

BRB No. 09-0335 BLA

DONNIE RAY COLLINS)
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 Claimant-Petitioner)
)
 v.)
)
 ZEIGLER COAL COMPANY) DATE ISSUED: 01/26/2010
)
 Employer-Respondent)
)
 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.

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

Fred C. Statum III and B. Duane Willis (Manier & Herod), Nashville, Tennessee, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (2004-BLA-06283) of Administrative Law Judge Joseph E. Kane rendered on a subsequent claim filed on August 12, 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).¹ This

¹ Claimant filed an application for benefits on September 1, 1983, but later withdrew it. Director's Exhibit 1. Claimant next filed an application for benefits on March 2, 1987, which was denied on November 1, 1988, because claimant did not

case is before the Board for the second time. In his initial Decision and Order, the administrative law judge credited claimant with eleven years of coal mine employment and determined that the subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge found that the newly submitted x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the merits, the administrative law judge found that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

After considering employer's appeal, the Board affirmed the administrative law judge's findings at Sections 718.202(a)(1) and 725.309. The Board also affirmed the administrative law judge's findings, on the merits, that claimant established that his pneumoconiosis arose out of coal mine employment under Section 718.203(b), and that he is totally disabled pursuant to Section 718.204(b)(2)(ii), (iv). The Board vacated, however, the administrative law judge's determination that Dr. Simpaio's opinion was sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c) and remanded the case for reconsideration of claimant's smoking history and the issue of whether pneumoconiosis is a substantially contributing cause of claimant's total disability. *D.R.C. [Collins] v. Zeigler Coal Co.* BRB No. 06-0953 BLA (Aug. 29, 2007)(unpub.).

On remand, the administrative law judge found that claimant's smoking history was at least eighty pack-years and that claimant failed to establish either the existence of legal pneumoconiosis under Section 718.202(a)(4) or total disability due to pneumoconiosis under Section 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in determining that he failed to establish that pneumoconiosis was a contributing cause of his total disability pursuant to Section 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief unless specifically requested to do so.

establish any element of entitlement. Director's Exhibit 2. Claimant took no further action until he filed a subsequent claim on August 12, 2002. Director's Exhibit 3.

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.² 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 the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.204(c), the administrative law judge determined that the opinions in which Drs. Simpao and Baker identified pneumoconiosis as a contributing cause of claimant's totally disabling pulmonary impairment were insufficient to satisfy claimant's burden of proof.³ Dr. Simpao examined claimant at the request of the Department of Labor (DOL) on October 31, 2002. Director's Exhibit 14. On DOL Form CM-988, Dr. Simpao noted that claimant was a current smoker and recorded a smoking history of one-half a pack per day for twenty-five years. *Id.* Dr. Simpao diagnosed coal workers' pneumoconiosis (CWP) and a moderate pulmonary impairment and indicated that "multiple years of coal dust exposure [are] medically significant in his pulmonary impairment." *Id.* On a questionnaire attached to DOL Form CM-988, Dr. Simpao reported that claimant is totally disabled by his pneumoconiosis and identified "objective

² The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 5. 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*).

³ The administrative law judge found that Drs. Tuteur and Repsher did not address the question of whether claimant is disabled, other than to note that claimant's mild to moderate airflow obstruction and emphysema were due to cigarette smoking. Decision and Order on Remand at 9. The administrative law judge determined that Dr. Tuteur's opinion was conclusory, unreasoned and entitled to little weight, as Dr. Tuteur did not explain why clinical pneumoconiosis could not be a contributing cause of claimant's disability. *Id.* at 10. Similarly, the administrative law judge found that Dr. Repsher did not offer a basis for his disability causation assessment. *Id.* The administrative law judge also gave diminished weight to their opinions because neither diagnosed clinical pneumoconiosis, contrary to his finding at Section 718.202(a)(1). *Id.*

findings on the chest x-ray, arterial blood gas [and] pulmonary function tests, and EKG along with symptomatology and physical findings,” as the bases for his diagnosis. *Id.*

Dr. Baker examined claimant at DOL’s request on October 9, 2004. Claimant’s Exhibit 2. On DOL Form CM-988, Dr. Baker indicated that claimant currently smoked an “occasional cigarette,” but had smoked one pack per day in the past. *Id.* Dr. Baker diagnosed CWP, based upon claimant’s chest x-ray and his history of coal dust exposure. *Id.* Dr. Baker also diagnosed chronic obstructive pulmonary disease (COPD), based upon the results of claimant’s pulmonary function study, and chronic bronchitis by history. *Id.* Dr. Baker identified coal dust exposure as the sole cause of claimant’s CWP, while identifying coal dust exposure and cigarette smoking as the causes of claimant’s COPD and chronic bronchitis. *Id.* Dr. Baker further determined that claimant is totally disabled by a moderate obstructive impairment. *Id.* In an addendum to DOL Form CM-988, Dr. Baker stated:

Claimant has clinical pneumoconiosis, based on x-ray changes consistent with pneumoconiosis and no other condition to account for these x-ray changes Legal pneumoconiosis is based on his chronic bronchitis as well as a moderate obstructive ventilatory defect While he does have a significant smoking history of about 35 pack[-]years, he also has a significant coal dust exposure of 13 years as well. While the 35[pack[-]year history of smoking is probably . . . more likely the major cause of his symptoms of chronic bronchitis and obstructive airway disease, it is felt that the 13 year history of coal dust exposure, likewise, contributes significantly and substantially aggravated his condition. Therefore, I feel his condition does represent legal pneumoconiosis and is due, at least in part, in a significant fashion[,] to his coal dust exposure.

Id.

The administrative law judge determined that neither Dr. Simpao nor Dr. Baker “offered an adequate explanation as to why he concluded that [c]laimant’s pulmonary impairment is related to coal mine dust exposure.” Decision and Order on Remand at 8. The administrative law judge also found that Drs. Simpao and Baker had relied upon “a smoking history that is significantly less than what I have found [c]laimant’s smoking history to be.” *Id.* at 8-9. Accordingly, he found that claimant failed to establish total disability due to pneumoconiosis under Section 718.204(c).

Claimant argues that the administrative law judge’s determination cannot be affirmed, as his discrediting of the opinions of Drs. Simpao and Baker conflicts with the finding in his previous Decision and Order. Claimant maintains that the diagnoses rendered by Drs. Simpao and Baker are adequately supported by, and consistent with, claimant’s histories, the doctors’ physical findings and the results of the objective testing.

Claimant also alleges that the administrative law judge erred in finding that Drs. Simpao and Baker relied upon inaccurate smoking histories.

Upon review of the relevant evidence, the administrative law judge's findings, and claimant's contentions on appeal, we affirm the administrative law judge's determination that claimant did not prove that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has emphasized that it falls within the purview of the administrative law judge as fact-finder to render credibility determinations and decide whether a doctor's opinion is sufficiently reasoned. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In the present case, the administrative law judge acted within his discretion in finding that Drs. Simpao and Baker did not provide adequate explanations for their shared conclusion, that coal dust exposure was a causal factor in claimant's totally disabling obstructive impairment.

The administrative law judge rationally found that Dr. Simpao "simply listed the testing he performed, without explaining how the testing supported his diagnosis." Decision and Order on Remand at 8; Director's Exhibit 14. In addition, the administrative law judge rationally determined that, although Dr. Baker clearly identified coal dust exposure as a contributing cause of claimant's pulmonary impairment, he set forth his conclusion without providing the underlying rationale. Decision and Order on Remand at 8; Claimant's Exhibit 2. We affirm, therefore, the administrative law judge's finding, that the opinions of Drs. Simpao and Baker were entitled to little weight, on the ground that the physicians did not adequately explain their opinions.⁴ *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Because we have affirmed the administrative law judge's discrediting of the opinions supportive of claimant's burden, we also affirm the administrative law judge's determination that claimant did not establish total disability

⁴ Because we vacated the administrative law judge's findings in his prior Decision and Order, that Dr. Simpao's opinion was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge was in no way bound by this finding on remand. *D.R.C. [Collins] v. Zeigler Coal Co.* BRB No. 06-0953 BLA, slip op. at 8-9 (Aug. 29, 2007)(unpub.). In addition, contrary to claimant's suggestion, the administrative law judge did not find Dr. Baker's opinion regarding the cause of claimant's total disability to be well reasoned or well documented. 2006 Decision and Order at 17.

due to pneumoconiosis pursuant to Section 718.204(c), an essential element of entitlement.⁵

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁵ In light of the permissible rationale set forth by the administrative law judge in support of his findings regarding the opinions of Drs. Simpao and Baker, we need not consider claimant's allegations of error regarding the administrative law judge's consideration of claimant's smoking history. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-383 n.4 (1983).