

BRB No. 12-0341 BLA

TERRY HAYTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACK DIAMOND CONSTRUCTION	)	DATE ISSUED: 04/30/2013
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (05-BLA-05744) of Administrative Law Judge Pamela J. Lakes rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).<sup>1</sup> This case is before the Board for the second time.

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<sup>1</sup> Because claimant's application for benefits was filed on November 20, 2002, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, and affect claims filed after January 1, 2005, do not apply to the instant case.

In her initial Decision and Order, the administrative law judge found that claimant worked for employer as a miner, credited claimant with 15.1 years of coal mine employment, and determined that employer is the responsible operator. Considering the merits of the claim, the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). The administrative law judge found, however, that claimant established the existence of legal pneumoconiosis,<sup>2</sup> in the form of obstructive lung disease due, in part, to coal mine dust exposure, based on the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the evidence together, the administrative law judge found that the existence of legal pneumoconiosis was established pursuant to Section 718.202(a). Further, the administrative law judge found that claimant is totally disabled by a respiratory or pulmonary impairment that is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge for further consideration of the relevant medical opinion evidence. *Hayton v. Black Diamond Construction Co.*, BRB No. 10-0347 BLA (Mar. 24, 2011)(unpub.). Initially, the Board affirmed the administrative law judge's findings that claimant was a miner within the meaning of the Act, and that employer was the properly named responsible operator.<sup>3</sup> *Id.*, slip op. at 4, 5. Further, while affirming some of the administrative law judge's conclusions regarding her weighing of the medical opinion evidence,<sup>4</sup> the Board

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<sup>2</sup> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "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).

<sup>3</sup> The Board also affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *Hayton v. Black Diamond Construction Co.*, BRB No. 10-0347 BLA, slip op. at 2 n.3 (Mar. 24, 2011)(unpub.).

<sup>4</sup> The Board rejected employer's request that, because the administrative law judge did not credit the opinion of Dr. Mullins, the physician who provided the Department of Labor sponsored examination, the case should be remanded to the district director to provide claimant with a complete pulmonary evaluation. *Hayton*, slip op. at 7. Additionally, the Board rejected employer's contention that the administrative law judge erred in finding Dr. Rasmussen well-qualified in light of his lack of certification in pulmonary diseases. The Board held that the administrative law judge considered this issue and found that the lack of certification was not dispositive in light of Dr.

nonetheless vacated the administrative law judge's finding that the medical opinion evidence was sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). The Board remanded the case to the administrative law judge to reconsider the relevant medical opinion evidence, specifically the conflicting medical opinions of Drs. Rasmussen, Bellotte and Zaldivar.<sup>5</sup> *Id.*, slip op at 8-10. In light of its decision to vacate the administrative law judge's finding of legal pneumoconiosis pursuant to Section 718.202(a)(4), the Board also vacated the administrative law judge's disability causation finding pursuant to Section 718.204(c), and instructed the administrative law judge, if reached on remand, to reconsider that issue. *Id.*, slip op. at 10.

Reconsidering the medical opinion evidence on remand, the administrative law judge clarified her prior findings and provided further explanation for her conclusion that Dr. Rasmussen's opinion was the most persuasive medical opinion and why she found it entitled to determinative weight on the issue of legal pneumoconiosis.

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Rasmussen's experience. *Id.* Similarly, the Board rejected employer's contention that the administrative law judge erred in not considering Dr. Bellotte to be one of the miner's treating physicians, holding that the administrative law judge rationally found that Dr. Bellotte's treatment was only incidental and that it did not form the basis for Dr. Bellotte's opinion. *Id.*

<sup>5</sup> Dr. Rasmussen, based on his examination of claimant and objective testing, as well as his review of the medical evidence of record, opined that claimant suffers from legal pneumoconiosis, in the form of chronic obstructive pulmonary disease and emphysema caused, in part, by coal mine dust exposure. Claimant's Exhibits 4, 7, 13, 14. Dr. Rasmussen also opined that claimant does not retain the pulmonary capacity to return to his coal mine employment. Further, Dr. Rasmussen noted that, in addition to claimant's smoking history and coal mine dust exposure, asthma could also be one possible contributor to claimant's lung disease, but that asthma alone would not produce a significant gas exchange impairment and, therefore, was inconsistent with claimant's lung disease. Claimant's Exhibit 14. Dr. Bellotte, based on his examination of claimant and review of the additional medical evidence, opined that claimant's respiratory impairment was due to both his smoking history and asthma, as his asthmatic condition was not properly controlled by his medication. Employer's Exhibits 9, 18. Dr. Bellotte opined that claimant's pulmonary condition was not due to black lung, or exposure to asbestos or silica dust. *Id.* Dr. Zaldivar, who also based his opinion on his examination of claimant, objective testing and his review of additional evidence of record, diagnosed asthma and smoking-related emphysema. Employer's Exhibit 10; Hearing Transcript at 101-178. Dr. Zaldivar also stated that he found no evidence of pneumoconiosis, caused either by coal mine dust or other occupational dust exposure. *Id.*

Incorporating her prior findings and analysis, as well as her current review of the evidence, the administrative law judge again found the medical opinion evidence sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). Additionally, noting that the Board found no errors with her prior finding, that disability causation was established pursuant to Section 718.204(c), she reaffirmed that finding and again found that claimant established entitlement to benefits.

On appeal, employer contends that the administrative law judge erred in failing to follow the Board's remand instructions and, therefore, argues that the award of benefits must be vacated. Specifically, employer contends that the administrative law judge failed to provide a detailed explanation for her conclusions and the weight she accorded the relevant evidence. Employer further contends that "administrative gridlock" has occurred and requests that the case, on remand, be assigned to a different administrative law judge. In response, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, does not respond to the appeal.

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.<sup>6</sup> 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 establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *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).

After considering the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we hold that the Decision and Order of the administrative law judge is rational, supported by substantial evidence, and in accordance with law. Contrary to employer's contention, the administrative law judge sufficiently addressed the Board's remand instructions. Further, within a reasonable exercise of her discretion as trier-of-fact, the administrative law judge determined that claimant established legal pneumoconiosis pursuant to Section

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<sup>6</sup> As claimant was last employed in the coal mining industry in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibits 4, 7.

718.202(a)(4), as well as disability causation pursuant to Section 718.204(c). She, therefore, found that claimant has established entitlement to benefits.

In challenging the administrative law judge's Decision and Order on Remand, employer contends that the administrative law judge erred in failing to follow the Board's remand instructions and, therefore, argues that the case must be remanded to the administrative law judge for further consideration of the evidence. Specifically, employer contends that the administrative law judge's discussion of the issues on remand either fails to reach a specific conclusion, fails to resolve the conflicting evidence, or fails to reach conclusions that are supported by substantial evidence.

The administrative law judge, in considering the conflicting medical opinion evidence, addressed the relevant issues noted by the Board in its remand instructions and clarified her prior findings. Specifically, the administrative law judge, in weighing the medical opinion evidence, considered the underlying documentation and the rationale considered by each of the physicians, including, *inter alia*, claimant's various occupational dust exposures, his smoking and medical histories, as well as his objective testing. Addressing the Board's specific concerns, the administrative law judge clarified her prior findings concerning claimant's mixed dust exposures.<sup>7</sup> The administrative law judge found that Dr. Rasmussen's opinion best addressed claimant's mixed dust exposure because the physician fully discussed the impact of claimant's various occupational dust exposures, including silica, as well as coal mine dust, on claimant's pulmonary condition, whereas Drs. Bellotte and Zaldivar did not adequately take the additional occupational dust exposures into consideration. Decision and Order on Remand at 4. Similarly, the administrative law judge expounded on the significance of the pattern of claimant's dust exposure, more fully discussing the contrary testimony of Drs. Bellotte and Zaldivar in contrast to that of Dr. Rasmussen. *Id.* at 4-6.

The administrative law judge also clarified her prior findings with regard to claimant's smoking history and the conflicting diagnoses of the presence or absence of asthma in the record. Specifically, the administrative law judge found that a review of the record indicates that the medical experts are not certain about the presence or absence of asthma in claimant. The administrative law judge found, however, that whether asthma co-exists with claimant's chronic obstructive pulmonary disease (COPD)/emphysema is not dispositive, as it does not preclude a finding that claimant's coal dust exposure is a contributing or aggravating factor to claimant's

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<sup>7</sup> The record reflects that claimant was exposed to multiple types of occupational dusts, including coal mine dust, silica and asbestos, both prior to and during his coal mine employment. Decision and Order on Remand at 3-4.

COPD/emphysema.<sup>8</sup> See 20 C.F.R. §718.102(b); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-173 (4th Cir. 2000); Decision and Order on Remand at 6-7. Likewise, the administrative law judge found that, because all of the varied smoking histories referenced by the physicians were considered to be “significant,” she did not consider the discrepancies in the histories to be a basis for discrediting any of the opinions. See *Compton*, 211 F.3d at 207-08, 22 BLR at 2-168; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); Decision and Order on Remand at 7. Consequently, the administrative law judge again found that Dr. Rasmussen’s opinion that claimant’s COPD was due to both his smoking and coal mine dust exposure was most consistent with claimant’s occupational and social histories and was, therefore, entitled to determinative weight over the contrary opinions of Drs. Bellotte and Zaldivar.<sup>9</sup>

In light of the discretion ascribed to the administrative law judge, as trier-of-fact, to determine the weight and credibility of the medical experts, see *Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997), and to assess the evidence of record and draw her own conclusions and inferences therefrom, see *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), we affirm the administrative law judge’s finding that Dr. Rasmussen’s opinion is more persuasive than the opinions of Drs. Bellotte and Zaldivar. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Additionally, because the administrative law judge has addressed the specific issues identified by the Board as requiring reconsideration, and her findings are within a reasonable exercise of her discretion, we affirm them. See *Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192. We, therefore, affirm the administrative law

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<sup>8</sup> To establish legal pneumoconiosis, claimant need only prove that his chronic obstructive pulmonary disease is “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b). There is no requirement that coal mine dust exposure be the sole cause of claimant’s respiratory or pulmonary problems.

<sup>9</sup> In particular, the administrative law judge rationally assigned less weight to the opinions of Drs. Zaldivar and Bellotte because she was not able to accurately evaluate the extent to which they relied on evidence outside the record. See *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(en banc); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff’d on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting); Decision and Order on Remand at 6.

judge's finding that claimant has established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

We also affirm the administrative law judge's finding that claimant has established disability causation pursuant to Section 718.204(c), based on her finding that Dr. Rasmussen's opinion is best supported by the underlying documentation in this case. *See Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192. Because the administrative law judge found the evidence sufficient to establish legal pneumoconiosis, a finding contrary to the opinions of Drs. Bellotte and Zaldivar, the administrative law judge permissibly accorded determinative weight to the opinion of Dr. Rasmussen. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge