BRB No. 06-0182 BLA

JAMES AUBREY HOPPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 12/15/2006
	)	
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 on Second Remand - Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Elizabeth A. Bruce, Madisonville, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (01-BLA-0684) of Administrative Law Judge Robert L. Hillyard awarding benefits on a claim[1] 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 case is before the Board for the third time. The procedural history of this case is contained in the Board's most recent decision. *Hopper v. Peabody Coal Co.*, BRB No. 04-0692 BLA (Mar. 24, 2005) (unpub.). In that decision, the Board vacated the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i),

[1] Claimant filed his application for benefits on July 27, 2000. Director's Exhibit 1.

because the administrative law judge erred in his assessment of the validity of the pulmonary function study dated September 28, 2000 and instructed the administrative law judge to provide valid reasons for either crediting or discounting the conflicting opinions regarding the validity of this pulmonary function study. Because the validity of the September 28, 2000 pulmonary function study could have impacted the administrative law judge's weighing of the conflicting physicians' opinions under 20 C.F.R. §718.204(b)(2)(iv), the Board, likewise, vacated the administrative law judge's finding that the medical opinions of record established total respiratory disability under this subsection. In the interest of judicial economy, the Board considered employer's allegations of error regarding the administrative law judge's weighing of the medical opinions of Drs. Pope and Fino and held that his weighing of these opinions was flawed. Consequently, the Board vacated the administrative law judge's findings that the medical opinions of record established total respiratory disability at 20 C.F.R. §§718.204(b)(2)(iv) and instructed the administrative law judge to reevaluate the medical opinions of record and accord each opinion appropriate weight based on the quality and persuasiveness of its reasoning and its underlying documentation. The Board also instructed the administrative law judge to then weigh all like and unlike evidence together and determine whether the evidence supportive of a finding of total disability outweighed the contrary and probative evidence at 20 C.F.R. §718.204(b). Additionally, the administrative law judge was instructed that if, on remand, he again found total respiratory disability established, he must provide his reasons for crediting or discounting the conflicting medical opinions of record and also determine whether the weight of the evidence established disability causation pursuant to 20 C.F.R. §718.204(c) in accordance with *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). *Hopper*, *slip op.* at 3-5.

On remand, the administrative law judge reweighed the evidence and found that the medical evidence of record was sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were awarded commencing as of July 2000, the month in which the claim was filed.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total respiratory disability pursuant to Section 718.204(b)(2)(i), (v) and total disability causation pursuant to Section 718.204(c). Claimant responds, urging affirmance of the administrative law judge's Decision and Order on Second Remand, to which employer replies, reiterating its arguments on appeal. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter, indicating his intention not to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are

rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially challenges the administrative law judge's finding that the pulmonary function studies of record demonstrated total respiratory disability pursuant to Section 718.204(b)(2)(i), arguing that the administrative law judge has committed the same error as before by assigning greater weight to Dr. Simpao's opinion that the September 28, 2000 pulmonary function study was valid on the sole basis that Dr. Simpao administered this test, a rationale which contravenes the holding in *Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992) and Board precedent. Employer contends that the administrative law judge's assessment of the September 28, 2000 pulmonary function study fails to comport with the Board's remand instructions because, notwithstanding his vague reference to the respective qualifications of Drs. Fino and Branscomb, the administrative law judge failed to consider their detailed explanations supporting their invalidations of this study and failed to proffer a permissible reason for finding the contrary opinions of Drs. Simpao and Burki worthy of greater weight. We disagree.

As an initial matter, the administrative law judge's weighing of the conflicting opinions concerning the validity of the September 28, 2000 pulmonary function study does not contravene either the holding in *Brinkley* or the Board's prior Decision and Order in this case. In *Brinkley*, the United States Court of Appeals for the Seventh Circuit held, "When no medical evidence is presented to contradict the evidence of invalidity, it is not rational to conclude the tests are valid." *Brinkley*, 972 F.2d at 883, 16 BLR at 2-133. Consequently, the court concluded that there was no rational basis for that administrative law judge's determination that the administering technicians' notations indicating good cooperation and comprehension were as equally probative as the consulting physicians' opinions invalidating the three qualifying pulmonary function studies because the record in that case contained no medical evidence refuting or contradicting the consulting physicians' opinions. Unlike the evidentiary record in *Brinkley* which contained only the technicians' statements of observed cooperation, the record in the instant case consists of conflicting physicians' opinions assessing the validity of the September 28, 2000 pulmonary function study including: the various opinions of Drs. Simpao, Burki, Fino, and Branscomb as well as the notations of the administering technician, Ms. Cynthia Brooks. The September 28, 2000 pulmonary function study, which yielded qualifying values, was administered by Dr. Simpao, the Director of the Miners' Respiratory Clinic in Greenville, Kentucky, who opined that the test demonstrated a moderately severe degree of restrictive airway disease and severe

degree of obstructive airway disease.[2] Director's Exhibit 14. In a consulting report dated October 14, 2000, Dr. Burki, who is Board-certified in internal medicine and pulmonary diseases, opined that this test was valid. Director's Exhibit 15. Dr. Fino, who is Board-certified in internal medicine and pulmonary diseases, and Dr. Branscomb, who is Board-certified in internal medicine each rendered consulting opinions and opined that the test was invalid. Employer's Exhibits 3, 4. Lastly, the notations of Ms. Brooks, the administering technician, reflect that claimant's effort, cooperation, and comprehension were good and that claimant tolerated the test well. Director's Exhibit 14. The administrative law judge, in accordance with the Board's remand instructions, considered the invalidations of Drs. Fino and Branscomb but, found that the opinions of Drs. Simpao and Burki, in conjunction with the comments by the administering technician, were more probative evidence of the reliability of the September 28, 2000 study than the contrary opinions of Drs. Fino and Branscomb, and as such, permissibly determined that the September 2000 study was an accurate indicator of claimant's true ventilatory function. Because the administrative law judge concluded that the September 28, 2000 pulmonary function study was valid, he rationally found that this test was sufficient to demonstrate total respiratory disability under Section 718.204(b)(2)(i). This was reasonable. *See Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986) (administrative law judge is entitled to consider the reliability of pulmonary function study evidence); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984); Decision and Order on Second Remand at 4. We, accordingly, affirm the administrative law judge's weighing of the conflicting evidence of the September 28, 2000 pulmonary function study and his determination that the preponderance of the pulmonary function study evidence was sufficient to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i) as this determination is rational, supported by substantial evidence, and contains no reversible error. *See Winchester*, 9 BLR at 1-178; *Burich*, 6 BLR at 1-1191.

Next, employer challenges the administrative law judge's weighing of the medical opinions of Drs. Pope, Simpao, and Baker pursuant to Section 718.204(b)(2)(iv) on remand. Employer argues that the administrative law judge erred in granting an automatic preference to the opinion of Dr. Pope inasmuch as he was claimant's treating physician, and in so doing, failed to mention the Sixth Circuit court's most recent decision in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), which held that opinions of treating physicians are no longer entitled to "extra"

[2] During his deposition on October 3, 2000, Dr. Simpao testified that, rather than relying on the opinion of the administering technician to determine whether a pulmonary function study is valid, he independently examines the tracings and associated data, renders this determination, and provides remarks under the interpretation section of the pulmonary function report. Director's Exhibit 30 at 10-13.

weight.[3] Employer's Brief in Support of Petition for Review at 16. Employer further asserts that the administrative law judge's crediting of Dr. Pope's opinion was irrational because this opinion lacks: any supportive documentation, a prior diagnosis of a totally disabling respiratory impairment, and any evidence that Dr. Pope possessed an enhanced ability to render a more accurate conclusion than employer's experts.

Employer is correct that the Sixth Circuit court withdrew from the suggestion that the opinions of treating physicians are automatically presumed to be correct. However, contrary to employer's allegation, the court "did not hold that deference to treating physicians is never appropriate." *Odom*, 342 F.3d at 492, 22 BLR at 2-622. Rather, the court held that, in accordance with Section 718.104(d), the administrative law judge must "analyze the nature and duration of the doctor-patient relationship along with the frequency and extent of treatment… and weigh the report of a treating physician 'against all other relevant evidence in the record'." *Williams*, 338 F.3d at 513, 22 BLR at 2-646; *see* 20 C.F.R. §718.105(d)(1)-(5). In assessing the probative value of Dr. Pope's opinion contained in his October 5, 2001 report and December 1, 2001 deposition testimony, the administrative law judge considered Dr. Pope's frequent examinations of claimant, once every six months over a period of three years and seven months and his reliance on claimant's medical history, brief cigarette smoking history, employment history, and symptomotology. Because Dr. Pope had also relied on his physical examinations of claimant, chest x-ray film abnormalities, qualifying pulmonary function studies, arterial blood gas studies, as well as his reviews of reports by Drs. Simpao and Selby, the administrative law judge, within a permissible exercise of his discretion, determined that Dr. Pope's opinion that claimant's "Class 4" impairment is totally disabling was well-reasoned and documented. Therefore, the administrative law judge rationally found that Dr. Pope's opinion was entitled to substantial weight. 20 C.F.R. §718.104(d); *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003) ("in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade."), *citing Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); Decision and Order on Second Remand at 6; Claimant's Exhibit 1; Employer's Exhibit 6. The administrative law judge found further that, while testifying during his deposition, Dr. Pope, who is Board-certified in internal, pulmonary disease, and critical care medicines,

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's last coal mine employment occurred in the state of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2. Contrary to employer's assertion, the most recent decision pronounced by the Sixth Circuit court concerning the treating physician rule is the decision in *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003), to which the administrative law judge correctly cited. Decision and Order on Remand at 6.

demonstrated an acute familiarity with claimant's medical background and current condition, which further bolstered the reliability of his opinion. This was rational. *See Odom*, 342 F.3d at 492, 22 BLR at 2-622; *Williams*, 338 F.3d at 518, 22 BLR at 2-655 (administrative law judge must consider multitude of factors that, when viewed overall, help determine whether the treating physician has offered a persuasive opinion); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Consequently, we reject employer's argument that the administrative law judge mechanically relied on Dr. Pope's disability opinion based on his treating physician status.

Employer argues that the administrative law judge erred by relying on the opinions of Drs. Baker, Simpao, and Pope that claimant is totally disabled since none of these physicians indicated any knowledge of the exertional requirements of claimant's usual coal mine work when rendering their disability assessments. Employer contends that Dr. Baker's notation that claimant was a mechanic and welder and Dr. Pope's reliance on claimant's "self-reported difficulty" performing his job are not tantamount to a finding of total respiratory disability. Employer additionally asserts that these physicians failed to provide "anything" that would enable the administrative law judge to compare their disability assessments with the physical demands of claimant's last coal mine work. We disagree.

Contrary to employer's argument, however, a review of the physicians' records reveals that the doctors were, in fact, familiar with the precise nature of claimant's usual coal mine work. In his July 21, 2001 report, Dr. Baker stated that claimant worked for twenty-eight and one-half years primarily in the surface mines as a mechanic and welder. Claimant's Exhibit 2. In his August 8, 2000 report, Dr. Simpao stated that claimant's coal mine employment career spanned a total of thirty-one years and while employed by employer, he was a mechanic. Director's Exhibits 16, 30. In his treatment records and progress notes, Dr. Pope stated that claimant worked in the strip mines until he was laid off in December 1997. Claimant's Exhibit 1. In the instant case, the administrative law judge properly found that claimant's coal mine employment career spanned a total of thirty-one years with his surface mining work as a mechanic and welder consisting of repairing heavy equipment, replacing parts, and welding. [2002] Decision and Order at 3; Hearing Transcript at 16-20. Consequently, because the positions of mechanic and welder have "a precise meaning in the context of coal mining, the administrative law judge could rationally conclude that [Drs. Baker, Simpao and Pope] understood the demands of working" as a mechanic and welder when rendering their respective opinions that claimant's respiratory impairment precluded him from performing his last coal mine work. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552 (6th Cir. 2002) (physician who finds total disability need not convey precise knowledge of exertional requirements of miner's job); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000) (physician's assessment of "mild" respiratory impairment may preclude the performance of the miner's usual duties depending on

exertional requirements of miner's usual coal mine employment); *Cross Mountain Coal Inc. v. Ward*, 93 F.3d 211, 219, 20 BLR 2-360, 2-374 (6th Cir. 1996). We, therefore, affirm the administrative law judge's crediting of the opinions of Drs. Baker, Simpao, and Pope that claimant's respiratory impairment precluded him from performing his regular coal mine work and the administrative law judge's resultant determination that claimant demonstrated total disability pursuant to Section 718.204(b)(2)(iv) as this determination is rational and supported by substantial evidence. *See Cornett*, 227 F.3d at 577, 22 BLR at 2-123; *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991) (*en banc*); Decision and Order on Second Remand at 12.[4]

Employer further argues that the administrative law judge impermissibly applied a more stringent standard to the opinions of its medical experts, Drs. Selby, Fino, and Branscomb in his evaluation of the conflicting medical opinions and improperly imposed the burden of proof to employer by requiring employer to rebut the evidence favorable to claimant. Specifically, employer avers that the administrative law judge's discrediting of the opinions of Drs. Branscomb and Fino because they failed to review each item of evidence or to explain how evidence favorable to claimant factored into their diagnoses was irrational considering his crediting of the opinions of claimant's experts since these physicians, likewise, failed to review and discuss all the relevant evidence. The administrative law judge's decision belies that contention.

The administrative law judge found that, even though Drs. Branscomb and Fino are "highly qualified" physicians and their reports "appeared quite thorough," each physician's opinion of no total disability was deficient inasmuch as each physician examined three chest x-ray interpretations that were negative, three pulmonary function studies, and the medical reports of Drs. Selby and Simpao. Because neither Dr. Branscomb nor Dr. Fino reviewed three chest x-ray interpretations that were read as positive for the existence of pneumoconiosis by equally-qualified physicians, two additional pulmonary function studies that were qualifying, or the report and deposition testimony of Dr. Pope, claimant's treating physician, when rendering their conclusions that claimant was not totally disabled, the administrative law judge determined that their opinions were based on incomplete, insufficient, and weighted information which precluded either doctor from rendering "a

[4] Employer additionally contends that Dr. Baker's opinion is insufficient to establish total respiratory disability under Section 718.204(b)(2)(iv) because it is a recommendation against further dust exposure. Employer's contention lacks merit inasmuch as Dr. Baker unequivocally opined in his August 17, 2001 supplemental report that claimant "is totally and permanently disabled for engaging in coal mining employment due to Coal Workers' Pneumoconiosis and obstructive airway disease" and "is also impaired for doing work requiring a similar amount of effort in a non-dusty occupation." Claimant's Exhibit 2.

balanced, reasoned and documented medical opinion." Decision and Order on Second Remand at 9, 11. Indeed, the Sixth Circuit court has held that when the administrative law judge "examine[s] the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," he/she must also consider any contrary test results or diagnosis in reaching a decision as to whether claimant is totally disabled. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Contrary to employer's argument, therefore, it was not irrational for the administrative law judge to discredit the opinions of Drs. Branscomb and Fino, consulting physicians who rendered opinions based on a limited review of pertinent medical records and diagnostic tests, on the basis that these physicians possessed an incomplete picture of the miner's health. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); Employer's Exhibits 3, 4. Hence, the administrative law judge's analysis constitutes a proper evaluation of the evidence and employer's arguments are rejected.

Next, we turn to employer's challenge to the administrative law judge's finding concerning disability causation pursuant to Section 718.204(c). Employer contends that the administrative law judge's determination that claimant established total disability due to pneumoconiosis lacks an explanation or rationale as the administrative law judge's entire analysis of the conflicting medical evidence is set forth in three perfunctory sentences. Employer asserts that the administrative law judge failed to engage in reasoned decision-making by applying his credibility determinations regarding the issue of total respiratory disability to the issue of disability causation since these are two independent issues requiring two separate analyses.

Employer's contention lacks merit. In both the "Narrative Medical Reports" and "Consultative Reports" sections of the Decision and Order, the administrative law judge initially noted the respective qualifications of each physician and, after identifying the underlying documentation upon which each opinion was based, he carefully analyzed whether that physician's opinion was sufficiently documented and adequately reasoned, and was therefore, entitled to any determinative weight and placed this discussion in a section entitled "Credibility Determination" for each particular opinion. Decision and Order on Second Remand at 4-12. Subsequent to this analysis, the administrative law judge rendered specific findings of fact under each applicable subsection, namely, Sections 718.204(b)(2)(iv) and 718.204(c). Decision and Order on Second Remand at 12-13. Hence, the administrative law judge did not abdicate his responsibility to determine the reliability of the evidence in three perfunctory sentences but rather, he conducted a qualitative assessment of all the medical opinions and engaged in a proper evidentiary analysis and, provided a thorough resolution of the relative weight of each medical opinion that is equally applicable and pertinent to both total respiratory disability and disability causation issues. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (*en banc*)

(McGranery, J., concurring and dissenting); *Workman v. Eastern Assoc. Coal Corp.*, 23 BLR 1-22 (2004) (*en banc*).

Finally, employer avers that the medical opinion evidence is insufficient to establish disability causation because Dr. Pope never definitively linked claimant's respiratory condition to his coal mine employment and Drs. Baker and Simpao provided conclusory opinions with bare conclusions. Essentially, employer is asking the Board to overturn the administrative law judge's credibility determinations. The Sixth Circuit court has held that a determination requiring the court to address a physician's credibility would exceed its limited scope of review. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). Furthermore, the court has categorically emphasized that it is for the administrative law judge as factfinder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility matter'." *Stephens*, 298 F.3d at 522, 22 BLR at 2-512, *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In *Stephens*, the Sixth Circuit court stated that it deferred to the administrative law judge's authority on the findings of fact. *Stephens*, 298 F.3d at 836, 22 BLR at 2-513; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Accordingly, as the administrative law judge rationally found the medical opinion evidence sufficient to demonstrate disability causation by according dispositive weight to the opinions of Drs. Pope, Baker, and Simpao, we affirm the administrative law judge's Section 718.204(c) determination. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995) (administrative law judge may treat conclusion of physician as "less significant," and thus, worthy of little probative weight, on the issue of disability causation when that physician failed to diagnose pneumoconiosis); *see Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Based on the foregoing, we affirm the administrative law judge's determinations that the medical evidence of record was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204 and that claimant is entitled to benefits. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the Decision and Order on Second Remand – Award of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge