

BRB No. 07-0719 BLA

M.D.A.)
)
 Claimant-Respondent)
)
 v.)
)
 CENTRAL OHIO COAL, c/o GENERAL)
 RECOVERY, INCOPORATED)
)
 and)
)
 CONSOL ENERGY, INCORPORATED, c/o) DATE ISSUED: 07/17/2008
 ACORDIA EMPLOYERS SERVICE)
)
 Employer/Carrier-)
 Petitioners)
)
 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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order–Award of Benefits (2005-BLA-6281) of Administrative Law Judge Thomas F. Phalen, Jr., 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). The administrative law judge accepted the parties' stipulation to thirty-two years of qualifying coal mine employment, and adjudicated this claim, filed on August 23, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(4), both with and without benefit of the presumption at 20 C.F.R. §718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the medical opinions in finding legal pneumoconiosis established at Section 718.202(a)(4), and contends that the administrative law judge erred in applying the presumption of causality at Section 718.203(b). Employer further contends that the administrative law judge failed to adequately discuss the conflicting medical evidence on the issues of total disability and disability causation at Section 718.204(b)(2)(iv), (c). Claimant has responded, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.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.² 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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

¹ We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) and total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mine industry in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3; Hearing Transcript at 18.

Employer initially challenges the administrative law judge's weighing of the evidence in finding that legal pneumoconiosis was established at Section 718.202(a)(4). The administrative law judge accurately summarized the conflicting medical opinions of record and determined that all of the physicians agreed that claimant suffered from an obstructive pulmonary impairment, but disagreed as to the etiology of the impairment. Drs. Diaz, Cohen and Knight diagnosed legal pneumoconiosis, while Drs. Rosenberg and Spagnolo concluded that claimant's pulmonary obstruction was due to cigarette smoking and other pulmonary conditions. Decision and Order at 13. The administrative law judge found that all of the physicians' reports were well-reasoned, well-documented and bolstered by the physicians' respective credentials. Decision and Order at 13; *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). However, the administrative law judge found that the sole consistency in the opinions was the lack of certainty as to the cause of claimant's pulmonary condition, because all of the physicians identified multiple risk factors for claimant's condition.³ Decision and Order at 14. Despite the lack of certainty, the administrative law judge found that the reports of Drs. Diaz, Cohen and Knight, concluding that claimant's pulmonary impairment was at least partially caused by coal dust exposure, were better supported by the objective evidence of record based on the following "undisputed factors:" (1) irrespective of whether claimant has bronchial asthma, no physician of record disputed Dr. Knight's conclusion that, if it existed, it was at least partially caused by coal dust exposure; (2) all of the physicians opined that claimant suffers from a pulmonary impairment, even after the administration of bronchodilators, leading the administrative law judge to conclude that claimant has an underlying fixed impairment consistent with legal pneumoconiosis; (3) despite claimant's significant smoking history, claimant was exposed to coal dust for twenty-five years after he quit smoking and his pulmonary condition continued to decline during that period, leading the administrative law judge to agree with the opinions concluding that claimant's condition was attributable to more than just his distant smoking history; and (4) Drs. Diaz and Knight both opined that the severity of claimant's pulmonary condition could not be explained by a twenty-eight pack year smoking history alone. Decision and Order at 14.

³ Drs. Rosenberg and Spagnolo acknowledged that coal dust exposure can cause airflow obstruction, but concluded that the pattern of obstruction was inconsistent with a condition related to coal dust exposure, and that the most likely cause of the airflow obstruction in claimant's case was his history of cigarette smoking. Director's Exhibit 10; Employer's Exhibits 3, 5. Drs. Diaz, Cohen and Knight opined that claimant's impairment was consistent with both his coal mine employment and his smoking history. Director's Exhibits 8, 10, 11; Claimant's Exhibits 1, 2.

Employer contends that, in finding legal pneumoconiosis established at Section 718.202(a)(4), the administrative law judge failed to provide adequate and accurate reasons for according greater weight to the opinions of Drs. Knight, Cohen and Diaz. Employer maintains that the administrative law judge failed to resolve the conflicts in the evidence and improperly substituted his own opinion for that of a medical professional. Employer's arguments have merit. First, we agree with employer's argument that it was illogical for the administrative law judge to credit Dr. Knight's opinion, that claimant had bronchial asthma caused in part by coal dust exposure, without first weighing the conflicting evidence of record and determining whether claimant suffered from the condition. Additionally, as Drs. Rosenberg and Spagnolo opined that claimant had no respiratory or pulmonary condition significantly related to, or substantially aggravated by coal dust exposure, *see* 20 C.F.R. §718.201, and Dr. Spagnolo specifically diagnosed bronchial asthma that was worsened by smoking and exposure to welding fumes, the administrative law judge was incorrect in stating that "no physician of record disputed Dr. Knight's conclusion that if such a condition exists, it was caused, in part, by coal dust exposure." Decision and Order at 14. We also agree with employer's argument that the administrative law judge improperly substituted his own opinion for that of a medical professional in concluding that claimant's lack of bronchodilator response demonstrated an underlying fixed impairment consistent with legal pneumoconiosis.⁴ Although the weighing of the evidence is for the administrative law judge, the interpretation of medical data is for the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Accordingly, it was error for the administrative law judge to interpret medical tests and thereby substitute his own conclusions for those of a physician.

It is the administrative law judge's function to determine the credibility of the medical witnesses and resolve the conflicts in the evidence. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). In view of the above discussion, we vacate the administrative law judge's finding that legal pneumoconiosis was established at Section 718.202(a)(4), and remand this case for the administrative law judge to reassess the conflicting medical opinions in light of their support in the record and the quality, persuasiveness and detail of each physician's reasoning in determining whether claimant has met his burden thereunder. *See Rowe*, 710 F.2d at 254, 5 BLR at 2-103.

⁴ Additionally, it appears that the administrative law judge assumed that any decline in claimant's pulmonary function after claimant stopped smoking, coupled with the assertion of Drs. Diaz and Knight that claimant's condition was more severe than that which would be caused by a 28 pack-year smoking history alone, must be attributable at least in part to coal dust exposure. *See* Decision and Order at 14.

Because we have vacated the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4), we must also vacate the administrative law judge's finding that claimant's pneumoconiosis arose out of coal mine employment at Section 718.203(b) for readjudication of this issue on remand, if reached. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007).

Employer next challenges the administrative law judge's finding that the weight of the medical opinions of record established total disability at Section 718.204(b)(2)(iv). Employer contends that there is no support for the administrative law judge's conclusion that Drs. Rosenberg and Spagnolo, in assessing claimant's ability to perform his usual coal mine employment, did not look beyond the table standards of the Department of Labor (DOL) for establishing disability. Employer further contends that there is no support for the administrative law judge's finding that Drs. Cohen and Diaz better understood the exertional requirements of claimant's last coal mine employment, when Dr. Diaz did not note any weights or specific jobs that claimant performed, and Dr. Rosenberg's description of claimant's exertional requirements, reviewed by Dr. Spagnolo, was "virtually identical to Dr. Rosenberg's understanding." Employer's Brief at 19-20. Employer's arguments are without merit.

In considering the issue of total disability at Section 718.204(b)(2)(iv), the administrative law judge determined first that claimant's usual coal mine employment as a welder and repairman involved lifting and carrying as much as one hundred pounds, swinging a twelve-pound sledge hammer and using a twenty-pound pry bar, and that claimant actually performed sustained heavy manual labor throughout his work shifts.⁵ Decision and Order at 16-17; Hearing Transcript at 30-33. The administrative law judge then determined that the opinions of Drs. Rosenberg and Spagnolo, that claimant retained the pulmonary capacity to perform his usual coal mine employment, were based primarily on the fact that claimant's objective test results were above DOL's disability standards, while Drs. Cohen and Diaz considered the heavy exertional requirements of claimant's coal mine employment duties in conjunction with his objective test results and concluded that claimant was totally disabled from performing this work. Decision and Order at 16-17. Although the administrative law judge found that the opinions of Drs. Rosenberg and Spagnolo were supported by their underlying test results,⁶ Decision and

⁵ By contrast, Dr. Spagnolo reported merely that claimant's last job as a drill shop welder involved lifting and carrying objects weighing more than 50 pounds. Employer's Exhibit 3.

⁶ While Dr. Spagnolo underreported the exertional requirements of claimant's usual coal mine employment in concluding that claimant's moderate obstructive impairment was not disabling, Employer's Exhibit 3, Dr. Rosenberg listed claimant's job duties and equipment weights in his report, Director's Exhibit 10, and testified that

Order at 16, he acted within his discretion in finding that the opinions of Drs. Cohen and Diaz⁷ were entitled to greater weight because these physicians “gave more credence to the actual exertional requirements of Claimant’s last position.” Decision and Order at 17; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

The administrative law judge’s findings and inferences at Section 718.204(b)(2)(iv) are supported by substantial evidence, and we may not substitute our judgment. *See Rowe*, 719 F.2d 251, 5 BLR 2-99; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Weighing all relevant evidence together, the administrative law judge permissibly found that claimant established total disability at Section 718.204(b), as he reasonably concluded that the medical opinions of Drs. Cohen and Diaz, based on the objective test results considered in conjunction with the heavy exertional requirements of claimant’s usual coal mine employment, constituted the most probative evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). As substantial evidence supports the administrative law judge’s findings at Section 718.204(b), they are affirmed.

Lastly, as the administrative law judge’s weighing of the medical opinions on the issue of the existence of pneumoconiosis affected his credibility determinations on the issue of disability causation, we vacate the administrative law judge’s findings at Section 718.204(c) for a reevaluation of the evidence on remand, if reached.

claimant’s test results showed a mild to moderate impairment that would allow claimant to perform medium to intermittently heavy work from a ventilatory perspective. *See* Decision and Order at 9; Employer’s Exhibit 5 at 33-34. However, the administrative law judge found that claimant was required to perform sustained heavy labor. Decision and Order at 17.

⁷ Contrary to employer’s arguments, Dr. Diaz attached a detailed three-page summary of claimant’s employment history to his report, and noted that claimant’s job duties involved very heavy manual labor. Claimant’s Exhibit 1. Therefore, the administrative law judge rationally concluded that Dr. Diaz had adequately considered the exertional requirements of claimant’s last coal mine job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order–Award of Benefits is affirmed in part and vacated in part, and this 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

BETTY JEAN HALL
Administrative Appeals Judge