BRB No. 04-0692 BLA

JAMES AUBREY HOPPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 03/24/2005
	)	
PEABODY COAL COMPANY	)	
	)	
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 Remand - Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (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 Remand (2001-BLA-0684) of Administrative Law Judge Robert L. Hillyard awarding benefits 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). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with thirty-one years of qualifying coal mine employment and adjudicated this claim, filed on July 27, 2000, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence established total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1), (a)(4), 718.203(b) and

718.204(b)(2), (c). Accordingly, benefits were awarded.

Employer appealed and in *Hopper v. Peabody Coal Co.*, BRB No. 02-0785 BLA (Aug. 28, 2003)(unpub.), the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1), but vacated the administrative law judge's finding that total disability was established at 20 C.F.R. §718.204(b)(2)(i) and remanded the case for the administrative law judge to provide his reasons for either crediting or discounting the conflicting opinions regarding the validity of the pulmonary function studies of record, including the opinions of the administering technicians and/or physicians, and determine whether the weight of the evidence was sufficient to establish total disability thereunder. Consequently, the Board also vacated the administrative law judge's findings that the medical opinions of record established total respiratory disability due to pneumoconiosis at 20 C.F.R. §§718.204(b)(2)(iv) and (c) 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 the support provided by its documentation, as well as the relative qualifications of the physicians. 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 determine whether the weight of the evidence establishes 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).

On remand, the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings at 20 C.F.R. §718.204(b), (c). Claimant responds, urging affirmance of the administrative law judge's Decision and Order on Remand, to which employer replies, reiterating its arguments on appeal. The Director, Office of Workers' Compensation Programs, has declined 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 applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer initially challenges the administrative law judge's finding that the pulmonary function studies of record establish total respiratory disability at Section 718.204(b)(2)(i), arguing that the administrative law judge erred in his assessment of the validity of the September 28, 2000, pulmonary function study. We agree. On remand, the administrative law judge evaluated the five pulmonary function studies of record and found that only the nonqualifying February 17, 1998, pulmonary function study and the September 28, 2000, qualifying pulmonary function studies were valid. Decision and Order at 4-6. He gave greater weight to the September 2000 pulmonary function study because it was more recent and was accompanied by the appropriate tracings and a description of claimant's cooperation and comprehension. Decision and Order at 6; Director's Exhibit 14. In assessing the validity of this study and according it "great weight supporting a finding of total disability," the administrative law judge stated that he gave greater weight to the opinion of Dr. Simpao, who administered the study, combined with the validation report by Dr. Burki, over the invalidation reports of Dr. Fino and Branscomb, who only reviewed the tracings. Decision and Order on Remand at 5; Director's Exhibits 14-15; Employer's Exhibits 3-4.

In our prior decision, we instructed the administrative law judge, on remand, to provide his reasons for either crediting or discounting the conflicting opinions regarding the validity of the pulmonary function studies of record, including the opinions of the administering technicians and/or physicians, and determine whether the weight of the evidence was sufficient to establish total disability. Slip op. at 4. Employer correctly maintains, however, that the administrative law judge did not address and weigh the invalidations by Drs. Fino and Branscomb of the September 28, 2000 pulmonary function study, but instead summarily dismissed those opinions because the doctors did not administer the test and only "reviewed the tracings at a later date." Decision and Order on Remand at 5. A reviewing doctor's opinion that a ventilatory study is unreliable because it is based on less than optimal effort must be considered by the adjudicator, *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985), and consulting physicians' opinions regarding the reliability of ventilatory studies may constitute substantial evidence for their rejection. *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). In this case, the administrative law judge has not provided permissible credibility determinations with respect to the conflicting opinions regarding the validity of the September 28, 2000, pulmonary function study. Because the administrative law judge has again rejected relevant evidence without a satisfactory explanation, *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983), we must again vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(i), and remand this case for him to provide valid reasons for either crediting or discounting the conflicting opinions regarding the validity of the September 28, 2000, pulmonary function study, and to

determine whether the weight of this evidence is sufficient to establish total disability thereunder.

Moreover, because the validity of the September 28, 2000, pulmonary function study that the administrative law judge relied upon to find total disability established at Section 718.204(b)(2)(i) may affect the weight to be accorded to each of the conflicting, physicians' opinions addressing the issue of whether claimant is totally disabled at Section 718.204(b)(2)(iv), we also vacate the administrative law judge's finding that the medical opinions of record established total respiratory disability.

Employer has raised specific allegations of error regarding the administrative law judge's weighing of the medical opinions of Drs. Pope and Fino at Section 718.204(b)(2)(iv) on remand. In the interest of judicial economy, we will address those allegations now. Employer contends that the administrative law judge improperly applied a mechanical preference for claimant's treating physician, Dr. Pope, and incorrectly declared that Dr. Pope has superior pulmonary certifications and an extended treatment history of claimant. Employer's Brief at 14. The administrative law judge was instructed on remand to reevaluate the medical opinions of record and accord each opinion appropriate weight based on the quality and persuasiveness of the doctor's reasoning and the support provided by documentation, as well as the physician's relative qualifications. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Rowe*, 710 F.2d 251, 5 BLR 2-99; Slip op. at 4. As employer alleges, although the administrative law judge declared that Dr. Pope has superior pulmonary certifications, he did not adequately explain his statement in light of his acknowledgement that Drs. Selby, Younes, Fino, Baker, and Branscomb are also Board-certified internists and/or pulmonologists. Decision and Order on Remand at 8-10. In addition, the administrative law judge failed to explain the basis of his determination, with reference to the particular aspects of the course of treatment rendered by Dr. Pope, that Dr. Pope's extended treatment of claimant entitles the doctor's opinion to enhanced weight. *Id.* With respect to Dr. Fino's opinion, employer correctly argues that the administrative law judge's rejection of the physician's opinion on the extent of impairment, solely on the basis that the physician did not diagnose pneumoconiosis, is flawed. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); Decision and Order on Remand at 10. Furthermore, employer correctly asserts that upon finding total disability established at Section 718.204(b)(2)(iv), the administrative law judge failed to follow the Board's remand instruction to weigh all like and unlike evidence together and determine whether the evidence supportive of a finding of total disability outweighed the contrary, probative

evidence at Section 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, on remand, the administrative law judge did not make a specific finding as to whether claimant's total disability is due to pneumoconiosis under Section 718.204(c). If, on remand, the administrative law judge finds total respiratory disability established, he must provide his reasons for crediting or discounting the conflicting medical opinions of record and determine whether the weight of the evidence establishes disability causation pursuant to Section 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).

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is vacated and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge