

BRB No. 07-0370 BLA

J.E.R.)
)
 Claimant-Respondent)
)
 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 01/31/2008
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, P.S.C.), Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2006-BLA-5062) of Administrative Law Judge Daniel F. Solomon 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). Based on a stipulation of the parties, the administrative law judge credited claimant with twenty-four years of coal mine employment, and adjudicated the claim pursuant to 20 C.F.R. Part 718 in light of the October 25, 2004 filing date. Addressing the merits of entitlement, the administrative law judge determined that the evidence was sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). In addition, he found that the evidence was sufficient to

establish that claimant suffered from a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits, commencing as of October 2004, the month in which claimant filed his application for benefits.

On appeal, employer contends that the administrative law judge's findings of legal pneumoconiosis at Section 718.202(a)(4), total disability under Section 718.204(b), and disability causation under Section 718.204(c) fail to satisfy the Administrative Procedure Act (APA). *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Claimant responds, urging affirmance of the award of benefits as supported by substantial evidence. Employer has also filed a reply brief. The Director, Office of Workers' Compensation Programs, has declined to file a brief.¹

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'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 suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis.² *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer asserts that the administrative law judge erred by failing to explain the bases for his findings pursuant to Sections 718.202(a)(4), 718.204(b)(2), and 718.204(c). Employer specifically contends that the administrative law judge erred by failing to explain how he resolved the conflict in the medical opinion evidence as to the validity of claimant's pulmonary functions studies and whether that evidence proved a disabling

¹ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

² As claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

respiratory condition. We agree.

There are three medical opinions of record. Dr. Simpao performed the Department of Labor examination on November 18, 2004. Director's Exhibit 12. He opined that the miner's x-ray showed no evidence of pneumoconiosis, but diagnosed pneumoconiosis based on claimant's symptoms, physical findings, and the results of a qualifying pulmonary function test, which he interpreted as showing a severe obstructive and restrictive respiratory condition. *Id.* Dr. Simpao commented that claimant was overweight, which could affect the results of the FVC, which is the restrictive side of claimant's impairment, Claimant's Exhibit 2 at 9, and indicated later in his deposition that a diffusion study could be helpful in assessing claimant's respiratory condition, Claimant's Exhibit 2 at 14-15. In his deposition, Dr. Simpao further stated that while a normal diffusion capacity could have some effect on his diagnosis of a restrictive impairment, the fact that claimant's FEV₁ was reduced would still support his diagnosis of a severe obstructive lung condition. Claimant's Exhibit 2 at 9, 14-15. He concluded that claimant was totally disabled and that claimant's severe respiratory impairment was due to a combination of coal dust exposure and smoking. *Id.*

Dr. Repsher examined claimant at the request of employer on June 7, 2005. Employer's Exhibit 1. Although Dr. Repsher obtained qualifying pulmonary function study results, he opined that the test was "uninterpretable" due to "either extremely poor effort and cooperation with the testing or residua of [claimant's] childhood paralytic poliomyelitis." *Id.* He opined that claimant had no evidence of a respiratory condition, citing claimant's normal arterial blood gas study and a normal diffusion study, "which would rule out any clinically significant interstitial lung disease, such as coal workers' pneumoconiosis." *Id.*

Finally, Dr. Fino prepared a report based on his review of the medical record, including the reports of Drs. Simpao and Repsher. Employer's Exhibit 2. He opined that both of claimant's pulmonary function tests were invalid due to poor effort. *Id.* Citing the normal diffusion capacity, and normal arterial blood gas study results, Dr. Fino opined that claimant did not suffer from any pulmonary disease, and that he had no respiratory impairment as a result of his coal mine employment. *Id.*

In weighing the conflicting medical opinions as to the existence of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge credited Dr. Simpao's opinion that claimant suffers from a severe obstructive and restrictive respiratory condition caused by coal dust exposure and cigarette smoking. However, the validity of Dr. Simpao's November 18, 2004 pulmonary function test, which served as the basis for his diagnosis of pneumoconiosis, is at issue in this case. Dr. Mettu, on a Department of Labor validation form, found the November 18, 2004 pulmonary function study "acceptable," whereas Dr. Fino, in his August 16, 2006 report, found the study was

invalid due to a premature termination to exhalation and a lack of reproducibility in the expiratory tracings. Director's Exhibit 12; Employer's Exhibit 2. In considering this evidence, the administrative law judge noted that the Department of Labor had Dr. Simpao's results reviewed by Dr. Mettu, who found the tracings to be "acceptable." Decision and Order at 7; Director's Exhibit 12. The administrative law judge then summarily stated:

Comparing the examinations rendered by Dr. Simpao and Dr. Respher, I note that Dr. Simpao did not report the spirometry in the suggested format, but he was deposed and [when] subject to cross-examination, explained that he did accurately note the FEV₁. I also note that his testing is supported by Dr. Mettu's evaluation, which I attribute significant weight. Dr. Respher was unable to accurately review the data he obtained.

Decision and Order at 7. After assigning Dr. Respher's opinion less weight, the administrative law judge further concluded that Dr. Fino's opinion was entitled to less weight as "[h]e did not examine the [c]laimant and much of his reasoning derives from Dr. Respher's findings." *Id.*

Employer makes several meritorious arguments with respect to the administrative law judge's weighing of the evidence at Section 718.202(a)(4). Under the facts of this case, it is imperative that the administrative law judge resolve the conflict in the evidence as to the validity of the November 18, 2004 pulmonary function test, as that finding bears on the credibility of Dr. Simpao's diagnosis of legal pneumoconiosis. The administrative law judge's failure to explain why he gave "significant weight" to Dr. Mettu's validation report, over Dr. Fino's contrary validation opinion, requires further explanation under the APA. The APA requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Therefore, we are compelled to vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and to remand this case for further consideration.³

³ We reject employer's assertion that the administrative law judge erred in his determination that Dr. Respher failed to adequately explain why a normal diffusion study would preclude a diagnosis of legal pneumoconiosis, in the form of an obstructive lung disease due, in part, to coal dust exposure. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). As noted by the administrative law judge, after being informed of the results of claimant's diffusion study, Dr. Simpao testified that the

Moreover, we agree with employer that, contrary to the administrative law judge's finding, Dr. Fino's opinion was "derived" not only from his review of Dr. Repsher's report, but also his review of all of the record evidence, including Dr. Simpao's objective testing. *See* Decision and Order at 8; Employer's Exhibit 2. Therefore, on remand, the administrative law judge must reconsider whether Dr. Fino offered a reasoned and documented opinion that claimant does not have pneumoconiosis based on the medical evidence that was available for his review.

On remand, the administrative law judge should also discuss all relevant evidence and give his reasons for crediting or discrediting the pulmonary function study evidence. The administrative law judge must examine each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and determine whether it constitutes a reasoned medical judgment as to the presence or absence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4),⁴ *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). After the administrative law judge has determined which opinions he considers to be reasoned and documented, he must explain specifically the bases for his credibility determinations pursuant to Section 718.202(a)(4). *See Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998).

With respect to the issue of total disability under Section 718.204(b)(2), we agree with employer that the administrative law judge failed to explain his weighing of the relevant evidence.⁵ After noting that there was no evidence of cor pulmonale in the

diffusion study would have some effect on his opinion with respect to the presence of a restrictive lung disease, but he also stated specifically that his opinion as to the presence of an obstructive lung impairment would not change, in light of the results of claimant's pulmonary function testing. Claimant's Exhibit 2 at 14-15; Decision and Order at 7. Dr. Repsher explained that the results of the diffusion study would rule out any clinically significant interstitial lung disease, such as coal workers' pneumoconiosis. Employer's Exhibit 1. There was no specific evidence from Dr. Repsher regarding the value of a diffusing capacity study in ruling out an obstructive impairment.

⁴ Relevant to this inquiry, employer asserts that the administrative law judge failed to perform a critical analysis of Dr. Simpao's testimony, wherein the doctor suggests that it is his practice to find that coal dust exposure is a contributing cause of obstructive lung impairment if the patient presents with a history of coal dust exposure. Employer's Brief at 11-12.

⁵ With respect to Section 718.204(b)(2), employer contends that the administrative law judge ignored contrary probative evidence in concluding that claimant was totally

record, and acknowledging that claimant must demonstrate total disability through pulmonary function studies, arterial blood gas studies, or medical opinions, the administrative law judge summarily concluded that claimant had satisfied his burden of proof:

I attribute Dr. Mettu's opinion some weight as to the validity of Dr. Simpao's testing. I accept that [c]laimant has established total respiratory disability. Although this is disputed by the [e]mployer, I credit Dr. Simpao's finding that noted a reduced vital capacity and flow volume curve which, according to competent expert testimony, indicates both a severe restrictive and severe obstructive airway disease. I accept the [c]laimant's testimony that his work required heavy lifting and requires significant stooping and crawling. I find that [c]laimant's testimony that he can lift 20 pounds occasionally, but could not lift 10 pounds comfortably if he had to carry it[,] is credible. I find that the [c]laimant's respiratory medical profile precludes performance of his past relevant work.

I specifically discount the position of Dr. Fino and Dr. Repsher that there is no evidence of a respiratory impairment in this record.

Decision and Order at 10.

Because the administrative law judge did not explain why he chose to accept the opinions of Drs. Mettu and Simpao as to the validity of the November 18, 2004 pulmonary function study, *see* discussion, *infra* at 5-6, and he offered no explanation for why he "discounted" the opinions of Drs. Fino and Repsher, his finding of total disability pursuant to Section 718.204(b)(2) fails to comport with the APA. *Wojtowicz*, 12 BLR 1-162. Thus, we vacate his finding pursuant to Section 718.204(b)(2), and remand this case for further consideration.

On remand, the administrative law judge must provide a detailed explanation of his findings pursuant to each subsection at Section 718.204(b)(2)(i)-(iv). The administrative law judge must weigh the evidence supportive of a finding that claimant is totally disabled against any contrary probative evidence in the record, prior to reaching his ultimate finding as to whether claimant has established total disability. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

disabled, such as claimant's normal arterial blood gas study results. Employer's Brief at 13.

Because the administrative law judge's finding that claimant established legal pneumoconiosis influenced his credibility determinations on the issue of disability causation, we vacate his finding that claimant established that pneumoconiosis was a contributing cause of his total disability pursuant to Section 718.204(c). If the administrative law judge again finds the evidence sufficient to establish the existence of legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment, he must reconsider the evidence relevant to whether claimant has satisfied his burden to establish disability causation at Section 718.204(c). *See Williams*, 338 F.3d at 516, 22 BLR at 2- 651-2. In so doing, the administrative law judge must address whether each physician's opinion is reasoned and documented for the purpose of proving or disproving that claimant's total disability is due to pneumoconiosis.⁶ *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

⁶ Employer correctly notes that while the administrative law judge rejected Dr. Fino's disability causation opinion because the doctor did not diagnose pneumoconiosis, he did not address Dr. Fino's statement that "even if I were to assume that [claimant] has coal workers' pneumoconiosis, there is still no objective evidence that it caused any respiratory impairment or pulmonary disability." Employer's Exhibit 2. On remand, the administrative law judge must consider Dr. Fino's statement and determine whether his opinion that claimant is not totally disabled due to pneumoconiosis is premised on a determination that is inconsistent with the administrative law judge's finding as to the presence or absence of legal pneumoconiosis. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge