BRB No. 13-0075 BLA

LEWIS BAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRES COAL SALES, INCORPORATED	)	DATE ISSUED: 10/31/2013
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-05438) of Administrative Law Judge Lystra A. Harris, rendered on a claim filed on January 28, 2010, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] After finding that claimant established 18.56 years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant has legal pneumoconiosis and a totally disabling respiratory impairment due to pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4

[1] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. The administrative law judge determined that claimant established one year of underground coal mine employment but found that the remainder of claimant's work was in surface coal mine employment. Decision and Order at 13-14. Because claimant did not establish that his work in surface coal mine employment was in conditions substantially similar to those in an underground mine, the administrative law judge concluded that claimant was unable to invoke the amended Section 411(c)(4) presumption. *Id*. at 14.

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 12. 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 (1989)(en banc).

(1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

I. 20 C.F.R. §718.202(a)(4) – Legal Pneumoconiosis

In weighing the medical opinion evidence relevant to the existence of legal pneumoconiosis,[3] the administrative law judge credited Dr. Baker's opinion, that claimant's chronic obstructive pulmonary disease (COPD) is due to cigarette smoking and coal dust exposure, as well reasoned and consistent with comments in the preamble to 2001 revisions to the regulations. *See* Decision and Order at 17; Director's Exhibit 18. The administrative law judge gave less weight to the contrary opinions of Drs. Jarboe and Broudy, that claimant's COPD is due solely to cigarette smoking, as she found that they did not sufficiently explain why coal dust could not also have contributed to claimant's impairment and acknowledged that they could not completely rule out a contribution from coal dust. *See* Decision and Order at 17-18; Director's Exhibits 20, 21, 25; Employer's Exhibits 3, 4.

Employer contends that because claimant has the burden of proof "there has to be a medical basis for concluding that cigarette smoking alone would not have caused [him] to have the same pulmonary impairment at this point." Employer's Brief at 38. In addition, employer argues that Dr. Baker's opinion is insufficient to establish the existence of legal pneumoconiosis, as Dr. Baker does not explain the basis for his diagnosis. Employer asserts that "while use of bronchodilators is not required by the [United States Department of Labor], the utilization of such testing nonetheless greatly impacts the credibility and weight of the medical opinion being offered . . . ." *Id*. at 31. Employer explains that "coal workers[']s pneumoconiosis causes a f[i]xed and permanent loss during testing[,] whereas smoking can and will show marked improvement with bronchodilators" and, therefore ,"the [administrative law judge] cannot give full weight and credit to a physician [like Dr. Baker] who deliberately avoids the issue by declining to test individuals." *Id*. at 31-32. In contrast, employer argues that Drs. Jarboe and Broudy gave detailed explanations as to why claimant does not have legal pneumoconiosis.

Although employer argues that if a physician relies on the results of a pulmonary function study to diagnose legal pneumoconiosis, he must administer bronchodilators in

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

order for the administrative law judge to credit his opinion, this is not required by the regulations. 20 C.F.R. §718.103. Furthermore, contrary to employer's contention, claimant need only show that he has a respiratory impairment "significantly related to, or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R. §718.201; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge properly found that Dr. Baker's attribution of claimant's respiratory disease to both smoking and coal dust exposure is supportive of a finding of legal pneumoconiosis. *See Gross v. Dominion Coal Corp*., 23 BLR 1-18 (2003). The administrative law judge acted within her discretion in determining that Dr. Baker rendered a reasoned and documented diagnosis of legal pneumoconiosis, as she found that it was based on Dr. Baker's examination, his understanding of claimant's work and smoking histories, and was further supported by the qualifying pulmonary function study evidence.[4] Decision and Order at 17; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). The administrative law judge also permissibly determined that the opinions of Drs. Broudy and Jarboe did not outweigh Dr. Baker's opinion, as both acknowledged that they could not rule out a contribution from coal dust exposure.[5] *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Employer's Exhibits 3 at 27, 4 at 10. Therefore, we affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a).

II. 20 C.F.R. §718.204(b)(2) – Total Disability

Relevant to 20 C.F.R. §718.204(b)(2)(i), the record contains the results of four pulmonary function studies. The pulmonary function study performed by Dr. Craven on January 26, 2010, without bronchodilator, was qualifying.[6] Director's Exhibit 22. The

[4] Dr. Baker diagnosed claimant with chronic obstructive pulmonary disease and chronic bronchitis due to a combination of coal dust exposure and cigarette smoking. Director's Exhibit 18. Dr. Baker found that cigarette smoking was the primary cause of claimant's impairment but that the effect from both causes was synergistic. *Id*.

[5] Dr. Broudy testified that "in my report I said that it was medically probable, that is more likely than not, that the impairment was due to cigarette smoking. This does not totally rule out the possibility that coal dust was playing a role." Employer's Exhibit 4 at 10. Dr. Jarboe stated that "can I say that coal dust didn't contribute in any way to this man's function? No, because the studies show that a minority of coal miners get – certainly get significant impairment, a minority." Employer's Exhibit 3 at 27.

[6] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices

pulmonary function study performed by Dr. Baker on February 26, 2010, without bronchodilator, was qualifying as well, and was validated by Dr. Gaziano. Director's Exhibit 18. The pulmonary function study performed by Dr. Jarboe on June 24, 2010 was qualifying pre-bronchodilator, and non-qualifying post-bronchodilator. Director's Exhibit 20. The pulmonary function study performed by Dr. Broudy on September 21, 2010 was qualifying both pre-bronchodilator and post-bronchodilator. Director's Exhibit 21. The administrative law judge indicated that "all of the pulmonary function tests conducted on the [c]laimant, without a bronchodilator, resulted in qualifying values." Decision and Order at 19. The administrative law judge acknowledged Dr. Jarboe's comment questioning the validity of the January 26, 2010 study, because it did not produce three acceptable curves, and his comment that the values in the test were similar to those produced in the test that he conducted. *Id*. The administrative law judge concluded that, even if she did not consider the January 26, 2010 study, the three remaining pulmonary function studies were sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*.

Because none of the blood gas studies were qualifying, and there was no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *See* Decision and Order at 19-20; Director's Exhibits 18, 20-21.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), Drs. Baker and Broudy opined that claimant has a totally disabling respiratory impairment. Director's Exhibits 18, 21, 25; Employer's Exhibit 4 at 12. The administrative law judge stated that both Drs. Baker and Broudy relied on valid, qualifying pre-bronchodilator pulmonary function studies and that Dr. Broudy's test was qualifying post-bronchodilator as well.[7] Decision and Order at 20. The administrative law judge indicated that Dr. Jarboe based his opinion, that claimant is not totally disabled, on the non-qualifying post-bronchodilator pulmonary

---

B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The administrative law judge acknowledged that Dr. Jarboe opined that Dr. Baker's pulmonary function study should be given less weight because he did not administer bronchodilators. Decision and Order at 20 n.10. However, the administrative law judge permissibly determined that, as the regulations do not require the administration of bronchodilators, he would not give less weight to Dr. Baker's opinion on this basis. *See* 20 C.F.R. §718.103; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

function study and the non-qualifying blood gas studies. *Id*. However, the administrative law judge determined that, [a]s none of the doctors included any reasoned discussion of the [c]laimant's job responsibilities in light of his current medical limitations, and primarily reiterated the findings of the pulmonary function tests, I afford these medical opinions less weight." *Id*. Weighing the evidence as a whole, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2) "after consideration of the opinions of Dr[s]. Broudy and Baker regarding the [c]laimant's [impairment] which rely on clinical testing, as well as the qualifying pulmonary function tests administered to the [c]laimant." *Id*.

Employer again asserts that Dr. Baker's failure to administer bronchodilators during the pulmonary function study detracted from its credibility, as "there is every reason to suspect that the post-bronchodilator study might be non-qualifying." Employer's Brief at 41. Consequently, employer contends that Dr. Baker's opinion is not well reasoned. Employer also maintains that, in crediting Dr. Baker's opinion, the administrative law judge selectively analyzed the evidence and did not weigh it appropriately, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer further states that Dr. Baker's opinion is conclusory and is not supported by the medical data.

There is no merit to employer's contention regarding Dr. Baker's pulmonary function studies. Employer has not provided evidence supporting its assertion that, had Dr. Baker performed a post-bronchodilator study, it would likely have been non-qualifying, nor has employer addressed the significance of the more recent test, performed by Dr. Broudy, which was qualifying after the administration of bronchodilators. *See* Director's Exhibit 21. In addition, the administrative law judge did not selectively analyze the evidence at 20 C.F.R. §718.204(b)(2)(iv), as she permissibly discredited all of the medical opinions relevant to the issue of total disability because none of the physicians discussed the exertional requirements of claimant's usual coal mine work nor considered them in conjunction with claimant's current medical condition. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. Therefore, the administrative law judge's determination, that claimant established that he is totally disabled, is supported by substantial evidence, based on the qualifying pulmonary function studies and the absence of contrary probative evidence. Consequently, we affirm the administrative law judge's finding that claimant is totally disabled at 20 C.F.R. §718.204(b)(2).

III. 20 C.F.R. §718.204(c) – Disability Causation

In considering the issue of disability causation, the administrative law judge gave little weight to the opinions of Drs. Broudy and Jarboe, that claimant did not have a disabling respiratory impairment due to coal dust exposure, as they "did not fully

consider the potential of the [c]laimant's coal mine exposure to aggravate and contribute to the [c]laimant's respiratory conditions." Decision and Order at 21. The administrative law judge also noted that Dr. Jarboe determined that claimant is not totally disabled. *Id*. In contrast, the administrative law judge gave greater weight to Dr. Baker's opinion, that claimant's disabling respiratory impairment is due to a combination of coal dust and smoking, as the administrative law judge found that Dr. Baker considered that both smoking and coal dust could have caused claimant's impairment. *Id*.

Employer asserts that the administrative law judge assumed that, once she determined that claimant has legal pneumoconiosis, claimant had to be totally disabled due to pneumoconiosis. Employer also argues that the administrative law judge did not comply with the APA in weighing the evidence and erroneously placed the burden of proof on employer's physicians "to disprove the requirements for benefit eligibility, rather than weighing the evidence under the preponderance of the evidence standard." Employer's Brief at 43. Employer further states that the administrative law judge gave less weight to the opinions of Drs. Broudy and Jarboe because they did not specifically explain why they excluded coal dust exposure as a contributing cause of claimant's disabling impairment. Employer contends that Dr. Baker did not rationally address claimant's lengthy smoking history and merely provided a conclusory statement concerning the cause of claimant's impairment. Employer asserts that Drs. Broudy and Jarboe provided detailed testimony, and reports, detailing the basis for their conclusions and that the administrative law judge erred in not giving their opinions greater weight.

Employer's contentions are without merit. The administrative law judge permissibly gave less weight to the opinions of Drs. Broudy and Jarboe, based on their statement that they could not rule out coal dust as a contributing cause of claimant's impairment. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. In addition, the administrative law judge acted within her discretion in giving more weight to Dr. Baker's opinion, as she found that Dr. Baker adequately addressed why claimant's smoking and coal dust exposure were both contributing factors to claimant's disability.[8] *Id*. Therefore, we affirm the administrative law judge's determination that claimant established disability causation at 20 C.F.R. §718.204(c), and further affirm the award of benefits.

[8] Contrary to employer's assertion, Dr. Baker considered claimant's smoking history and concluded that "[a]s [claimant's] cigarette smoking exposure is greater than his coal dust exposure, it is the primary cause of his condition, but his coal dust exposure would be synergistic with cigarette smoking." Director's Exhibit 18.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge