BRB No. 09-0471 BLA

RANDAL WILLIAMS (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WILLIAMS BROTHERS COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	DATE ISSUED: 04/22/2010
	)	
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 on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2005-BLA-05239) of Administrative Law Judge Janice K. Bullard, rendered on a miner's subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for the second time. In her previous Decision and Order, issued on February 26, 2007, the administrative law judge accepted the parties' stipulation that the miner had at least eighteen years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. After concluding that the claim was timely filed under 20 C.F.R. §725.308, the administrative law judge found that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Considering the claim on the merits, the administrative law judge found 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 total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's findings, that claimant established total disability pursuant to 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *R.W.* [*Williams*] *v. Williams Brothers Coal Co*., BRB No. 07-0562 BLA, slip op. at 2 n.1 (Apr. 29, 2008) (unpub.). The Board vacated, however, the administrative law judge's findings under 20 C.F.R. §§725.308, 718.202(a)(1), (4), 718.203(b) and 718.204(c). *Id*. at 3-6. The Board remanded the case to the administrative law judge with instructions to reconsider the timeliness of the subsequent claim and to consider the earlier x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). The Board also directed the administrative law judge to make a finding as to whether claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

[1] Claimant filed his initial claim for benefits on June 22, 1989, which was denied by the district director on April 25, 1990, because claimant failed to establish any elements of entitlement. Director's Exhibit 1. No action was taken with regard to the denial of that claim until a subsequent claim was filed on January 14, 2004. Director's Exhibit 3. Claimant died on April 9, 2009, subsequent to the issuance of the Decision and Order Awarding Benefits on Remand dated February 26, 2009, which is the subject of this appeal.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant's initial and subsequent claims were both filed before January 1, 2005. Director's Exhibits 1, 3.

Id. at 6. The Board further directed the administrative law judge to consider, under 20 C.F.R. §718.203(b), the medical opinions regarding the source of the opacities observed on x-ray. *Id*. Finally, the Board instructed the administrative law judge to reconsider the date of onset, if she determined that claimant established entitlement to benefits. *Id*.

On remand, the administrative law judge again found that the subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge also determined that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and the existence of legal pneumoconiosis at 20 C.F.R §718.202(a)(4). In addition, the administrative law judge found that employer did not rebut the presumption, set forth in 20 C.F.R. §718.203(b), that claimant's clinical and legal pneumoconiosis arose out of coal mine employment. Lastly, the administrative law judge found that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer alleges that the administrative law judge did not properly weigh the evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c).[3] Employer also contends that the administrative law judge erred in her evaluation of the contrary medical evidence relevant to rebuttal of the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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

[3] Employer reasserts its argument, raised in the prior appeal, that before finding the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1), the administrative law judge must address the opinions of the experts who indicated that the opacities on x-ray do not represent coal workers' pneumoconiosis. Although employer's arguments were specifically rejected by the Board, *R.W.* [*Williams*] *v. Williams Brothers Coal Co*., BRB No. 07-0526 BLA, slip op. at 5-6 (Apr. 29, 2008) (unpub.), employer wishes "to preserve the issue for any potential further appeal." Employer's Brief at 9-10.

[4] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that the claim is timely filed pursuant to 20 C.F.R. §725.308 and that claimant established the existence of clinical pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.202(a)(1). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.[5] 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).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he was totally disabled and that his disability was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

I. Existence of Legal Pneumoconiosis

A. Previously Submitted Evidence

Employer alleges that the administrative law judge erred in discrediting, pursuant to 20 C.F.R. §718.202(a)(4), the opinions in which Drs. Wright, Anderson, Williams and Broudy indicated that claimant's obstructive impairment is not related to coal dust exposure.[6] Employer's Brief at 12-16. We disagree.

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

[6] Dr. Wright examined claimant on February 22, 1986 and diagnosed a moderate obstructive and restrictive ventilatory impairment, but concluded that claimant did not suffer from any occupational lung injury, based on claimant's smoking history, physical examination and objective testing. Director's Exhibit 1. Dr. Anderson examined claimant on March 24, 1986 and diagnosed a mild obstructive ventilatory defect, but opined that claimant did not have pneumoconiosis, or any impairment caused by coal dust exposure, but had emphysema caused by smoking. *Id.* Dr. Williams examined claimant on July 12, 1989, at the request of the Department of Labor. *Id.* He noted mild to moderate "respiratory rhonchi . . . wheezing [and] expiratory rales perhaps due to intrinsic bronchitis, likely related to cigarette smoking." *Id.* Dr. Broudy examined claimant on November 1, 1989 and diagnosed chronic bronchitis with chronic airway obstruction caused by smoking, but opined that no significant pulmonary or respiratory impairment was caused by claimant's work as a coal miner based on claimant's cigarette smoking history and coal dust exposure history, along with claimant's "symptoms and pulmonary function study findings of obstructive airway disease due to cigarette smoking." *Id.*

Contrary to employer's argument, the administrative law judge acted within her discretion in finding that Dr. Wright's opinion regarding the existence of legal pneumoconiosis[7] was conclusory, as Dr. Wright did not attempt to explain how he concluded that coal dust exposure was not responsible for the "breathing problems he observed." Decision and Order at 17; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Moreover, the administrative law judge permissibly determined that Dr. Anderson's opinion regarding the presence of legal pneumoconiosis was conclusory, as he diagnosed emphysema due to smoking, but "failed to explain why coal dust exposure did not cause [c]laimant's breathing problems." Decision and Order at 13-14, 17; *see Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-113. In addition, the administrative law judge reasonably concluded that the opinions of Drs. Wright, Anderson, Williams and Broudy were not entitled to any weight because they were based upon examinations that were remote in time. Decision and Order at 17; *see Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); *Bates v. Director, OWCP*, 7 BLR 1-113 (1984); *Kendrick v. Kentland-Elkhorn Coal Co.*, 5 BLR 1-730 (1983). We affirm, therefore, the administrative law judge's decision to give no weight to the previously submitted opinions of Drs. Wright, Anderson, Williams, and Broudy on the issue of legal pneumoconiosis.

B. Newly Submitted Evidence

Employer also argues that the administrative law judge erred in her evaluation of the newly submitted medical opinions in which Drs. Fino, Broudy and Forehand addressed the existence of legal pneumoconiosis. In his April 7, 2004 report, Dr. Fino, a Board-certified pulmonologist, noted that claimant has suffered from shortness of breath for the past twenty years. Employer's Exhibit 2. He indicated that claimant worked for thirty-five years as a miner and had a forty year history of cigarette smoking. *Id*. Dr. Fino observed that claimant's pulmonary function study (PFS) showed a moderate obstructive ventilatory defect with improvement after inhalation of a bronchodilator and that claimant's blood gas study (BGS) reflected a reduced diffusing capacity. *Id*. Dr. Fino diagnosed moderate obstructive lung disease, probable bullous emphysema and interstitial disease at the bases of the lungs. *Id*.

[7] Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

In a supplemental report dated September 22, 2005, Dr. Fino again concluded that claimant has significant bullous emphysema, which is causing compression of the lung tissue at the base, and that "there may be a non-coal mine dust-related diffuse pulmonary interstitial fibrosis present." Employer's Exhibit 3. He opined that claimant has "variable hypoxemia with exercise which argues against . . . [a] coal dust-related pulmonary condition . . . ." *Id*. He concluded that claimant was "disabled from returning to his last mining job" because of his pulmonary impairments, which were unrelated to his coal mine dust inhalation and are more consistent with bullous emphysema, with the possibility of an idiopathic, non-occupational interstitial pulmonary fibrosis. *Id*.

Dr. Broudy, a Board-certified pulmonologist, testified in a deposition conducted on October 21, 2005, and stated that he treated claimant for breathing difficulties on multiple occasions from 1998 to 2003. Employer's Exhibit 4. He stated that claimant exhibited pulmonary emphysema and post-inflammatory fibrotic type changes seen on x-ray in 1998. *Id*. He opined that the emphysema on x-ray was due to smoking because smoking is "by far the most common cause of pulmonary emphysema." *Id*. He also testified that claimant's 1998 PFS showed severe obstructive airway disease and his BGSs showed mild resting arterial hypoxemia, both of which were due to smoking. *Id*. He diagnosed chronic obstructive airway disease due to cigarette smoking and chronic interstitial pulmonary fibrotic changes related to peribronchial fibrosis, also due to cigarette smoking. *Id*.

Dr. Broudy testified that claimant had an obstructive disease, which was partially reversible, and stated that "obstructive airways disease is the type of impairment that was noted on spirometry[,] and this is . . . tightly associated with cigarette smoking and would lead me to the conclusion that his impairment was due to cigarette smoking, not coal dust exposure." Employer's Exhibit 4. He also concluded that claimant's coal mine employment did not cause claimant's emphysema because "his disease really manifested itself long after he quit work," and it is very unusual for pneumoconiosis to present itself years after coal dust exposure has ended. *Id*.

Dr. Forehand, who is Board-certified in allergy, immunology, and pediatrics, examined claimant on June 29, 2004, and recorded a coal mine employment history of twenty-seven years and a thirty year smoking history. Director's Exhibit 17. Dr. Forehand reported that claimant was suffering from "progressively worsening exertional shortness of breath with any type of physical labor." *Id*. The physician further described claimant's PFS as normal and indicated that his BGS revealed exercise-induced arterial hypoxemia. *Id*. Based on these tests, along with his interpretation of claimant's x-ray, Dr. Forehand opined that claimant's shortness of breath was due to impairment of lung function. *Id*. He concluded that coal dust exposure, and not smoking, caused claimant's respiratory impairment because "[c]igarette smoking impairs lung function by inflaming and narrowing the airways, which can be measured by [PFS] and the appearance of

emphysema on chest x-ray." *Id*. Dr. Forehand excluded cigarette smoking as a cause of the impairment because claimant's PFS showed normal FEV1 levels and his chest x-ray showed no radiographic evidence of emphysema. *Id*. Dr. Forehand further noted that, "[o]n the other hand, coal mine dust exposure impairs lung function by interfering with the movement of oxygen from the lung to the blood stream and is best seen when arterial oxygen falls during exercise[,] as in [claimant's] case." *Id*.

Dr. Forehand conducted another examination of claimant on June 13, 2006 and indicated that claimant worked for thirty years as a miner. Claimant's Exhibit 6. Dr. Forehand opined that claimant's shortness of breath is caused by "a combination of his arterial hypoxemia and[,] to a lesser extent[,] by his obstructive lung disease." *Id*. He concluded that claimant "has a work-limiting[,] totally and permanently disabling respiratory impairment of an oxygen transfer nature. [Claimant's PFS] does not meet similar disability criteria." *Id*. Dr. Forehand related claimant's shortness of breath and arterial hypoxemia to the extensive scarring, or fibrosis, in claimant's lungs. *Id*. He stated that fibrosis results from smoking and from coal dust exposure, but that smoking should result in impairments seen on a PFS. *Id*. Dr. Forehand opined that claimant's PFS showed only mild abnormalities, "indicating the effects of cigarette smoking . . . are not serious or disabling." *Id*.

In considering the newly submitted opinions on the issue of legal pneumoconiosis, the administrative law judge noted that all the physicians "diagnosed [c]laimant with an obstructive respiratory impairment/disease." Decision and Order at 18. She accorded no weight to the opinion of Dr. Fino, that claimant's pulmonary impairment is unrelated to coal dust exposure, because his report was "poorly explained, and largely conclusory in nature, particularly in contrast with the report of Dr. Forehand[.]" *Id*. The administrative law judge concluded that Dr. Forehand's opinion, "that coal mine dust was the cause of [c]laimant's obstructive ventilatory defect," was "well-reasoned and well-documented, and . . . entitled to weight." *Id*. at 18-19. She assigned Dr. Broudy's opinion, "that coal mining employment was not the cause of [c]laimant's obstructive lung disease," no weight because Dr. Broudy relied on the fact that pneumoconiosis is not a latent and progressive disease and "ignore[ed] the regulatory conclusion that obstructive defects can be caused by coal mine dust." *Id*. Therefore, based on Dr. Forehand's opinion, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. at 18-19.

Employer argues that the administrative law judge should have taken into account the superior qualifications of Drs. Fino and Broudy when weighing their opinions ruling out the presence of legal pneumoconiosis. Employer's Brief at 21, 24-25, 27. Employer also contends that the administrative law judge offered no valid reasons for discounting Dr. Broudy's opinion on the issue of legal pneumoconiosis and erred in failing to

consider Dr. Broudy's status as a treating physician. These allegations of error are without merit.

Although an administrative law judge may defer to physicians with superior qualifications, he or she is not required to do so. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In addition, the administrative law judge acted within her discretion in assigning no weight to Dr. Broudy's newly submitted opinion on the issue of legal pneumoconiosis because Dr. Broudy's opinion was based on assumptions that are in conflict with the regulations. Contrary to employer's argument, the administrative law judge did not find Dr. Broudy's opinion to be "hostile" to the regulations, but rather rationally determined that it was inconsistent with the position of the Department of Labor (DOL), that pneumoconiosis is a latent and progressive disease and that obstructive defects can be caused by coal mine dust. 65 Fed. Reg. 79920, 79938, 79940 (Dec. 20, 2000); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008) (A physician's opinion, that a miner's condition was caused by cigarette smoking because miners rarely have clinically significant obstruction from coal dust, is contrary to the medical literature cited by DOL).

Moreover, the administrative law judge reasonably found that Dr. Broudy's opinion on the issue of disability causation was entitled to no weight because Dr. Broudy "dismissed pneumoconiosis as a potential contributing cause of [c]laimant's pulmonary condition in a conclusory, and therefore, unreliable fashion." Decision and Order at 20; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Because determining the credibility of the medical experts is a matter within the sound discretion of the administrative law judge, we affirm the administrative law judge's finding that the opinion of Dr. Broudy was entitled to no weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). We also hold that, in light of the administrative law judge's permissible determination that Dr. Broudy's opinion regarding the existence of legal pneumoconiosis was entitled to no weight, the administrative law judge did not err in omitting consideration of Dr. Broudy's status as a treating physician. 20 C.F.R. §718.104(d); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003).

Employer further argues that the administrative law judge erred in finding that Dr. Fino's legal pneumoconiosis opinion was "poorly explained, and largely conclusory . . . in contrast with the report of Dr. Forehand." Employer's Brief at 19-22, 27-31. Employer contends that in making these determinations, the administrative law judge

failed to consider numerous flaws in Dr. Forehand's opinion, including Dr. Forehand's reliance on the absence of emphysema on claimant's x-ray, even though other x-rays suggested the presence of emphysema, and other physicians diagnosed emphysema. *Id*. at 28 Employer also maintains that the administrative law judge should have addressed Dr. Forehand's reliance on inaccurate coal mine employment and smoking histories in finding that his opinion was better reasoned than Dr. Fino's opinion. *Id*. at 29.

These contentions have merit. In finding Dr. Forehand's opinion to be well-documented, well-reasoned and better explained than Dr. Fino's opinion on the issue of the cause of claimant's pulmonary impairment, the administrative law judge did not consider whether the physicians had an accurate understanding of claimant's smoking and coal mine employment histories. Moreover, the administrative law judge did not determine the length and extent of claimant's use of cigarettes, while she accepted employer's stipulation to at least eighteen years of coal mine employment, without making an independent finding.[8] 2007 Decision and Order at 3, 14. Because reliance on an inaccurate smoking history or coal mine employment history could undermine the credibility of Dr. Forehand's opinion, the sole support for the administrative law judge's finding of legal pneumoconiosis, we vacate her finding at 20 C.F.R. §718.202(a)(4). *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993); *Maypray v. Island Creek Coal Co*., 7 BLR 1-683 (1985).

In addition, the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), that Dr. Forehand "concluded that coal mine dust was the cause of [c]laimant's obstructive ventilatory defect," is not an accurate characterization of Dr. Forehand's opinion. Decision and Order at 18; *see* Director's Exhibit 17; Claimant's Exhibit 6. Dr. Forehand indicated in his July 13, 2006 report that claimant's "shortness of breath and arterial hypoxemia" are due to his coal dust exposure, but did not specifically identify coal dust exposure as a cause of the mild, irreversible obstructive impairment that he diagnosed, based upon claimant's pulmonary function study. Claimant's Exhibit 6. Dr. Fino attributed claimant's obstructive impairment to emphysema caused by smoking. Employer's Exhibit 2. In considering whether the medical opinion of Dr. Forehand is sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge must accurately identify the impairment diagnosed by Dr. Forehand, and his conclusion as to its etiology, and determine whether Dr. Forehand's opinion on this issue is reasoned and documented. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

[8] Dr. Fino noted a smoking history of one pack per day for forty years and a history of coal mine employment of thirty years. Employer's Exhibit 2. Dr. Forehand recorded a smoking history of one pack per day for thirty years and coal mine employment histories of twenty-seven and thirty years. Director's Exhibit 17.

On remand, in reassessing the relative weight to which the opinions of Drs. Fino and Forehand are entitled, the administrative law judge must make a finding as to the length of claimant's smoking history and determine whether the credibility of these opinions is affected by her finding. The administrative law judge must also determine the significance of the physicians' reliance on a coal mine employment history that is significantly longer than that credited by the administrative law judge. As required by the Administrative Procedure Act (APA), the administrative law judge must set forth her findings in detail, including the underlying rationales. 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 30 U.S.C. §932(a); *see Wojtowicz v. Director, OWCP*, 12 BLR 1-162 (1988).

II. Pneumoconiosis Arising Out of Coal Mine Employment

A. Legal Pneumoconiosis

In light of our decision to vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we must also vacate her determination that employer failed to rebut the presumption that claimant's obstructive impairment arose out of coal mine employment set forth in 20 C.F.R. §718.203(b). Decision and Order on Remand at 20. If the administrative law judge determines on remand that the existence of legal pneumoconiosis has been proven under 20 C.F.R. §718.202(a)(4), she need not address whether the disease arose out of coal mine employment under 20 C.F.R. §718.203(b), as this element of entitlement is subsumed in the finding of legal pneumoconiosis.

B. Clinical Pneumoconiosis

Employer contends that the administrative law judge erred in finding that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant 20 C.F.R. §718.203(b).[9] On remand, the administrative law judge noted that the Board had instructed her "to consider the 'earlier x-ray evidence and medical opinions' because they 'are also relevant to the . . . consideration of rebuttal at 20 C.F.R. §718.203(b)' . . . [and] to discuss the x-ray reading of Dr. Halbert, which is supportive of [e]mployer's position

[9] Pursuant to 20 C.F.R. §718.201(a)(1), 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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

that the presumption should be rebutted." Decision and Order at 19 (internal citations omitted). Accordingly, the administrative law judge summarized all of the x-ray interpretations and medical opinions submitted in the previous claim and noted that, in a newly submitted x-ray interpretation, Dr. Halbert read a June 29, 2004 x-ray as positive for pneumoconiosis, but stated that the opacities were not consistent with coal workers' pneumoconiosis. Decision and Order at 7-16, 19.

The administrative law judge also considered the newly submitted medical opinions of Drs. Fino, Forehand and Broudy regarding the etiology of the pneumoconiosis seen on x-ray. Dr. Fino examined claimant on March 26, 2004 and interpreted a chest x-ray as showing no opacities in the middle and upper lung fields, but suggesting bilateral middle and upper lobe bullous disease. Employer's Exhibit 2. He opined that claimant's chest x-ray also showed a fine interstitial pattern in both lower lung fields, classified as 2/1, t/t, but "[was] not consistent with simple coal workers' pneumoconiosis" because of the absence of rounded opacities and the presence of clear middle and upper lung zones. *Id*.

Dr. Forehand examined claimant on June 29, 2004 and noted that claimant's chest x-ray was positive for pneumoconiosis, classified as 1/2, t/t. Director's Exhibit 17. Dr. Forehand examined claimant a second time on June 13, 2006, and again stated that claimant's x-ray showed "chronic inhalation and retention of coal dust." Claimant's Exhibit 6. He further stated that claimant's coal dust exposure is reflected on his chest x-ray "where a mixture of 'p' type rounded opacities and 't' type linear opacities are present." Dr. Forehand explained: "[Twenty percent] of disabled coal miners with coal workers' pneumoconiosis have linear opacities on chest x-ray[,] so this finding is not surprising. Having linear opacities does not rule out coal workers' pneumoconiosis." *Id*.

In a deposition conducted on October 21, 2005, Dr. Broudy testified that he ruled out coal dust exposure as a cause of claimant's conditions because pneumoconiosis due to coal dust inhalation is seen as "small, rounded opacities in the upper zones, at least initially, and in this case[,] all we found on the x-ray[s] were some irregular opacities in the mid and lower zones." Employer's Exhibit 4.

The administrative law judge determined that the evidence from claimant's 1989 claim was entitled to no weight regarding the etiology of clinical pneumoconiosis because pneumoconiosis is a progressive disease, and the evidence submitted in conjunction with the 2004 claim is more reliable. Decision and Order at 19. The administrative law judge further found that Dr. Halbert's newly submitted x-ray report did not rebut the presumption that the pneumoconiosis seen on x-ray was due to coal dust exposure because "it is essentially cumulative evidence" and is not well-reasoned. *Id*. at 19-20. In considering the medical opinions of Drs. Fino, Forehand and Broudy, the administrative law judge found that "the evidence does not rise to the level" of

establishing that claimant's pneumoconiosis did not arise from coal mine employment because "[c]redible experts offered by [c]laimant expressed the opinion that [claimant's] pneumoconiosis arose from coal mining." *Id*. at 20.

Employer contends that, in mechanically giving less weight to the evidence from claimant's prior claim, the administrative law judge did not address the interpretations of the film dated July 12, 1989, in which Drs. Wheeler and Scott ruled out pneumoconiosis as the source of the fibrosis observed on x-ray. Both physicians concluded that the abnormalities were not consistent with pneumoconiosis and noted the presence of non-specific linear fibrosis. Director's Exhibit 1. Contrary to employer's argument, the administrative law judge acted within his discretion in finding that the x-ray evidence contained in the prior claim was entitled to no weight because these x-rays "reflect [claimant's] health and . . . medical conditions as of the date rendered, rather than as of the present time" and, therefore, are of "limited utility." Decision and Order at 19; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge rationally concluded that no weight should be given to these x-rays, as the newer x-rays "[suggest] that pneumoconiosis is present." *Id*.; *see Woodward*, 991 F.2d at 314, 17 BLR at 2-77.

Employer also argues that the administrative law judge erred in her consideration of Dr. Halbert's opinion regarding the etiology of opacities on x-ray. Employer's Brief at 16-18. We disagree. The determination of whether an opinion is sufficiently reasoned is within the discretion of the administrative law judge. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325.[10] In this case, the administrative law judge reasonably found that Dr. Halbert's opinion was not well-reasoned, and therefore, entitled to no weight, as Dr. Halbert "does not explain why s/t opacities . . . are not typical of coal workers' pneumoconiosis[.]" Decision and Order at 19-20; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325.

Employer additionally argues that the administrative law judge erred in her evaluation of the opinions of Drs. Fino, Broudy and Forehand concerning the etiology of the opacities observed on claimant's x-rays. Specifically, employer contends that the

[10] Because we affirm the administrative law judge's determination that Dr. Halbert's opinion on the etiology of opacities on x-ray is "not well[-]reasoned," any error committed by the administrative law judge in finding Dr. Halbert's opinion to be cumulative is harmless, as she cited other permissible reasons for according the opinion less weight. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

opinions of Drs. Fino and Broudy are at least as well-documented and well-supported as the opinion of Dr. Forehand and that the administrative law judge did not explain what factors made Dr. Forehand's opinion better reasoned or better supported on this issue. Employer's Brief at 21-26. Employer also alleges that the administrative law judge failed to explain why Dr. Forehand's citation to a particular epidemiological study rendered his opinion more credible. *Id*. at 30-31. In addition, employer maintains that the administrative law judge should have credited the opinions of Drs. Fino and Broudy, based upon their superior qualifications and Dr. Broudy's treatment history with claimant. *Id*. at 25, 27. Employer's contentions are without merit.

The administrative law judge reasonably determined that Dr. Forehand's opinion, "that . . . while [c]laimant's presentation may be atypical (with irregularly shaped opacities in the lower portions of the lung)[,] it is not impossible" because "twenty percent of coal miners with coal workers' pneumoconiosis have irregular opacities on their chest x-rays," is at least as credible as the contrary opinions of Drs. Fino and Broudy. Decision and Order at 20, citing Claimant's Exhibit 6 at 2; *see Napier*, 301 F.3d 703, 22 BLR 2-537; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Accordingly, the administrative law judge properly found that employer did not rebut the presumption at 20 C.F.R. §718.203(b). *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. In addition, contrary to employer's argument, the administrative law judge was not required to defer to the opinions of Drs. Fino and Broudy based upon their qualifications.[11] *See Worley*, 12 BLR at 1-23. Accordingly, we affirm the administrative law judge's finding that the evidence was insufficient to rebut the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

III. Total Disability Due to Pneumoconiosis

Because we have vacated the administrative law judge's finding, under 20 C.F.R. §718.202(a)(4), that claimant's obstructive impairment was related to coal dust exposure, we also vacate her determination that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). On remand, the administrative law judge

[11] We decline to address employer's assertion that the administrative law judge should have taken Dr. Broudy's status as a treating physician into account, as employer has not explained how the factors set forth in 20 C.F.R. §718.104(d) render Dr. Broudy's opinion regarding the source of the opacities observed on x-ray more credible than the opinions of the other physicians. *See Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director*, OWCP, 6 BLR 1-107, 1-109 (1983).

must reconsider this issue in light of her findings at 20 C.F.R. §718.202(a)(4). In addition, when addressing the issue of disability causation at 20 C.F.R. §718.204(c), the administrative law judge must determine whether claimant has established that he is totally disabled due to either clinical or legal pneumoconiosis, or a combination of the two. Finally, the administrative law judge must set forth her findings in detail, including the underlying rationales, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.[12]

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[12] Claimant's counsel submitted an attorney fee petition requesting payment for services performed before the Board. Employer filed a response in which it asserts that counsel did not comply with 20 C.F.R. §802.203 in drafting his petition. We decline to address the fee petition at this stage in the proceedings, as the extent of counsel's success in prosecuting the claim has yet to be determined. 20 C.F.R. §802.203; *see Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993) (*en banc*) (Brown, J., concurring); *Markovich v. Bethlehem Steel Corp.*, 11 BLR 1-105 (1987).