

BRB No. 07-0547 BLA

F.B.)
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 Claimant-Respondent)
)
 v.) DATE ISSUED: 03/25/2008
)
 CONSOL OF KENTUCKY)
)
 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 Awarding Benefits of Paul H. Teitler,
Administrative Law Judge, United States Department of Labor.

Philip Lewis, Hyden, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-BLA-05777)
of Administrative Law Judge Paul H. Teitler 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). The administrative law judge accepted the
parties' stipulation to twenty years of coal mine employment, as supported by the record,
and considered the claim under the regulations set forth in 20 C.F.R. Part 718.¹ The

¹ This is an initial claim for benefits, which was filed on May 17, 2004. Director's
Exhibit 2. When the district director issued a proposed Decision and Order awarding
benefits, employer requested a formal hearing, which was held before Administrative
Law Judge Paul H. Teitler on August 3, 2006.

administrative law judge found, based upon employer's concession in its post-hearing brief and the evidence of record, that the existence of pneumoconiosis arising from coal mine employment was established pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that the medical opinion evidence was sufficient to establish that claimant is totally disabled and that pneumoconiosis is a contributing cause of his total disability under 20 C.F.R. §718.204(b), (c). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief unless specifically requested to do so.²

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.³ 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, 363 (1965).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the treatment records and medical opinions of Drs. Breeding and Alam, and the medical opinions of Drs. Baker, Wicker, Repsher, and Castle. Director's Exhibits 13, 15, 17, 27; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 3-6. Dr. Breeding is a general practitioner who has treated claimant since 1992.⁴ Dr. Breeding indicated that claimant's problems due to pneumoconiosis have increased over the years and that claimant was a

² We affirm the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and that claimant did not prove that he is totally disabled under 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 7.

⁴ The administrative law judge stated that Dr. Breeding began treating claimant in 1988. Decision and Order at 6. In a letter dated April 22, 2004, Dr. Breeding indicated that although claimant was initially seen at Mountain Comprehensive Health Services on February 5, 1988, he did not become claimant's treating physician until July 10, 1992. Director's Exhibit 17; Employer's Exhibit 3 at 5-6.

hard worker who experienced difficulty performing his usual coal mine employment due to increased shortness of breath. Director's Exhibit 17; Employer's Exhibit 3 at 17. Dr. Breeding stated that claimant is totally disabled due to pneumoconiosis, noting that although claimant's pulmonary function tests were "somewhat normal," his cardiopulmonary stress (CPX) test established that claimant has hypoxia. Employer's Exhibit 3 at 17. Dr. Breeding indicated that his statements regarding the clinical evidence were based upon the findings of Dr. Alam, the pulmonologist to whom he referred claimant. *Id.* at 18.

Dr. Alam, a Board-certified pulmonologist, began treating claimant in 2000. Dr. Alam indicated that claimant's pulmonary function study results were "not that bad," but further noted that because the testing was done at rest, it was not clear what limitations claimant would have with exercise. Employer's Exhibit 4. Based upon claimant's CPX test, which he described as showing mild hypoxia, Dr. Alam concluded that claimant has a moderate pulmonary limitation. Director's Exhibit 17; Employer's Exhibit 4. Dr. Alam opined that claimant is totally disabled due to pneumoconiosis, based upon claimant's chest x-ray, symptoms, and the results of the CPX test. Employer's Exhibit 4.

Dr. Baker, a Board-certified pulmonologist, examined claimant on June 5, 2004. Claimant's Exhibit 1. Dr. Baker described claimant's pulmonary function study as within normal limits, and found that the blood gas study revealed mild resting hypoxemia. *Id.* Based on the presence of pneumoconiosis on claimant's chest x-ray, Dr. Baker opined that claimant was totally disabled from working in a dusty environment, and he attributed any pulmonary impairment primarily to coal dust exposure. *Id.* At his deposition, Dr. Baker acknowledged that the pulmonary function studies were normal, indicating that claimant retained the ventilatory capacity to return to coal mine employment. Employer's Exhibit 6. Dr. Baker stated that if claimant was his patient, he would not permit him to return to coal mine employment because his condition could worsen, and he opined that the exertion required might be beyond claimant's capacity. *Id.*

Dr. Wicker examined claimant on June 25, 2004. Director's Exhibits 13, 15; Claimant's Exhibit 2. Dr. Wicker performed pulmonary function and arterial blood gas studies, and opined that claimant's respiratory capacity appeared to be adequate to perform his previous coal mine employment, but he advised claimant to avoid dusty environments. *Id.*

Dr. Repsher, a Board-certified pulmonologist, examined claimant on September 15, 2004, and indicated that claimant's pulmonary function and arterial blood gas studies were normal. Director's Exhibit 27. Based on these tests, as well as his review of the other pulmonary function and arterial blood gas studies of record, Dr. Repsher opined that claimant had no pulmonary impairment. Director's Exhibit 27; Employer's Exhibit 5. Dr. Repsher criticized Dr. Alam's reliance upon the CPX test, noting that Dr. Alam did not compensate for claimant's obesity in calculating the VO₂ values. *Id.* Dr.

Repsher indicated that upon recalculation, claimant's CPX test results were in the normal range and showed no respiratory impairment. *Id.*

Dr. Castle, a Board-certified pulmonologist, performed a pulmonary evaluation on January 12, 2005, and reported that claimant's pulmonary function study showed a mild degree of restriction without obstruction or diffusion abnormality. Employer's Exhibits 1, 7. Dr. Castle also reviewed claimant's medical records, noting that his blood gas study values were normal, and did not support the diagnosis of a totally disabling respiratory impairment from any cause. *Id.* Dr. Castle did not find the isolated VO₂ value from the CPX test to be persuasive evidence that claimant was disabled, given the normal pulmonary function and blood gas studies. Employer's Exhibits 1, 7.

Upon weighing the medical opinion evidence under Section 718.204(b)(2)(iv), the administrative law judge initially determined that Drs. Alam, Baker, Repsher, and Castle "are all highly qualified as pulmonary specialists." Decision and Order at 11. The administrative law judge then found that Dr. Breeding and Dr. Alam are claimant's treating physicians pursuant to 20 C.F.R. §718.104(d). *Id.* The administrative law judge further indicated that under Section 718.104(d), he was required to "accept the statement of a treating physician with regard to the issues of whether the miner suffers from pneumoconiosis or whether the miner is totally disabled due to pneumoconiosis," in the absence of contrary probative evidence. *Id.* The administrative law judge determined that Dr. Breeding's opinion, that claimant is totally disabled, was more persuasive than the contrary opinions of Drs. Repsher, Castle, and Wicker, due to Dr. Breeding's observation of claimant over many years and his reliance upon the CPX test, which showed "some pulmonary impairment."⁵ *Id.* at 12. The administrative law judge concluded, therefore, that claimant established that he is totally disabled pursuant to Section 718.204(b)(2)(iv). *Id.* The administrative law judge further found that when weighed against the non-qualifying pulmonary function and blood gas studies of record, Dr. Breeding's opinion was sufficient to establish total disability under Section 718.204(b)(2). *Id.*

Employer argues that the administrative law judge erred in according greatest weight to Dr. Breeding's opinion, based upon his status as a treating physician, without adequately addressing the factors set forth in Section 718.104(d)(1), (d)(4), and (d)(5). This contention has merit. Pursuant to Section 718.104(d)(1), "[t]he opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions." 20 C.F.R. §718.104(d)(1). Similarly, Section 718.204(d)(4) provides that "[t]he types of

⁵ The administrative law judge determined that Dr. Baker's opinion was "to some extent supportive" of the diagnoses of total disability rendered by Drs. Alam and Breeding. Decision and Order at 11.

testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition." 20 C.F.R. §718.104(d)(4). In the present case, the administrative law judge cited Dr. Breeding's description of claimant's respiratory problems, but did not address Dr. Breeding's statement that he relied upon Dr. Alam's findings in diagnosing pneumoconiosis and in assessing the significance of claimant's pulmonary function study, blood gas study, and CPX test results. Employer's Exhibit 3 at 18.

Employer is also correct in maintaining that the administrative law judge did not properly address Dr. Breeding's opinion pursuant to Section 718.104(d)(5), which provides that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). Dr. Breeding acknowledged that claimant's pulmonary function and blood gas studies do not indicate the presence of a disabling impairment, but stated that the VO₂ value produced on the CPX test supports a diagnosis of total respiratory disability. Director's Exhibit 17; Employer's Exhibit 3 at 17. As employer contends, however, the administrative law judge did not explain why he credited the results of the CPX test over the non-qualifying pulmonary function and blood gas studies of record nor did he resolve the conflict between Dr. Breeding's and Dr. Alam's interpretations of the CPX test and those offered by Drs. Repsher and Castle. In addition, because the CPX test is not identified in Part 718 as a means by which a miner can prove that he is totally disabled, it constitutes "[o]ther medical evidence" under 20 C.F.R. §718.107. Pursuant to Section 718.107, an administrative law judge can admit "[t]he results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate . . . a respiratory or pulmonary impairment," if the party submitting the test proves that it is "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(a), (b). The administrative law judge did not consider whether claimant met his burden of proof regarding the CPX test.

Because the administrative law judge did not properly apply the factors set forth in Section 718.104(d)(1), (d)(4), and (d)(5) when according greatest weight to Dr. Breeding's opinion, we vacate the administrative law judge's finding that Dr. Breeding's opinion is sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) and his finding that claimant proved that he is totally disabled under Section 718.204(b)(2). *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003); *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting). This case is remanded, therefore, to the administrative law judge for

reconsideration of whether claimant has established total disability at Section 718.204(b)(2). On remand, the administrative law judge must reconsider Dr. Breeding's opinion in light of Section 718.104(d)(1), (d)(4), and (d)(5), and in conjunction with the other medical opinions of record.⁶ In addressing the extent to which Dr. Breeding's diagnosis of a totally disabling impairment is adequately documented, the administrative law judge must consider whether the CPX test evidence is admissible pursuant to Section 718.107(b). The administrative law judge must evaluate the bases for each physician's opinion, and fully articulate the rationale underlying his conclusions regarding the weight to be accorded to their diagnoses. *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 U.S.C. §932(a); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also vacate the administrative law judge's determination that Dr. Breeding's opinion was sufficient to establish that claimant was totally disabled due to pneumoconiosis at Section 718.204(c), as the administrative law judge relied upon his findings at Section 718.204(b)(2)(iv) in making this determination. If the administrative law judge finds on remand that claimant has established total disability pursuant to Section 718.204(b)(2), he must reconsider whether claimant has proven that pneumoconiosis is a contributing cause of his total disability under Section 718.204(c). 20 C.F.R. §718.204(c); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

⁶ The administrative law judge did not accurately summarize 20 C.F.R. §718.104(d)(5) in his Decision and Order. Rather than mandating that the administrative law judge accept the statement of a treating physician regarding the elements of entitlement, Section 718.104(d)(5) provides that the administrative law judge is required, in the absence of contrary probative evidence, to accept the statement of a treating physician with respect to the nature of his or her relationship with the miner and the duration, frequency, and extent of treatment. 20 C.F.R. §718.104(d)(5); *see* Decision and Order at 11.

Accordingly, the Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings 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