

BRB No. 13-0527 BLA

MAURICE ROSS)
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 Claimant-Petitioner)
)
 v.)
)
 PEABODY COAL COMPANY)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 06/03/2014
)
 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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Elizabeth Ashley Bruce, Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (2009-BLA-5147) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent

claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).² This case is before the Board for the third time. In the last appeal, the Board vacated Administrative Law Judge Rudolf L. Jansen's finding that claimant failed to establish either the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), or total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), based on the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant had not been provided with a complete pulmonary evaluation. Accordingly, the Board remanded the case to the district director for a complete pulmonary evaluation to be provided to claimant, and for reconsideration of the claim in light of the new evidence. *M.D.R. v. Peabody Coal Co.*, BRB No. 06-0923 BLA (Aug. 22, 2007) (Smith, J., concurring and dissenting) (unpub.); Director's Exhibit 30-68.

On remand, following claimant's new pulmonary evaluation, the case was referred to the Office of Administrative Law Judges and assigned to Judge Sellers (the administrative law judge), who issued a decision on the record in accordance with the joint request of the parties. The administrative law judge credited claimant with twenty-two years of coal mine employment, based on the parties' earlier stipulation, and adjudicated this subsequent claim pursuant to the regulations at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly submitted evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing that one of the applicable conditions of entitlement had changed pursuant to 20 C.F.R. §725.309 since the denial of claimant's prior claim. Considering the entire record, the administrative law judge found that the weight of the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

¹ Claimant, Maurice Ross, filed his first application for benefits on December 9, 1986, which was finally denied on July 7, 1987 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on March 12, 2002, which is currently pending on appeal. Director's Exhibit 3.

² Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that the claimant is totally disabled due to pneumoconiosis if the claimant establishes that he or she suffers from a totally disabling respiratory or pulmonary impairment and worked at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012). The administrative law judge properly found that the presumption at amended Section 411(c)(4) was not applicable to this case, as the claim was filed prior to January 1, 2005. Decision and Order on Remand at 4.

In the present appeal, claimant challenges the administrative law judge's determination that the medical opinion evidence failed to demonstrate total respiratory disability under Section 718.204(b)(2)(iv). Employer/carrier (employer) responds, urging affirmance of the denial of benefits. The Director has filed a letter indicating that he is not participating in this appeal.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.⁴ 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 establish 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability at Section 718.204(b)(2)(iv). Specifically, claimant maintains that Drs. O'Bryan, Houser and Baker adequately demonstrated their knowledge of the exertional requirements of claimant's coal mine employment as a section foreman or supervisor, and that the administrative law judge improperly discredited their disability assessments on the ground that they possessed insufficient knowledge. Claimant argues that, while the administrative law judge correctly discounted the opinion of Dr. Rosenberg, he was inconsistent in crediting the opinion of Dr. Repsher, that claimant does not suffer from a totally disabling respiratory impairment, despite acknowledging that Dr. Repsher did not exhibit any knowledge of the exertional requirements of claimant's usual coal mine employment. Claimant's Brief at 8-10.

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

After finding that the pulmonary function study and blood gas study evidence was insufficient to establish total respiratory disability at Section 718.204(b)(2)(i), (ii), and that there was no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii), the administrative law judge considered the bases for the disability assessments of Drs. O'Bryan, Houser and Baker at Section 718.204(b)(2)(iv), and concluded that their opinions were entitled to little weight. In so finding, the administrative law judge reviewed claimant's testimony at the original hearing in this case on December 14, 2004, and determined that claimant's usual coal mine work was as a section foreman. Claimant supervised a ten-man underground mining crew and walked throughout the areas of the mine where his men were working, checking "all the places, mak[ing] sure everything was safe." Decision and Order on Remand at 32; Director's Exhibit 30-320. While claimant testified that he occasionally performed some of the duties of his men, including rock dusting, driving a shuttle car, and helping out while a member of his crew ate lunch or dinner, Director's Exhibit 30-321, the administrative law judge noted that, during cross-examination, claimant acknowledged that the terms of the contract between employer and the union prohibited claimant from performing any of the physical activities that the miners he supervised were supposed to be doing. Decision and Order on Remand at 32; Director's Exhibit 30-333. Although claimant testified that he, nevertheless, did "a little work" at the request of a crew member, the administrative law judge concluded that claimant's duties primarily involved walking, with only intermittent physical labor when the need arose. *Id.*

In evaluating Dr. O'Bryan's opinion, the administrative law judge determined that the physician interpreted non-qualifying pulmonary function studies obtained in January 2003 as showing a moderate obstructive impairment. Although noting that reliance on non-qualifying tests can support a reasoned assessment of total disability, the administrative law judge acted within his discretion in discounting Dr. O'Bryan's opinion, that claimant's impairment would preclude him from performing his last coal mine job, as he found that the physician neither identified what he considered that job to be, nor stated the exertional requirements of the job.⁵ Decision and Order on Remand at 32; Director's Exhibit 30-428-31; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Similarly, while the administrative law judge acknowledged that Dr. Houser could reasonably base his opinion that claimant is totally disabled on non-qualifying test results, *see Cornett*, 227 F.3d at 577, 22 BLR at 2-123, the administrative law judge determined that Dr. Houser indicated that claimant's last job, as a "face boss," required him to shovel coal on the belt line at times, and to help maintain and service equipment to keep it functional. Decision and Order on Remand at 33;

⁵ In his report, under "Job Title and Description of Job's Physical Requirements," Dr. O'Bryan listed claimant's employment with employer from 1966 to 1985 as "Beltlines x? Drive shuttle car x? Supervisor x 15 yrs." Director's Exhibit 30-428.

Director's Exhibit 30-27. The administrative law judge concluded that Dr. Houser's description was not consistent with claimant's testimony that, as a section foreman, he was not actually allowed to perform any work of the miners he supervised and that "he would only 'do a little work'" on occasion. Thus, the administrative law judge permissibly found that Dr. Houser's opinion, that claimant was "physically unable to perform his last coal mine employment (1985) as a face boss" was entitled to diminished weight, since Dr. Houser did not convey a precise knowledge of the physical demands of claimant's job. Decision and Order on Remand at 33-34; Claimant's Exhibit 1.

With respect to the opinion of Dr. Baker, the administrative law judge determined that the physician, while correctly identifying claimant's position as a supervisor, failed to demonstrate sufficient awareness of the exertional requirements of the job. In addition, the administrative law judge questioned the reliability of Dr. Baker's July 2004 pulmonary function study results, which produced qualifying values, as Dr. Baker listed only fair cooperation, Director's Exhibit 30-397, and the more recent tests yielded higher, non-qualifying values, Director's Exhibit 30-14, Employer's Exhibit 2. Decision and Order on Remand at 33; *see Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1989). Notably, the administrative law judge determined that the most recent pulmonary function study, obtained by Dr. Repsher in July 2010, produced noticeably higher values than the 2003, 2004 and 2008 tests, and was interpreted as showing "very mild and clinically insignificant [obstruction]." Decision and Order on Remand at 13, 34; Employer's Exhibit 2. Observing that both Dr. Repsher and Dr. Rosenberg characterized the degree of claimant's impairment as, at most, very mild, the administrative law judge discounted Dr. Rosenberg's opinion of no disability because Dr. Rosenberg did not physically examine claimant and appeared to base his assessment solely on the non-qualifying values of the objective tests. Decision and Order on Remand at 35-36. However, while acknowledging that Dr. Repsher did not identify the exertional requirements of claimant's job as a supervisor, the administrative law judge rationally concluded that Dr. Repsher's statement, that claimant's tests showed that he "has the respiratory capacity to continue to work as a coal miner," Employer's Exhibit 2, was "clearly sufficient to embrace the work of a supervisor whose job it was to supervise, not regularly work alongside, a crew of miners." Decision and Order on Remand at 34; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Weighing all of the evidence together, and finding that the more recent evidence was the most probative of claimant's present condition, *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988), the administrative law judge acted within his discretion in finding that claimant failed to meet his burden of establishing total respiratory disability pursuant to Section 718.204(b). Decision and Order on Remand at 35-36; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his findings thereunder, and his resultant determination that claimant's entitlement to benefits is precluded. *Anderson*, 12 BLR at 1-112.

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge