

BRB No. 09-0379 BLA

JAMES G. HENSLEY)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 02/23/2010
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 LESLIE RESOURCES)
)
 and)
)
 SECURITY INSURANCE OF HARTFORD,)
 INCORPORATED)
)
 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 Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denial of Benefits (2004-BLA-05491) of Administrative Law Judge Joseph E. Kane rendered on a claim filed on September 3, 2002, 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 a third time. In his first Decision and Order, issued on April 21, 2005, the administrative law judge credited claimant with twenty-one years of coal mine employment and found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and total disability pursuant to 20 C.F.R. §718.204(b)(2). However, the administrative law judge determined that the evidence was insufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant appealed, asserting that the administrative law judge erred in failing to credit the opinion of Dr. Baker, that he is totally disabled due to pneumoconiosis. The Board affirmed the administrative law judge's finding that Dr. Baker's disability causation opinion was entitled to little weight as Dr. Baker relied on an inaccurate smoking history. *See Hensley v. Leslie Resources*, BRB No. 05-0729 BLA (Mar. 31, 2006) (unpub.). The Board, however, held that the administrative law judge erred in failing to consider the opinion of Dr. Simpao, that claimant's moderate pulmonary impairment was due to coal dust exposure, in his analysis of the evidence at 20 C.F.R. §718.204(c). *Id.* Thus, the Board vacated the administrative law judge's denial of benefits and remanded the case for reconsideration of whether claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

In his Decision on Remand Granting Benefits, issued on September 29, 2006, the administrative law judge determined that Dr. Simpao's opinion was not sufficiently reasoned to support claimant's burden of proof at 20 C.F.R. §718.204(c), as Dr. Simpao failed to explain the basis for his findings and cited to no objective testing to support his conclusion that claimant's moderate respiratory impairment was due to coal dust exposure. With respect to Dr. Baker's opinion, the administrative law judge noted that he previously found Dr. Baker's opinion on the issue of disability causation to be well-reasoned but entitled to little weight because he based his opinion on an inaccurate smoking history. The administrative law judge nonetheless found that because there were no other well-reasoned and well-documented opinions to outweigh Dr. Baker's opinion, that claimant was totally disabled due, in part, to coal dust exposure, Dr. Baker's opinion was sufficient to establish disability causation at 20 C.F.R. §718.204(c). Thus, the administrative law judge awarded benefits.

Employer appealed, and the Board rejected employer's argument that the administrative law judge was precluded from reconsidering the opinion of Dr. Baker on remand and relying on it to find that claimant was totally disabled by pneumoconiosis. The Board noted that, since the administrative law judge had not rejected Dr. Baker's opinion outright and had only assigned it less weight, he had discretion to rely on Dr. Baker's opinion at 20 C.F.R. §718.204(c). *J.H.[Hensley] v. Leslie Resources*, BRB No. 07-0174 BLA (Sept. 26, 2007) (unpub.). However, the Board held that the administrative law judge erred in failing to explain the basis for his finding that Dr. Baker's opinion was

reasoned. *Id.* The Board also held that the administrative law judge erred in failing to consider the disability causation opinions of Drs. Broudy and Dahhan in light of his finding that the existence of clinical pneumoconiosis had been established at 20 C.F.R. §718.202(a)(1). *Id.* Finally, the Board affirmed the administrative law judge's finding that Dr. Simpao's opinion was not sufficiently reasoned as to whether claimant was totally disabled due to pneumoconiosis. *Id.* The Board therefore vacated the administrative law judge's award of benefits and remanded the case for reconsideration of the opinions of Drs. Baker, Broudy and Dahhan pursuant to 20 C.F.R. §718.204(c). *Id.*

On January 7, 2009, the administrative law judge issued his Decision and Order on Remand Denial of Benefits, which is the subject of this appeal. In accordance with the Board's directive, the administrative law judge reconsidered the opinions of Drs. Broudy and Dahhan, both of whom concluded that claimant's total disability was not due to pneumoconiosis. He gave both opinions little weight because he found that they were poorly reasoned and because neither physician diagnosed pneumoconiosis, contrary to his findings. The administrative law judge also reconsidered Dr. Baker's opinion and found that it was not sufficiently reasoned to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not crediting Dr. Baker's opinion, based on his status as claimant's treating physician. Claimant further contends that, insofar as the administrative law judge found Dr. Simpao's opinion on the issue of disability causation to be unreasoned, the Director, Office of Workers' Compensation Programs (the Director), has failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate the claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds and requests that the case be remanded to the district director in order for the Department of Labor (DOL) to satisfy its statutory obligation 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.¹ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 18. 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*).

Claimant argues that the administrative law judge erred in not crediting the opinion of Dr. Baker as reasoned and documented on the issue of total disability. Claimant's Brief at 3-5. However, contrary to claimant's assertion, the administrative law judge specifically found claimant to be totally disabled by a respiratory or pulmonary impairment based in part on Dr. Baker's opinion, as well as the qualifying pulmonary function studies and the medical opinions of Drs. Broudy, Baker and Dahhan. 2005 Decision and Order at 12. Therefore, claimant's argument is rejected.

Claimant also contends that the administrative law judge erred in not crediting the opinion of Dr. Baker, that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), based on Dr. Baker's status as a treating physician. Claimant's Brief at 5. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003). Rather, the Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.*

In this case, the administrative law judge took into consideration the factors set forth at 20 C.F.R. §718.104(d),² but rationally found that Dr. Baker did not adequately explain the bases for his opinion, that pneumoconiosis or coal mine dust exposure contributed to claimant's disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); 2009 Decision and Order on Remand at 6-7. As the administrative law judge noted, Dr. Baker "did not specify whether [c]laimant's disability was caused by clinical pneumoconiosis, legal pneumoconiosis, or both." 2009 Decision and Order on Remand at 6. The administrative law judge further found:

Dr. Baker's reliance on an inaccurate smoking history is especially problematic in this case, because Dr. Baker considered it significant that

² Pursuant to 20 C.F.R. §718.104(d), the administrative law judge is required to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the administrative law judge must take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the administrative law judge's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

[c]laimant's condition remained unchanged "despite cessation of smoking over 15 years ago [1990]," whereas, [c]laimant testified that he smoked one pack of cigarettes per-day until approximately January of 2002.

2009 Decision and Order on Remand at 6, *quoting* Director's Exhibit 24. Thus, because the administrative law judge found that "the only rationale evident from Dr. Baker's opinion is his incorrect belief that [c]laimant had ceased smoking fifteen years earlier," the administrative law judge acted within his discretion in concluding that Dr. Baker's opinion was "not sufficient to sustain [c]laimant's burden of proof," and he was not required to credit Dr. Baker's opinion, based solely on his status as claimant's treating physician. *Id.* at 6-7; *see Williams*, 338 F.3d at 513; 22 BLR at 2-647; *Clark*, 12 BLR at 1-155. We therefore affirm, as supported by substantial evidence, the administrative law judge's credibility findings with regard to Dr. Baker's opinion.

Finally, claimant contends that the Director failed to fulfill his statutory obligation to provide him with a complete and credible pulmonary evaluation because the administrative law judge found that Dr. Simpao's opinion was unreasoned and undocumented on all of the issues of entitlement. Claimant's Brief at 7. In the present case, the Director concedes that the DOL did not satisfy its statutory obligation as the administrative law judge completely discredited Dr. Simpao's opinion and the remaining physicians failed to credibly address disability causation, leaving "the record completely devoid of any credible medical opinion on disability causation." Director's Letter Brief at 2. The Director maintains, therefore, that "a remand to provide claimant with a complete pulmonary evaluation that credibly addresses all elements of entitlement is required." *Id.* at 2.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete:

In the end, the DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) *specifically links each conclusion in his or her medical opinion to those medical tests*. Together,

the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, --- BLR --- (6th Cir. 2009) (emphasis added). Insofar as the administrative law judge permissibly found that Dr. Simpao “state[d] no basis” for attributing claimant’s respiratory impairment to coal dust exposure and “cite[d] to no objective testing or findings to support his opinion,” we agree with the Director that the DOL failed to provide claimant with a complete pulmonary evaluation, as required by the Act. 2006 Decision and Order on Remand at 4.

Accordingly, the administrative law judge’s Decision and Order on Remand Denial of Benefits is affirmed in part and vacated in part, and this case is remanded to the district director for further development necessary to satisfy the DOL’s statutory obligation pursuant to 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge