BRB No. 06-0923 BLA

M.D.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 08/22/2007
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

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

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand – Denying Benefits (03-BLA-6474) of Administrative Law Judge Rudolf L. Jansen rendered on a subsequent 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). Claimant filed this claim on March 12, 2002.[1] Director's Exhibit 3. It is now before the Board for the second time.

Initially, Administrative Law Judge Daniel J. Roketenetz found that the x-ray evidence developed since the prior denial of benefits established the existence of pneumoconiosis and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.202(a)(1), 725.309(d). However, Judge Roketenetz denied benefits because claimant did not establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).

Pursuant to claimant's appeal, the Board vacated the decision in part and remanded the case for further consideration. [*MDR*] *v. Peabody Coal Co.*, BRB No. 05-0596 BLA (Dec. 23, 2005)(unpub.). At 20 C.F.R. §718.202(a)(1), the Board instructed the administrative law judge to consider the admissibility of a negative reading of a November 8, 2004 x-ray that was submitted by employer,[2] and to reconsider the x-ray evidence in light of the physicians' radiological credentials. At 20 C.F.R. §718.204(b)(2)(i), the Board instructed the administrative law judge to explain how he determined that the pulmonary function studies were non-qualifying,[3] considering that claimant's age exceeded the maximum age listed in the Appendix B table of pulmonary function values, and his height fell between the listed table values. Because the administrative law judge relied on his finding that the pulmonary function studies were non-qualifying to discredit the medical opinions that claimant is totally disabled, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv), and instructed him to reconsider the medical opinions.

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[1] Claimant filed his first claim for benefits on December 9, 1986, which was finally denied on July 7, 1987 because the evidence did not establish any element of entitlement. Director's Exhibit 1.

[2] Although Dr. Schulteis's negative x-ray reading was in the record, employer had not designated it in any category of evidence under 20 C.F.R. §725.414.

[3] A "qualifying" pulmonary function study yields values equal to or less than those listed in the table at 20 C.F.R. Part 718, Appendix B, for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

On remand, Judge Roketenetz was unavailable and the case was reassigned, without objection, to Administrative Law Judge Rudolf L. Jansen (the administrative law judge). The administrative law judge admitted Dr. Schultheis's negative reading of the November 8, 2004 x-ray. Additionally, the administrative law judge excluded Dr. Brandon's positive reading of the June 11, 2002 x-ray, which was submitted by claimant. In evaluating the evidence, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement because claimant had not established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), or total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in excluding Dr. Brandon's positive reading of the June 11, 2002 x-ray and in admitting Dr. Schultheis's negative reading of the November 8, 2004 x-ray. Claimant also challenges the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.204(b)(2)(i),(iv). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge erred in excluding Dr. Brandon's x-ray reading and erred in evaluating the pulmonary function studies and medical opinions relating to total disability. The Director further states that if the administrative law judge on remand again discredits the opinion of Dr. Simpao, who examined claimant on behalf of the Director, a remand to the district director is required to provide claimant with a complete pulmonary evaluation.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where 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(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because the evidence did not establish any element of entitlement. Director's Exhibit 1.

Consequently, claimant had to submit new evidence establishing any element to proceed with his claim.[4] 20 C.F.R. §725.309(d)(2), (3).

At the outset, we note that the administrative law judge discredited as unreasoned Dr. Simpao's opinion provided to claimant by the Director. We further note the Director's concession that if the administrative law judge on remand again "ultimately discredits the opinion of Dr. Simpao . . . then he would have to remand the case to the district director for the Director to provide claimant with a credible examination." Director's Brief at 5. The Director states that the administrative law judge discredited Dr. Simpao's opinion "at least in part" because Dr. Simpao relied on a non-qualifying pulmonary function study. Director's Brief at 4. As we discuss below, we agree with the Director that the administrative law judge should have considered Dr. Simpao's pulmonary function study to be qualifying. However, we consider it unnecessary for the administrative law judge to file another decision in this case before remanding it to the district director for a complete pulmonary evaluation. It is clear to us that directing the administrative law judge to reconsider the medical opinions in light of the qualifying study would not result in a change in the administrative law judge's assessment of Dr. Simpao's opinion regarding total disability.[5] The administrative law judge has stated that he discounted Dr. Simpao's opinion on total disability both because he had relied on a non-qualifying pulmonary function study and because the doctor had not provided the basis for his opinion. Decision and Order on Remand at 14. Therefore, based on the Director's concession, we conclude that this case should be remanded to the district director for a complete pulmonary evaluation to be provided to claimant, and for reconsideration of his claim in light of the new evidence. *See* 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994). Because on remand, the record must be re-opened to admit the evidence developed in claimant's complete pulmonary examination, and because that evidence may bear on all elements of entitlement, we must

[4] We reject claimant's contention that the administrative law judge also had to consider whether the new evidence differed qualitatively from the evidence submitted in the prior claim. Under the revised version of 20 C.F.R. §725.309(d) applicable to this claim, no qualitative comparison of the old and new evidence is required. *See* 20 C.F.R. §§725.2(c), 725.309(d)(2),(3); 65 Fed.Reg. 79919, 79968 (Dec. 20, 2000); 64 Fed.Reg. 54965, 54984 (Oct. 8, 1999). Consequently, our statement in the prior appeal that the administrative law judge should conduct a qualitative comparison was inaccurate, and does not constitute the law of the case. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989).

[5] Further, we note that neither the current administrative law judge nor the previous administrative law judge ever determined whether Dr. Simpao's opinion as to the existence of pneumoconiosis was a credible opinion.

vacate the administrative law judge's decision regarding each element. Nevertheless, in the interest of judicial economy, we will address the specific issues raised on appeal.

Section 725.414-Evidentiary Limitations

Claimant argues that the administrative law judge erred by excluding the positive reading of the June 11, 2002 x-ray by Dr. Brandon, who is a Board-certified radiologist and B reader. Claimant's argument has merit. The June 11, 2002 x-ray was initially read as positive for pneumoconiosis by Dr. Simpao, who conducted the pulmonary evaluation that the Director provided to claimant. Claimant submitted Dr. Brandon's positive reading of the same x-ray as rebuttal evidence in response to Dr. Simpao's reading pursuant to 20 C.F.R. §725.414(a)(2)(ii), and Judge Roketenetz admitted it as such. However, the administrative law judge on remand ruled that Dr. Brandon's positive reading did not "rebut" Dr. Simpao's positive reading, and logically could be considered only as affirmative evidence in support of claimant's case. Decision and Order on Remand at 5 n.2. Because claimant had already reached his limit of two affirmative-case x-ray readings, the administrative law judge excluded Dr. Brandon's reading of the June 11, 2002 x-ray.

However, as the Director states, the applicable regulation allows each party to submit an "interpretation of each chest X-ray . . . submitted . . . by the Director pursuant to §725.406," regardless of which party the original reading favors. 20 C.F.R. §725.414(a)(2)(ii),(3)(ii). Additionally, rebuttal evidence need not contradict the specific item of evidence to which it is responsive, but rather, need only refute "the case" presented by the opposing party. *Id*. Therefore, as Dr. Brandon's positive reading of the June 11, 2002 x-ray was submitted by claimant in rebuttal of the case presented by employer, we reverse the administrative law judge's ruling excluding this interpretation. Consequently, we also vacate the administrative law judge's findings regarding the evaluation of the x-ray evidence at 20 C.F.R. §718.202(a)(1). On remand, the administrative law judge should admit Dr. Brandon's reading of the June 11, 2002 x-ray and reweigh the x-ray evidence accordingly.

Claimant additionally argues that the administrative law judge erred by admitting Dr. Schultheis's negative reading of the November 8, 2004 x-ray because it was not designated as evidence under 20 C.F.R. §725.414 by employer. The administrative law judge admitted Dr. Schultheis's reading of the November 8, 2004 x-ray "[i]n accordance with the Board's Remand Order." Decision and Order on Remand at 5 n.2. Contrary to the administrative law judge's ruling, the Board's remand order did not require the admission of Dr. Schultheis's reading. Rather, the Board instructed the administrative law judge to consider Dr. Schultheis's reading, which employer had not designated as evidence, only "to the extent it is admissible." [*MDR*], slip op. at 5-6. As the

administrative law judge did not discuss whether Dr. Schultheis's reading was admissible, we vacate the administrative law judge's admission of this reading and instruct the administrative law judge to reconsider this issue. On remand, the administrative law judge should require employer to designate its x-ray evidence under 20 C.F.R. §725.414.

Section 718.202(a)(1)-Weighing of X-ray Evidence

In addition to the x-ray admissibility issues just discussed, claimant argues that the administrative law judge mischaracterized Dr. Repsher's radiological qualifications by stating that he is dually qualified when in fact he is only a B reader. It is not clear whether the administrative law judge understood that Dr. Repsher is a B reader only.[6] The administrative law judge should reconsider Dr. Repsher's qualifications on remand. Claimant argues further that the administrative law judge mischaracterized as negative Dr. Brandon's positive reading of the November 8, 2004 x-ray. Because the administrative law judge characterized Dr. Brandon's reading as both positive and negative,[7] we instruct him to reconsider Dr. Brandon's positive reading. Further, on remand, if the administrative law judge admits Dr. Schulteis's reading of the November 8, 2004 x-ray, he should address claimant's objection to the consideration of Dr. Schultheis's qualifications, which are not of record. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990); 29 C.F.R. §18.201(e). Contrary to claimant's additional contention, however, the administrative law judge, on remand, need not credit the most recent x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 60, 19 BLR 2-271, 2-281 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Section 718.202(a)(4)-Medical Opinion Evidence

[6] In his chart of the x-ray evidence, the administrative law judge accurately noted that Dr. Repsher is solely a B reader. Decision and Order on Remand at 5. However, the administrative law judge inaccurately stated, in his discussion of the November 8, 2004 x-ray, that Dr. Repsher is dually qualified. Decision and Order on Remand at 9.

[7] In his charting of Dr. Brandon's positive reading of the November 8, 2004 x-ray and in his discussion of this x-ray, the administrative law judge accurately noted its classification as 2/3. Decision and Order on Remand at 5, 9. However, in weighing the x-ray evidence, the administrative law judge stated that he assigned the greatest weight to the negative readings by the most highly qualified readers, including the negative interpretation by Dr. Brandon. Decision and Order on Remand at 9.

Claimant argues that the administrative law judge erred by finding that the opinions of Drs. Baker, Simpao, and O'Bryan were not well-reasoned or well-documented. Claimant further argues that the administrative law judge erred by relying upon Dr. Repsher's opinion that claimant does not have pneumoconiosis, where Dr. Repsher's opinion, claimant asserts, was based on his negative B reading that was reread by a dually qualified physician as positive for pneumoconiosis.

Initially, the administrative law judge acted within his discretion in according the opinions of Drs. Baker, O'Bryan, and Repsher significant probative weight based on the documented qualifications of these physicians as Board-certified pulmonary specialists, and we affirm such crediting as it is unchallenged on appeal.[8] *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-67 (2004)(*en banc*); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 10.

Contrary to claimant's contention, the administrative law judge rationally discredited Dr. O'Bryan's opinion that claimant has pneumoconiosis, because Dr. O'Bryan did not adequately explain how coal dust exposure contributed to claimant's impairment, in light of claimant's smoking habit. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order on Remand at 10-11. Additionally, claimant argues that Dr. Baker had sufficient basis for his opinion, because he performed a complete medical examination with full testing. While Dr. Baker may have performed a complete examination, claimant provides no reason to disturb the administrative law judge's permissible determination that Dr. Baker actually provided "no basis, at all" for his diagnosis, beyond citing claimant's abnormal x-ray and coal mine dust exposure history. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Claimant's Exhibit 2.

Additionally, claimant contends that Dr. Repsher based his opinion on a negative x-ray reading. The administrative law judge, however, found that Dr. Repsher gave several reasons for his opinion and explained it in detail. Decision and Order at 11. Substantial evidence supports the administrative law judge's finding, Employer's Exhibit 2, and claimant has not substantiated his allegation that Dr. Repsher merely relied on a negative x-ray reading to conclude that claimant has neither clinical nor legal pneumoconiosis. We therefore reject claimant's contention.

Section 718.204(b)(2)(i)-Pulmonary Function Study Evidence

[8] Because the administrative law judge disposed of Dr. Simpao's opinion based on credentials, he did not analyze whether Dr. Simpao's diagnosis of pneumoconiosis was reasoned.

Claimant argues that the administrative law judge erred by finding that the September 16, 2002 pulmonary function study was non-qualifying and thus that the pulmonary function studies were in equipoise.[9] On remand, using an extrapolation method, the administrative law judge found that the September 16, 2002 pulmonary function study was non-qualifying. Decision and Order on Remand at 12-13. To find the September 16, 2002 pulmonary function study non-qualifying, the administrative law judge used the table height of 66.9 inches because it was closer to the miner's actual height of sixty-seven inches, rather than the closest greater height of 67.3 inches. Decision and Order on Remand at 13. The administrative law judge also took "judicial notice of the linear mathematical formula that may be applied to accurately extrapolate the table values out to the values for miners above age 71" and attached to the decision, as "Exhibit B", the linear graphs and data that he relied upon. Decision and Order on Remand at 12-13. Based on the formula, the administrative law judge found that claimant's FEV1 of 1.65 was non-qualifying because the formula yielded a qualifying FEV1 value of 1.6153.[10] Decision and Order on Remand at 13.

The Director responds that the administrative law judge erred by taking official notice of the linear mathematical formula to find that the September 16, 2002 pulmonary function study is non-qualifying. Director's Brief at 3-4. The Director asserts that the administrative law judge's taking of official notice of the formula does not comply with the rule governing official notice set out at 29 C.F.R. §18.201(b),[11] because it assumes

[9] The record contains five pulmonary function studies. The June 11, 2002 and November 8, 2004 pulmonary function studies are nonconforming. Director's Exhibit 11; Employer's Exhibit 2. The January 21, 2003 pulmonary function study is non-qualifying. Claimant's Exhibit 3. The July 31, 2004 pulmonary function study was found qualifying by the administrative law judge using an extrapolation method. Claimant's Exhibit 2. No party challenges the administrative law judge's finding that the July 31, 2004 pulmonary function study is qualifying. Thus, whether the September 16, 2002 pulmonary function study is qualifying or non-qualifying affects the numerical weight of the pulmonary function study evidence. Director's Exhibit 11. The qualifying or non-qualifying nature of the September 16, 2002 pulmonary function study is in dispute because claimant, at the time the pulmonary function study was performed, was over the age of seventy-one (the maximum age found on the pulmonary function study tables) and between the heights delineated on the table.

[10] The September 16, 2002 pulmonary function study is qualifying for a seventy-one year old miner based on its FEV1 of 1.65 and FEV1/FVC ratio of fifty percent, if the closest greater table height of 67.3 inches is used.

[11] 29 C.F.R. §18.201(b) of the procedural rules of the Office of Administrative Law Judges sets forth the kinds of adjudicative facts of which an administrative law

that a "simple" extrapolation of the table values correctly results in accurate disability determinations for older miners. The Director states that this assumption is a medical opinion not subject to official notice. Director's Brief at 4, *citing Grigg v. Director, OWCP*, 28 F.3d 416, 418, 18 BLR 2-299, 2-303 (4th Cir. 1994). The Director explains that no medical evidence was submitted to support the administrative law judge's use of a linear mathematical formula beyond the table values, and states that there is no medical evidence that the September 16, 2002 pulmonary function study does not indicate total disability. The Director requests that the Board vacate the administrative law judge's Section 718.204(b)(2)(i) findings, instruct the administrative law judge to consider the September 16, 2002 pulmonary function study qualifying, and remand for a reweighing of the pulmonary function studies.[12] Employer responds in support of the administrative law judge's extrapolation method, stating that the Coal Mine (BLBA) Procedure Manual provides no guidance on how to extrapolate values for miners over age seventy-one. Employer's Brief at 15 n.3.

Upon consideration of the above arguments, we agree with the Director, whose duty it is to ensure the proper administration of the Black Lung program. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994). In this case, the administrative law judge took judicial notice of a linear mathematical formula to extrapolate the pulmonary function table values for miners above age seventy-one. However, the administrative law judge's taking of such official notice does not meet the requirements of official notice because it assumes, without a medical basis, that a "simple" extrapolation of the table values correctly results in accurate disability determinations for older miners. Moreover, the administrative law judge did not identify the source from which the formula was

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judge may take official notice. 29 C.F.R. §18.201(b). An officially noticed fact must be one that is not subject to reasonable dispute in that it is:

(1) Generally known within the local area,

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or

(3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.

29 C.F.R. §18.201(b)(1)-(3).

[12] As he did in the prior appeal, the Director urges the Board to consider the September 16, 2002 pulmonary function study qualifying because the values were lower than the applicable table values for an age seventy-one miner.

obtained.[13] *See* 29 C.F.R. §18.201(b)(2),(3). Therefore, we vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i), and remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge should consider that the September 16, 2002 pulmonary function study is qualifying, and reweigh the pulmonary function studies.

Section 718.204(b)(2)(iv)-Medical Opinion Evidence

Claimant argues that the administrative law judge erred by finding that total disability was not established based on the opinions of Drs. Baker, O'Bryan, and Simpao. The Director responds that the administrative law judge's analysis of the medical opinion evidence is "inextricably linked" to his review of the pulmonary function studies. Director's Brief at 2-3. The administrative law judge gave less weight to the opinions of Drs. Baker, O'Bryan, and Simpao, in part, because they were based on non-qualifying pulmonary function studies.[14] Decision and Order on Remand at 14.

We agree with the Director that the administrative law judge's weighing of the medical opinion evidence was affected by his weighing of the pulmonary function study evidence. Because we have vacated the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i), we also vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv). Consequently, we remand the case to the administrative law judge for reconsideration of the medical opinions.

[13] As the Director notes, "[Administrative Law] Judge [Rudolf L.] Jansen does not identify the derivation of the formula he applied. Thus, it is unclear whether his notice of just the formula comported with [29 C.F.R. §]18.201." Director's Brief at 4 n.7.

[14] Dr. Baker opined that claimant has a moderate pulmonary impairment, and stated that claimant's "pulmonary function studies, performed both by Dr. Simpao and me, are both disabling for him performing his prior work in the coal mining industry." Claimant's Exhibit 2. Thus, Dr. Baker's conclusion was based on both the qualifying pulmonary function study he administered on July 31, 2004 and Dr. Simpao's September 16, 2002 pulmonary function study, which we have held, was qualifying. *Id.* Dr. O'Bryan opined that claimant should not return to the mines, and stated that claimant's impairment would preclude him from returning to his last coal mine job. Claimant's Exhibit 3. Dr. O'Bryan's opinion was based on the January 21, 2003 non-qualifying pulmonary function study. Dr. Simpao checked the "no" box indicating that claimant does not have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 11; Claimant's Exhibit 4. Dr. Simpao's opinion was based in part on the September 16, 2002 qualifying pulmonary function study. *Id.*

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is vacated, and the case is remanded to the district director for a complete pulmonary evaluation to be provided to claimant, and for reconsideration of his claim in light of the new evidence.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues' decision to remand this case to the administrative law judge for reconsideration at 20 C.F.R. §§725.414, 718.202(a)(1),(4), and to reject claimant's argument at 20 C.F.R. §725.309(d). I also agree that a remand to the district director is required to provide claimant with a complete pulmonary evaluation because the administrative law judge ultimately discredited Dr. Simpao's opinion. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-92, 1-93 (1994); Director's Brief at 5. However, I would vacate at Section 718.202(a)(4) for two additional reasons. First, the administrative law judge did not determine whether Dr. Baker's diagnosis of legal pneumoconiosis was reasoned and documented. Second, the administrative law judge did not consider that Dr. Repsher's opinion, that claimant does not have pneumoconiosis, was based on his negative B reading that was reread as positive for pneumoconiosis by a better qualified reader. Thus, I would remand for the administrative law judge to determine whether claimant established the existence of pneumoconiosis at Section 718.202(a)(4) based on the opinions of Drs. Baker and Repsher.

Moreover, I respectfully dissent from the decision to vacate and remand the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). I

would affirm those findings. In the prior appeal, the Board instructed the administrative law judge to explain his weighing of the pulmonary function studies and medical opinions. On remand, the administrative law judge provided a reasonable explanation. In my view, the administrative law judge rationally used a linear mathematical formula to determine that the September 16, 2002 pulmonary function study is non-qualifying. Thus, the administrative law judge reasonably found that the pulmonary function study evidence is in equipoise, and did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

At 20 C.F.R. §718.204(b)(2)(iv), I believe that the administrative law judge rationally gave less weight to the opinions of Drs. Baker, O'Bryan, Simpao, and Repsher because they did not identify the exertional requirements of claimant's usual coal mine employment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577-578, 22 BLR 2-107, 2-123, 2-124 (6th Cir. 2000). As the administrative law judge provided a valid reason for finding that claimant did not establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv), I would affirm it. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n.4 (1983).

In sum, I would affirm the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i), (iv), but remand at 20 C.F.R. §§725.414, 718.202(a)(1), (4), and for a complete pulmonary evaluation.

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ROY P. SMITH
Administrative Appeals Judge