BRB No. 03-0428 BLA

JOE DENZIL VAUGHN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY	)	
	)	DATE ISSUED: 03/29/2004
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd, and Lloyd PLLC), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor, Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

BEFORE: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (2000-BLA-0256) of Administrative Law Judge Robert L. Hillyard with respect to 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). This is the second time that this case has been before the Board. When this case was before the Board previously, the Board vacated the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis and remanded the case to the administrative law judge with instructions to render separate findings as to the issues of total disability and total disability causation. The Board also instructed the administrative law judge to reconsider the opinions of Drs. Naeye, Fino, Kleinerman, Selby, and Younes on remand and to consider whether the case should be remanded to the district director for a complete pulmonary evaluation. *Vaughn v. Apogee Coal Co.*, BRB No. 01-0443 BLA (March 2, 2002)(unpub.).

On remand, the administrative law judge issued an Order in which he denied claimant's Motion to Remand this case to the district director for a complete pulmonary evaluation. In his subsequent Decision and Order, the administrative law judge determined that claimant failed to establish total disability due to pneumoconiosis and denied benefits accordingly. Claimant argues on appeal that the administrative law judge erred in denying his motion to remand the case to the district director for a complete pulmonary evaluation. Claimant also contends that the administrative law judge did not follow the Board's remand instructions and that the administrative law judge did not properly weigh the medical opinions of record. Employer responds, urging affirmance of the administrative law judge's order refusing to remand the case to the district director and the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded and argues that although the reason that the administrative law judge gave for denying claimant's motion to remand the case to the district director was incorrect, the denial was appropriate, as Dr. Simpao, the physician who examined claimant at the request of the Department of Labor, performed a complete and credible 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially contends on appeal that the administrative law judge erred in denying his Motion to Remand this case to the district director on the ground that claimant was not entitled to a new pulmonary evaluation in support of his request for modification. Employer has responded and argues that claimant waived this issue by failing to raise the alleged insufficiency of Dr. Simpao's opinion when the district director denied his claim for benefits. The Director has also responded and maintains that although the administrative law judge did not give a proper reason for rejecting

claimant's motion, denial was appropriate because Dr. Simpao provided a complete pulmonary evaluation pursuant to 20 C.F.R. §§718.101, 725.405 and 725.406.

Both claimant and the Director are correct in asserting that the ground upon which the administrative law judge premised his rejection of claimant's Motion to Remand was not appropriate. Although the administrative law judge determined correctly that the Director is not obligated to provide a new examination upon the filing of a request for modification, Order dated August 28, 2002 at 2, this was not the issue before him. The issue, which was timely presented by claimant's petition for modification, was whether Dr. Simpao's opinion satisfied the Director's obligation to furnish claimant with a complete pulmonary evaluation in support of his claim for benefits. *See* 20 C.F.R. §725.310 (2000); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).[1] Claimant's appeal of the denial of his Motion for Remand for a complete pulmonary evaluation is rejected.

Upon further reflection, it is determined that there is merit in the Director's assertion that Dr. Simpao's written report and deposition testimony constituted a complete and credible pulmonary evaluation under Sections 718.101, 725.405, and 725.406. Dr. Simpao examined claimant on October 16, 1997, and noted that claimant was "slightly cyanotic" and had "inspiratory and expiratory wheezes." Director's Exhibit 6. Dr. Simpao recorded claimant's employment, medical, and smoking histories and claimant's complaints of shortness of breath. *Id*. The doctor also obtained a pulmonary function study, validated by Dr. Burki, which showed moderate restrictive and obstructive impairments, a chest x-ray that was interpreted as positive for pneumoconiosis, and a blood gas study that produced values in excess of the table values appearing in 20 C.F.R. Part 718, Appendix C. Based upon this data, Dr. Simpao diagnosed coal workers' pneumoconiosis and a severe respiratory impairment to which "multiple years of coal dust exposure" was "a medically significant," contributing factor. *Id*.

The administrative law judge determined that the biopsy evidence of record established the existence of pneumoconiosis and that the weight of the pulmonary function study evidence was sufficient to establish the presence of a totally disabling

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). The amendments to the regulation pertaining to requests for modification, set forth in 20 C.F.R. §725.310, do not apply to requests for modification of claims filed before January 19, 2001. 20 C.F.R. §725.2.

respiratory impairment. Decision and Order dated January 10, 2001 at 15-16, 18. Thus, Dr. Simpao's diagnoses were not unreasoned and were consistent with both the objective evidence that he adduced and the evidence of record as a whole. With respect to the issue of disability causation, Dr. Simpao was not equivocal or inconsistent. Rather, Dr. Simpao explained at his deposition that he was unable to quantify the precise extent to which coal dust exposure, lung resection, or cigarette smoking contributed to claimant's totally disabling respiratory impairment, but nevertheless indicated that coal dust exposure or pneumoconiosis made some contribution. Director's Exhibits 6, 42 at 21-24, 26-27. We hold, therefore, that Dr. Simpao's opinion was sufficient to satisfy the Director's obligation to provide claimant with a complete and credible pulmonary evaluation.[2] *See Cline v. Director, Office of Workers' Compensation Programs*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166 (8th Cir.1984). In light of this holding, we also vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish either total disability or total disability due to pneumoconiosis under 20 C.F.R. §718.204 and remand the case to the administrative law judge for reconsideration of Dr. Simpao's opinion under Section 718.204.

With respect to the administrative law judge's consideration of the evidence under Section 718.204 in the Decision and Order on Remand, claimant argues that the administrative law judge did not comply with the Board's instruction to render separate findings as to the issues of total disability and total disability causation on remand. *See Vaughn v. Apogee Coal Co.*, BRB No. 01-0443 BLA (March 2, 2002)(unpub.), slip op. at 7. Claimant's contention has merit. After reviewing the objective and medical opinion evidence relevant to total respiratory or pulmonary disability, the administrative law judge set forth his findings in a manner that combined this issue with the issue of disability causation. The administrative law judge stated that:

> Although the pulmonary function study evidence was determined to support a finding of total disability, I find that the Claimant's *total disability is due to lung cancer caused by smoking, not a totally disabling respiratory or pulmonary impairment*. Based upon the foregoing, I find that the medical opinion evidence does not support a finding of a totally disabling respiratory or pulmonary impairment. As noted in the prior Decision, *weighing the pulmonary function study, arterial blood gas study,*

[2] To the extent that this disposition is inconsistent with the holding in our prior Decision and Order regarding the administrative law judge's weighing of Dr. Simpao's opinion, we overrule our previous decision. *See Arizona v. California*, 460 U.S. 605, 618 n.8 (1983).

> *and medical opinion evidence, I find that the evidence fails to support a finding that the Claimant is totally disabled due to pneumoconiosis*.

Decision and Order on Remand at 7 (emphasis supplied). Because the administrative law judge's analysis does not reflect consideration of total disability and total disability causation as separate issues, we vacate his finding that claimant did not establish that he is totally disabled due to pneumoconiosis.

On remand, the administrative law judge must first determine whether claimant has established the existence of a totally disabling respiratory or pulmonary impairment, *regardless of its source*, pursuant to Section 718.204(b)(2)(i)-(iv).

If the administrative law judge determines that claimant has met his burden under one or more of these subsections, and that the record contains probative evidence suggesting that claimant is not suffering from total respiratory or pulmonary disability, he must weigh the evidence supportive of a finding of total disability against the contrary evidence to determine if claimant has proven total disability by a preponderance of the evidence. *See* 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-95 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987)(*en banc*). If the administrative law judge finds that claimant has demonstrated that he is suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b), the administrative law judge must consider whether claimant has established that pneumoconiosis is a substantially contributing cause of his total disability in accordance with Section 718.204(c).

Claimant argues that when the administrative law judge weighed the medical opinion evidence relevant to the issue of totally disability, he did not properly consider the opinions of Drs. Naeye, Kleinerman, Fino, and Younes.[3] Drs. Naeye and Kleinerman determined that claimant is not suffering from a totally disabling respiratory or pulmonary impairment. Dr. Fino indicated that claimant was not disabled before his treatment for lung cancer. Dr. Younes found that claimant is totally disabled from a respiratory standpoint.

With respect to the administrative law judge's consideration of Dr. Naeye's opinion, claimant maintains that the administrative law judge did not resolve the conflict between Dr. Naeye's determination that the pathology evidence supported a finding of

[3] The administrative law judge's finding that Dr. Selby's opinion, that claimant is not totally disabled due to pneumoconiosis, is entitled to little weight, is affirmed as it is unchallenged on appeal. Decision and Order on Remand at 6; Employer's Exhibit 2; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

severe simple coal workers' pneumoconiosis and his statement that the pulmonary function studies of record indicated that claimant's pneumoconiosis was mild because claimant did not demonstrate any signs of respiratory disability. Director's Exhibit 46. Claimant also asserts that the administrative law judge erred in finding that the opinions of Drs. Naeye and Kleinerman were entitled to substantial weight in comparison to the other opinions of record without addressing the fact that neither physician reviewed the 1999 pulmonary function study which produced qualifying values. Employer's Exhibit 2. These contentions have merit, in part.

Contrary to claimant's argument, the administrative law judge rationally found that Dr. Naeye's determination that claimant does not have a totally disabling respiratory impairment was reasoned and documented based upon Dr. Naeye's explanation of his diagnosis and his reliance upon a 1994 study that did not show an impairment in pulmonary function. Decision and Order on Remand at 3; Director's Exhibit 32; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Similarly, the administrative law judge properly determined that Dr. Kleinerman's opinion that claimant is not totally disabled from a respiratory standpoint is reasoned and documented because it was explained and supported by the objective evidence to which Dr. Kleinerman referred. Decision and Order on Remand at 5; Employer's Exhibits 3, 4; *Clark*, 12 BLR 1-149.

However, claimant is correct in maintaining that in determining the *relative weight* to which these opinions were entitled, the administrative law judge should have addressed the significance of the fact that Drs. Naeye and Kleinerman did not review the 1999 pulmonary function study, which the administrative law judge determined was the most probative because it most accurately reflected claimant's current condition and which the administrative law judge relied upon in finding total disability established under Section 718.204(c)(1) (2000). Decision and Order dated January 10, 2001 at 17. This is not to say that the administrative law judge is required to accord less weight to these opinions, but that in light of the administrative law judge's finding regarding the significance of the 1999 pulmonary function study, he must provide an explanation if he decides to give greater weight to the opinions of Drs. Naeye and Kleinerman than to the contrary opinions of physicians who reviewed the 1999 study. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Claimant also alleges that the administrative law judge erred in crediting Dr. Fino's opinion that claimant is not totally disabled due to pneumoconiosis. Analysis of this argument requires a distinction to be made between the issue of total disability and that of causation. Regarding the issue of total disability, the administrative law judge found that Dr. Fino did not render an opinion as to whether claimant was suffering from a totally disabling respiratory or pulmonary impairment. The record reflects, however, that the administrative law judge did not address Dr. Fino's statements that "[h]ad it not been

for the lung cancer, [claimant] would retain the physiologic capacity from a respiratory standpoint to perform all the requirements of his last job" and "this man was neither partially nor totally disabled from returning to his last mining job or a job requiring similar effort prior to the development of his lung cancer." Director's Exhibit 45. The administrative law judge must, therefore, reconsider Dr. Fino's opinion under Section 718.204(b)(2)(iv) on remand. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Claimant further contends that the administrative law judge erred in discrediting Dr. Younes's opinion that claimant is totally disabled on the ground that Dr. Younes did not personally review the 1997 pulmonary function study upon which he relied. This contention has merit. The cover letter from the claims examiner indicates that Dr. Younes was provided with a copy of the October 16, 1997 pulmonary function study and the physician's written comments in response to the claims examiner's questions regarding the severity of any respiratory or pulmonary impairment suggest that he independently assessed the significance of the results. Director's Exhibit 44. The administrative law judge must, therefore, reconsider Dr. Younes's opinion pursuant to Section 718.204(b)(2)(iv) on remand. *Tackett*, 7 BLR 1-703. If the administrative law judge reaches the issue of total disability causation pursuant to Section 718.204(c) on remand, however, the administrative law judge need not reconsider Dr. Younes's opinion. The administrative law judge rationally determined that Dr. Younes's diagnosis of total disability due to pneumoconiosis is entitled to little weight, as Dr. Younes did not "note the length or rate of claimant's smoking history." Decision and Order on Remand at 7; *Bobick*, 13 BLR 1-52; *Stark*, 9 BLR 1-36; *Maypray*, 7 BLR 1-683.

If the administrative law judge reaches the issue of total disability causation pursuant to Section 718.204(c) on remand, we hold that contrary to claimant's argument, he need not reconsider whether Dr. Fino relied upon an accurate smoking history. The administrative law judge rationally found that in determining that claimant's disability was due to his cigarette smoking, Dr. Fino relied upon a substantial smoking history that closely approximated the administrative law judge's finding of "over eighty pack years." Decision and Order dated January 10, 2001 at 3; Director's Exhibit 45; *Bobick v. Saginaw Mining* Co., 13 BLR 1-52 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co*., 7 BLR 1-683 (1985). Nevertheless, claimant is correct in maintaining that the administrative law judge did not explain his determination that Dr. Fino documented his finding that claimant was not disabled before his lung cancer was diagnosed and did not consider whether Dr. Fino's opinion was premised upon the assumption that pneumoconiosis does not progress once coal dust exposure ceases. *See Hall*, 12 BLR 1-80. In weighing Dr. Fino's opinion on causation the administrative law judge must address this evidence on remand.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge