir. 1990).

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pursuant to 20 C.F.R. §718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Here, Dr. Kraynak relied upon seven pulmonary function studies, four of which were found to be invalid. Of the three valid pulmonary function studies, two were qualifying while the third and most recent was non-qualifying and was found by the administrative law judge to be the most representative of claimant's pulmonary capacity. None of the blood gas studies that Dr. Kraynak considered was qualifying.[5] When deposed, Dr. Kraynak attempted to harmonize his opinion with the invalid and non-qualifying objective study results, Claimant's Exhibit 20 at 17-21, 31-34, but the administrative law judge did not discuss any of this testimony. Because the administrative law judge did not provide a sufficiently detailed analysis, we must vacate his finding pursuant to Section 718.204(c)(4).

Employer also challenges the administrative law judge's deference to Dr. Kraynak's treating status. Employer's Brief at 22-24. A treating physician's opinion merits consideration, but the administrative law judge must determine that it is documented and reasoned. *See Mancia v. Director, OWCP*, 130 F.3d 579, 589, 21 BLR 2-214, 2-236 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997). Because the administrative law judge did not articulate his reasons for concluding that Dr. Kraynak's opinion was well reasoned with respect to the underlying objective evidence, we cannot affirm the administrative law judge's finding based upon his preference for the treating physician. Therefore, we remand this case for the administrative law judge to make specific, explained findings regarding whether the medical opinions are reasoned pursuant to Section 718.204(c)(4).

Pursuant to Section 718.204(c), employer contends that the administrative law judge failed to weigh the contrary probative evidence. Employer's Brief at 17-19. This contention has merit. Section 718.204(c) does not provide for a finding of total respiratory disability "upon a mere showing of evidence satisfying any one (or more) of the five alternatative methods" of proving disability. *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-197 (1986). Rather, it provides that such evidence establishes total respiratory disability only in the absence of contrary probative evidence. *Shedlock*, 9 BLR at 1-198; *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987). Therefore, the administrative law judge must weigh all of the contrary probative evidence together, indicate the relative weight assigned thereto, and determine whether the evidence establishes a totally disabling respiratory impairment. *Id*.

[5] Dr. Kruk relied upon two qualifying pulmonary function studies, one valid and one invalid, and apparently considered no blood gas studies.

Here, the administrative law judge found that the pulmonary function and blood gas studies did not support a finding of total disability pursuant to Section 718.204(c)(1) or (c)(2). In making his finding at Section 718.204(c), however, the administrative law judge failed to discuss these studies.[6] Under these circumstances, we do not consider the administrative law judge's statement that he "review[ed] the evidence as a whole regarding total disability" to be a sufficiently detailed discussion of the evidence. Decision and Order on Remand at 7. Accordingly, we vacate the administrative law judge's finding and instruct him on remand to weigh all of the contrary probative evidence to determine whether it establishes total respiratory disability pursuant to Section 718.204(c). *See Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Fields, supra*; *Shedlock, supra*.

Pursuant to Section 718.204(b), employer argues that the administrative law judge erred by discounting Dr. Dittman's opinion because he failed to diagnose pneumoconiosis. Employer's Brief at 25-26. Dr. Dittman opined that claimant has no pulmonary impairment and is not totally disabled. Employer's Exhibit 3. Although he diagnosed heart disease, he did not opine that it disables claimant or that the respiratory problems diagnosed by the other two physicians are due to heart disease and not pneumoconiosis. *Id*. Because Dr. Dittman did not address disability causation, the administrative law judge's unnecessary discounting of Dr. Dittman's opinion for failing to diagnose pneumoconiosis has no impact on the causation inquiry.

[6] Based upon the administrative law judge's comment at Section 718.204(c)(2), we know that the non-qualifying blood gas studies "play[ed] no role" in his decision, but we do not know why they played no role. Decision and Order on Remand at 4.

However, there is merit in employer's additional contention that the administrative law judge should have assessed the credibility of claimant's two disability causation opinions in light of Dr. Dittman's testimony criticizing the manner in which claimant's physicians ruled out the possibility of heart disease. Employer's Brief at 27. Both Drs. Kraynak and Kruk based their disability causation opinions in part on their belief that claimant does not have heart disease. Claimant's Exhibits 1 at 3; 8 at 3; 20 at 11, 15. Claimant's testimony that he has never been diagnosed with heart trouble corroborates their opinions. Hearing Transcript at 20. However, based upon certain examination findings, complaints, and test results, Dr. Dittman diagnosed atherosclerotic disease and angina pectoris. Employer's Exhibits 3 at 3-5; 5 at 10-11, 18-19. When reminded at his deposition that Dr. Kruk ruled out heart disease, Dr. Dittman opined that Dr. Kruk relied upon a cardiac stress test that was inconclusive because it was not conducted to claimant's maximum capacity.[7] Employer's Exhibit 5 at 31. The administrative law judge did not discuss any of this medical testimony at Section 718.204(b). Because we must remand this case for the administrative law judge to reconsider total disability, we believe the better course is to also vacate his disability causation finding pursuant to Section 718.204(b) and instruct him to resolve the evidence regarding the presence or absence of heart disease in order to assess the probative value of the disability causation opinions, if reached. *See Bonessa v. United States Steel Corp*., 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).[8]

Employer contends that the administrative law judge failed to address its objections to the attorney's fee petition or provide a rationale for his findings. Employer's Brief at 6-8. Following the administrative law judge's award of benefits, claimant's counsel filed a petition with the administrative law judge requesting a fee

[7] Dr. Kruk had to terminate the test after only one minute and forty-five seconds due to claimant's shortness of breath. Claimant's Exhibit 8 at 2.

[8] We reject employer's repeated contention that a threshold modification analysis was required, for the same reasons given in our previous decision. *Witmer*, slip op. at 3; *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc*., 17 BLR 1-14, 1-19 (1992).

of $3,138.75 for 20.25 hours of legal services at a rate of $155.00 an hour. Employer filed specific objections to the reasonableness of the hourly rate and the number of hours charged, and contended that the fee petition did not demonstrate that the particular services rendered were necessary to the establishment of entitlement. Thereafter, the administrative law judge issued a three-sentence order summarily rejecting all of employer's objections and awarding the requested fee.

The award of attorney's fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a), is discretionary and will be sustained on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Goodloe v. Peabody Coal Co*., 19 BLR 1-91 (1995); *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

We are unable to review the administrative law judge's fee award because, as employer contends, the administrative law judge did not address employer's specific objections to the fee petition or explain his dismissal of those objections. *See Ovies v. Director, OWCP*, 6 BLR 1-689, 1-692 (1983); *Busbin v. Director, OWCP*, 3 BLR 1-374, 375 (1981). Therefore, we vacate the fee award and instruct the administrative law judge on remand to reconsider counsel's fee petition pursuant to Section 725.366, address employer's specific objections, and provide a rationale for his findings.[9]

[9] We regard the dispute employer raises concerning the interrogatories it filed below to be a moot issue, since claimant's counsel in her fee petition and in her objection to employer's motion to hold this matter in abeyance answered employer's questions concerning her hourly rate and billing practices as specifically as they are likely to be answered. Employer's Brief at 8-10.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, his Supplemental Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge