BRB No. 13-0028 BLA

E. T. HALL Claimant-Respondent v. COLLINS & MAY COAL COMPANY and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/18/2013 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (08-BLA-05047) of Administrative Law Judge Joseph E. Kane rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (Supp. 2011) (the Act). This case, filed on January 19, 2007, is before the Board for the second time. Director's Exhibit 2.

In the initial decision, the administrative law judge credited claimant with eleven years of coal mine employment,[1] as stipulated by the parties,[2] and found that claimant established the existence of clinical[3] and legal[4] pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). The administrative law judge further found that while the pulmonary function studies of record demonstrated the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), the blood gas study evidence was inconclusive pursuant to 20 C.F.R. §718.204(b)(2)(ii), and the medical opinion evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Thus, the administrative law judge concluded that the evidence, as a whole, did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's denial of benefits. Specifically, the Board affirmed the administrative law judge's findings that the x-ray and medical opinion evidence established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and that the pulmonary function studies demonstrated the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i). The Board vacated, however, the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, vacated the administrative law judge's

[1] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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, 1-202 (1989) (en banc).

[2] Claimant is unable to invoke the presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because he did not establish fifteen years of coal mine employment. 30 U.S.C. §921(c)(4).

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

finding that the evidence as a whole failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).[5] *See Hall v. May Mining Co.*, BRB Nos. 09-0757 BLA and 09-0757 BLA-A (Aug. 30, 2011) (unpub.). The Board instructed the administrative law judge on remand to reconsider whether the medical opinion evidence demonstrates total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), and to then consider whether all relevant evidence, when weighed together, establishes total respiratory disability at 20 C.F.R. §718.204(b). The Board also instructed the administrative law judge that if, on remand, he found total disability established pursuant to 20 C.F.R. §718.204(b), he must consider whether claimant established that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

On remand, the administrative law judge found that the medical opinions established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and that the evidence, as a whole, established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinions in determining that total disability was established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

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 suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

[5] The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established eleven years of coal mine employment, that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) and (a)(3), and that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii) and (iii). *See Hall v. May Mining Co.*, BRB Nos. 09-0757 BLA and 09-0757 BLA-A (Aug. 30, 2011) (unpub.); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

totally disabling. *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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In evaluating the evidence relevant to total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Broudy, Westerfield, and Baker. Dr. Broudy examined claimant and diagnosed "moderately severe chronic obstructive airways disease," markedly diminished diffusing capacity, and mild resting hypoxemia, based on the results of the pulmonary function and blood gas testing he performed. Director's Exhibit 12; Employer's Exhibit 4. Dr. Broudy concluded, however, that while claimant has a "significant" pulmonary impairment, he retains the respiratory capacity to perform his usual coal mine work as a mechanic. Director's Exhibit 12; Employer's Exhibits 4, 5. Dr. Broudy stated that he based his opinion on the fact that the objective test results he obtained were non-qualifying.[6] *Id*. Dr. Westerfield reviewed the medical evidence of record and diagnosed "moderate airway obstruction," as reflected by Dr. Broudy's objective test results. Employer's Exhibit 6. Dr. Westerfield stated that claimant could return to his usual coal mine work as a mechanic because, while his "[p]ulmonary function studies do not qualify him for arduous work, . . . he could maintain [the] energy requirements of moderate and heavy work." *Id*. Finally, Dr. Baker also diagnosed claimant with a "moderate obstructive defect" and severe resting hypoxemia, based on his physical examination and objective test results, but concluded that claimant does not have the respiratory capacity to perform his usual coal mine work as a mechanic. Director's Exhibit 10. The administrative law judge credited the opinion of Dr. Baker, and discounted the opinions of Drs. Broudy and Westerfield, to conclude that the medical opinion evidence established total disability. Decision and Order on Remand at 7-8.

Employer asserts that the administrative law judge erred in discounting the opinions of Drs. Broudy and Westerfield, that claimant retains the respiratory capacity to perform his usual coal mine work, and in crediting the opinion of Dr. Baker, that claimant is totally disabled. Employer's Brief at 8. Specifically, employer contends that the administrative law judge improperly discredited the opinions of Drs. Broudy and Westerfield, and credited Dr. Baker's opinion, based on the accuracy of each physician's understanding of the exertional requirements of claimant's job. *Id.*

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

The administrative law judge initially noted that Dr. Broudy based his opinion, in part, on the fact that the pulmonary function study and blood gas study he performed yielded non-qualifying values, which was contrary to the administrative law judge's findings that, as a whole, the pulmonary function studies of record establish total disability, and the blood gas studies are inconclusive, not non-qualifying.[7] Decision and Order on Remand at 7-8. The administrative law judge further noted that Dr. Broudy acknowledged that claimant's job as a mechanic was "fairly heavy work," requiring that he lift "heavy items." Decision and Order on Remand at 6; Employer's Exhibit 4 at 10. Considering that even a mild impairment may be disabling, depending on the exertional requirements of a claimant's usual coal mine work, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), the administrative law judge permissibly discounted Dr. Broudy's opinion, in part, because Dr. Broudy did not adequately explain how claimant could perform his "fairly heavy work" in light of his "significant," "moderately severe" respiratory impairment and mild resting hypoxemia. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 7-8. The administrative law judge, therefore, acted within his discretion in finding Dr. Broudy's opinion to be not credible.

The administrative law judge next considered Dr. Westerfield's opinion that, based on the non-qualifying objective testing he reviewed, claimant is not disabled. Contrary to employer's contention, the administrative law judge permissibly discounted Dr. Westerfield's opinion, in part, because Dr. Westerfield did not adequately explain why claimant's moderate obstructive impairment would not prevent claimant from performing heavy work as a mechanic, but would only prevent him from performing "arduous" work. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 8. Moreover, the administrative law judge further permissibly found that, based on claimant's credible testimony about the exertional requirements of his job, "it could easily be characterized as 'arduous'" work, which Dr. Westerfield conceded claimant could not perform. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(en banc recon.); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209, 1-1213 (1984); Decision and Order on Remand at 8. Therefore,

[7] In his initial decision, the administrative law judge found that the blood gas studies yielded mixed qualifying and non-qualifying results, but were predominately non-qualifying. Decision and Order at 18. Thus, the administrative law judge concluded that as the blood gas study evidence was "inconclusive for the presence of a disabling impairment," it was insufficient to meet claimant's burden to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id.*

the administrative law judge acted within his discretion in discounting the opinion of Dr. Westerfield.

In contrast, the administrative law judge permissibly credited Dr. Baker's opinion, that claimant lacks the respiratory capacity to perform his usual coal mine work, because he found Dr. Baker's opinion to be better reasoned, more persuasive, and more consistent with the objective evidence of record, including the weight of the qualifying pulmonary function studies and the inconclusive, but not non-qualifying, blood gas study evidence. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order on Remand at 7-8. An administrative law judge may properly credit the medical opinions that he determines are better supported by the objective evidence of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982). Because he found Dr. Baker's opinion to be well-reasoned, based upon comprehensive documentation, and more consistent with the objective evidence, the administrative law judge properly accorded greater weight to the opinion of Dr. Baker, that claimant is totally disabled, than to the contrary opinions of Drs. Broudy and Westerfield. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Wetzel*, 8 BLR at 1-141. Because the administrative law judge gave valid reasons for discounting the opinions of Drs. Broudy and Westerfield, and crediting the opinion of Dr. Baker, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[8] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

In weighing together the contrary probative evidence, pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge rationally determined that because the medical opinions and pulmonary function studies support total disability, and the blood gas studies are inconclusive, but not non-qualifying, the evidence of record, as a whole, demonstrates that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R.§ 718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order on Remand at 8. Therefore, we affirm the administrative law judge's conclusion that the preponderance of the evidence establishes total disability, pursuant to 20 C.F.R. §718.204(b)(2). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

[8] Thus, we need not address employer's additional allegations of error regarding the administrative law judge's consideration of the medical opinion evidence. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-11.

Finally, the administrative law judge, relying upon Dr. Baker's opinion, found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[9] Decision and Order on Remand at 9. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710 (1983). We, therefore, affirm the administrative law judge's award of benefits.

[9] Specifically, the administrative law judge rationally discounted the opinions of Drs. Broudy and Westerfield because they did not diagnose claimant with pneumoconiosis, contrary to the administrative law judge's finding. *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order on Remand at 9. Further, the administrative law judge rationally credited the opinion of Dr. Baker, that claimant's disabling chronic obstructive pulmonary disease and chronic bronchitis are significantly related to, or substantially aggravated by, coal mine dust exposure, to conclude that pneumoconiosis is a "substantially contributing cause" of claimant's total disability, pursuant to 20 C.F.R. §718.204(c). *See Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 303 (6th Cir. 2001); Decision and Order on Remand at 9.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge