



BRB No. 16-0040 BLA

LUKE LAPOTSKY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PAGNOTTI ENTERPRISES,)	
INCORPORATED)	
)	
and)	
)	DATE ISSUED: 09/28/2016
STATE WORKERS' INSURANCE FUND)	
)	
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 of Adele Higgins Odegard,
Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Edward K. Dixon (Zimmer Kunz, PLLC), for employer/carrier.

Before: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2010-BLA-05896) of Administrative Law Judge Adele Higgins Odegard, denying benefits on a claim filed on February 3, 2003, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, which is being considered pursuant to claimant's second request for modification under 20 C.F.R. §725.310, is before the Board for the second time.¹

In a Decision and Order issued on August 2, 2012, the administrative law judge credited claimant with nine and three-quarter years of coal mine employment,² found that claimant established the existence of clinical pneumoconiosis,³ pursuant to 20 C.F.R. §718.202(a)(1), and found that claimant established that his clinical pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(c). Based on her finding that claimant's clinical pneumoconiosis arose out of coal mine employment, the administrative law judge found that claimant established a mistake in a determination of fact in the previous decision denying benefits, pursuant to 20 C.F.R. §725.310. The administrative law judge further found, however, that claimant did not establish that he has a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). Additionally, the administrative law judge found that, even assuming that claimant established total disability, he did not establish that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board vacated the administrative law judge's finding that the pulmonary function study evidence did not establish total

¹ The Board set forth the full procedural history of this case in its prior decision. *Lapotsky v. Pagnotti Enters., Inc.*, BRB Nos. 12-0580 BLA/A slip op. at 2-3. In its current decision, the Board will focus on the more recent procedural history, as it is no longer necessary to summarize the decisions of the two previous administrative law judges who denied benefits in 2006 and 2009.

² Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

³ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

disability, pursuant to 20 C.F.R. §718.204(b)(2)(i), and remanded the case for reconsideration of that issue.⁴ *Lapotsky v. Pagnotti Enters., Inc.*, BRB Nos. 12-0580 BLA/A, slip op. at 4-7 (July 30, 2013) (unpub.). Because the administrative law judge's weighing of the pulmonary function studies on remand could affect her credibility determinations regarding the medical opinion evidence, the Board also vacated the administrative law judge's findings that the medical opinion evidence did not establish total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv), or total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). *Id.* at 7.

Additionally, upon review of employer-carrier's (employer's) cross-appeal, the Board rejected employer's allegations of error at 20 C.F.R. §718.202(a), and affirmed the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis. The Board found merit, however, in employer's argument that the administrative law judge did not adequately explain her finding that the clinical pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(c). The Board therefore vacated the administrative law judge's findings at 20 C.F.R. §§718.203(c) and 725.310, and instructed the administrative law judge to reconsider those issues. *Id.* at 9-12.

On remand, the administrative law judge again found that claimant established that his clinical pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(c), and that he demonstrated a mistake in a determination of fact. Next, the administrative law judge found that the pulmonary function study evidence established total disability, pursuant to 20 C.F.R. §718.204(b)(2)(i), and that the medical opinion evidence both for and against total disability at 20 C.F.R. §718.204(b)(2)(iv) merited little weight. Weighing all of the relevant evidence together at 20 C.F.R. §718.204(b)(2), the administrative law judge determined that the pulmonary function study evidence established that claimant has a totally disabling respiratory or pulmonary impairment. The administrative law judge further found, however, that claimant did not establish that clinical pneumoconiosis is a substantially contributing cause of his total disability, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

⁴ The Board affirmed, as unchallenged, the administrative law judge's findings that claimant has nine and three-quarter years of coal mine employment, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), and that claimant did not establish total disability with arterial blood gas study evidence or evidence of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *Lapotsky*, slip op. at 3 n.4.

On appeal, claimant argues that the administrative law judge erred in her analysis of the medical opinion evidence when she found that Dr. Kraynak's opinion, submitted by claimant, was not sufficiently reasoned to establish total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the administrative law judge erred in finding that Dr. Kraynak's opinion did not establish that claimant's total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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. 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 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

At this stage in the case, it is undisputed that claimant has established every element of entitlement but the final one, disability causation.⁵ To establish that he is totally disabled due to pneumoconiosis, claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally

⁵ Therefore, we need not address claimant's argument that the administrative law judge erred in determining that Dr. Kraynak's medical opinion was not sufficiently reasoned to establish total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant's Brief at 4-9. Any error in that determination was harmless, because the administrative law judge ultimately found that claimant established total disability, and claimant has not pointed to any evidence that the administrative law judge's weighing of Dr. Kraynak's opinion regarding the existence of total disability affected her weighing of Dr. Kraynak's opinion regarding the cause of total disability. See *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.” 20 C.F.R. §718.204(c)(1)(i),(ii). Claimant must establish the cause of his total disability “by means of a physician’s documented and reasoned medical report.” 20 C.F.R. §718.204(c)(2). In remanding this case, the Board instructed the administrative law judge that “[w]hen weighing the medical opinions relevant to . . . total disability causation, the administrative law judge must examine the physician’s reasoning and determine whether the physician has adequately identified the basis for his or her opinion.” *Lapotsky*, slip op. at 11-12.

On remand, the administrative law judge considered Dr. Kraynak’s opinion that claimant is totally disabled due to clinical coal workers’ pneumoconiosis. Claimant’s Exhibit 3 at 14, 16. The administrative law judge also took note of claimant’s smoking history. Claimant told Dr. Levinson that he smoked sixteen cigarettes a day for about fifty years, and Dr. Kraynak assumed in his deposition testimony that claimant’s smoking history was as great as sixty to eighty pack-years. Employer’s Exhibit 2; Claimant’s Exhibit 3 at 18. The administrative law judge determined that claimant has “a significant smoking history, which lasted for approximately 50 years.” Decision and Order on Remand at 9. In light of Dr. Kraynak’s acknowledgment of that history, the administrative law judge concluded that Dr. Kraynak did not adequately explain his opinion that claimant is totally disabled due to clinical pneumoconiosis:

Dr. Kraynak acknowledged this [smoking] history, and testified as to his opinion that there would be some element of obstructive pulmonary disease relative to that history. Dr. Kraynak also acknowledged that given Claimant’s smoking history, had the Claimant not had a history of coal mine dust exposure, Dr. Kraynak would have concluded that his impairment was smoking-related. Dr. Kraynak conceded that Claimant’s smoking history could, by itself, account for his respiratory impairment, but also maintained that in his opinion, Claimant’s disability is due to pneumoconiosis. The medical evidence of record contains sparse notes as to the reasoning behind this opinion, and Dr. Kraynak neither provided citation to medical evidence nor a reasoned explanation as to how he came to his conclusions.

Decision and Order on Remand at 9 (citations omitted); *see* Claimant’s Exhibit 3 at 15, 18, 26, 29-30. The administrative law judge therefore determined that, as she had found in her prior decision, Dr. Kraynak’s opinion on the issue of disability causation was “not well-reasoned or documented,” and she accorded it “minimal weight.” Decision and Order on Remand at 9. For that reason, the administrative law judge also adopted her prior conclusion that Dr. Kraynak’s opinion was not entitled to any extra weight as the opinion of claimant’s treating physician, pursuant to 20 C.F.R. §718.104(d). *Id.*

Therefore, the administrative law judge found that claimant failed to establish that he is totally disabled due to pneumoconiosis.

Claimant contends that Dr. Kraynak's opinion is well-reasoned, and that the administrative law judge "summarily concluded" that it was insufficient to establish disability causation. Claimant's Brief at 11-12. Claimant also argues that the administrative law judge "selectively analyzed" Dr. Kraynak's opinion, ignoring the fact that Dr. Kraynak ruled out obesity and heart failure as causes of claimant's disabling impairment. *Id.* at 12.

Claimant's arguments lack merit. The administrative law judge did not summarily conclude that Dr. Kraynak's opinion was insufficient, nor did she selectively analyze Dr. Kraynak's opinion. Instead, the administrative law judge permissibly assessed the reasoning of Dr. Kraynak's opinion regarding the cause of claimant's total disability, in light of claimant's smoking history. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); 20 C.F.R. §718.104(d)(5).

Although Dr. Kraynak opined that claimant is totally disabled "based on his coal worker's pneumoconiosis alone," he agreed that claimant's smoking history is substantially greater than the length of his coal mine employment, that claimant has "a significant smoking history," and that "part of his lung problem is due to his prior tobacco abuse, no doubt about it." Claimant's Exhibit 3 at 16, 18, 24-25. Dr. Kraynak also testified that if claimant had never worked in coal mines, "you'd have to conclude [claimant's impairment] was due to cigarette smoking." *Id.* at 26. Given those statements, it was within the administrative law judge's discretion to determine whether Dr. Kraynak adequately explained the basis for his opinion that claimant's clinical pneumoconiosis contributes to his total disability. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 577-78, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); 20 C.F.R. §§718.104(d)(5), 718.204(c)(2).

The administrative law judge found that the record contained only "sparse notes as to the reasoning behind [Dr. Kraynak's] opinion" Decision and Order on Remand at 9. Reiterating her previous finding regarding Dr. Kraynak's disability causation opinion, the administrative law judge found that Dr. Kraynak "neither provided citation to medical evidence nor a reasoned explanation as to how he came to his conclusions."⁶ *Id.*

⁶ In her previous decision, the administrative law judge considered Dr. Kraynak's testimony that "smoking does not cause respiratory problems to the extent that coal mine employment does." Decision and Order at 24 (discussing Claimant's Exhibit 3 at 25-26). The administrative law judge found that Dr. Kraynak's explanation for attributing claimant's disability to clinical pneumoconiosis was "not supported by any citation to

Substantial evidence supports the administrative law judge's permissible credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Because the administrative law judge permissibly discredited Dr. Kraynak's opinion, the only opinion supporting a finding of disability causation, we affirm the finding that claimant failed to establish that clinical pneumoconiosis is a substantially contributing cause of his total disability, pursuant to 20 C.F.R. §718.204(c). Because claimant failed to establish that his total disability is due to pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

medical evidence or authority,” and that it suggested Dr. Kraynak would attribute an impairment to coal mine employment rather than smoking “no matter what the facts of the specific case.” *Id.*

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge