U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0354 BLA

JAMES E. LYLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENERGY WEST MINING COMPANY	)	DATE ISSUED: 04/24/2018
	)	
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 Awarding Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits, rendered by Administrative Law Judge Lee J. Romero, Jr. on a miner's claim filed on June 27, 2011, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with twenty-eight years of underground coal mine employment, based on the stipulation of the parties. He also found that claimant had a totally disabling respiratory or pulmonary impairment and,

therefore, invoked the rebuttable presumption of total disability due to pneumoconiosis.[1] The administrative law judge found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total disability based on the blood gas study and medical opinion evidence. Employer also asserts that the administrative law judge erred in finding that it did not rebut the presumed existence of legal pneumoconiosis or total disability causation. Claimant responds, urging an affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Invocation of the Presumption – Total Disability

The regulations provide that a miner will be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability using any of four types of evidence: pulmonary function study evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). If an administrative law judge finds that total disability has been established under one or

[1] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had twenty-eight years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[3] The record reflects that the miner's last coal mine employment was in Utah. Director's Exhibit 4. Accordingly, we will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

more subsections, he or she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge determined that claimant "overwhelmingly" established total disability at 20 C.F.R. §718.204(b)(2)(ii) because both of the blood gas studies had qualifying values. Decision and Order at 10, 27-28; Director's Exhibits 11, 32. Evaluating the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially stated that claimant's most recent position as a "beltman" required him to perform various jobs, including moving belts and lifting a roller and dust bags, which constituted "heavy labor." Decision and Order at 28-29. The administrative law judge then found that claimant established total disability under this prong based solely on Dr. Gagon's medical report.[4] *Id*. at 28-33. Weighing the evidence as a whole, the administrative law judge ultimately determined that claimant established total disability at 20 C.F.R. §718.204(b)(2).[5] *Id*. at 33.

Employer argues that the administrative law judge erred in failing to adequately consider the medical opinions explaining that the qualifying blood gas study values are actually normal at the altitude performed.[6] We reject employer's argument.

The administrative law judge considered the testimony of Drs. Gagon and Farney that claimant's blood gas study values are normal based on altitude, Decision and Order at 30-31, and acted within his discretion in rejecting their opinions because the standards in

[4] Dr. Gagon stated that claimant had a "mild/mod[erate] impairment with [shortness of breath] walking [less than half a] mile [and] abnormal blood gases." Director's Exhibit 11.

[5] The administrative law judge found that claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii), as none of the pulmonary function studies are qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 9, 27-28; Director's Exhibits 11, 32.

[6] During Dr. Gagon's October 5, 2012 deposition, he testified that the blood gas study values obtained on the September 8, 2011 study were within a normal range and that claimant could return to his most recent coal mine employment. Employer's Exhibit 5 at 15-17; Director's Exhibit 11. Similarly, Dr. Farney testified during his May 10, 2016 deposition that the blood gas study values are within normal limits based on tables developed by Drs. Crapo and Morris. Employer's Exhibit 11 at 25-26.

Appendix C are already adjusted for age and altitude.[7] We therefore affirm his finding that the blood gas study evidence is qualifying and establishes total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990); Decision and Order at 27-28.

We also reject employer's assertions concerning the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Employer contends that the administrative law judge erred in crediting Dr. Gagon's written report, based on his initial view of the qualifying blood gas study, when Dr. Gagon retracted his diagnosis of a disabling respiratory impairment in his subsequent deposition. Employer asserts that the administrative law judge did not rationally explain why he discredited Dr. Gagon's deposition testimony, especially given that it is consistent with Dr. Farney's opinion that the pulmonary function and blood gas studies are within normal limits for claimant's age, gender and the elevation at which the studies were performed.

Contrary to employer's contention, the administrative law judge permissibly gave "probative weight" to Dr. Gagon's written opinion but little weight to his testimony. There is no inconsistency in the administrative law judge's reasoning. The diagnosis of a disabling impairment in Dr. Gagon's report reflects the administrative law judge's determination that the blood gas studies Dr. Gagon relied on are qualifying, while his testimony is based on the rejected view that these studies are normal. For the reasons explained above, those conclusions are reasonable. The administrative law judge therefore acted within his discretion in relying on the written report that accepted that view, while discrediting the testimony that contradicted it. *See Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1217, 24 BLR 2-155, 2-164 (10th Cir. 2009); *see also Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 F. App'x. 551, 2004 WL 720254 (4th Cir. Apr. 5, 2004)

[7] The regulation at 20 C.F.R. §718.204(b)(2)(ii) provides, "[i]n the absence of contrary probative evidence," arterial blood-gas values that are equal to or less than those set forth in Appendix C "shall establish a miner's total disability." 20 C.F.R. §718.204(b)(2)(ii). Regarding comments received before the final version of Appendix C was promulgated, the Department of Labor (DOL) acknowledged that altitude affects arterial blood-gas values, but explained that there is not a "straight-forward linear lowering of arterial blood oxygen tension as the oxygen pressure in the atmosphere decreases with altitude." 45 Fed. Reg. 13,678, 13,712 (Feb. 29, 1980). Consequently, the DOL adopted a sliding scale that designated three levels of altitude. *Id*. The DOL also changed the tables of Appendix C to establish a level of arterial oxygen tension below which a miner can be considered to be disabled regardless of age. *Id*. Therefore, the values set forth in Appendix C were determined by the DOL after consideration of elevation and the advanced age of many miners filing claims for benefits.

(unpub.) (upholding the administrative law judge's discrediting of a doctor's opinion which contradicts Appendix C); Decision and Order at 31.

Moreover, the administrative law judge further permissibly discredited Dr. Gagon's testimony because he did not attempt to explain the basis for changing his conclusion.[8] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-334 n.9 (4th Cir. 1998) (an administrative law judge may choose to discredit an opinion that lacks a thorough explanation); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988) (the administrative law judge properly discredited a physician's opinion as unreasoned as the doctor failed to explain changes in his conclusions contained in his initial report and those revealed during

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[8] Dr. Gagon testified:

> Q: There's also [a] resting blood gas study done. Why was he not exercised? Was there a medical contraindication to exercise?
>
> A: I don't see a medical reason that he wasn't exercised. I'm not sure why he wasn't exercised in this case. The respiratory therapist who did the test wrote that he didn't meet the exercise requirements, and I'm not sure what those requirements are that he wasn't exercised.
>
> Q: Okay. Altitude here at Price is what? Almost 6,000 feet?
>
> A: Yes.
>
> Q: Barometric pressure on the day that he was tested was 630.
>
> A: Okay.
>
> Q: There's a normal range listed for the PCO2 and the PO2. He fell within the normal range on both his PCO2 and his PO2?
>
> A: Yes.
>
> Q: So this was a normal resting blood gas study for Price?
>
> A: Yes.

Employer's Exhibit 5 at 15-16. Rather than attempting to reconcile this testimony with Dr. Gagon's previous view, employer's counsel simply moved to another line of questioning. *Id.*

subsequent deposition); Decision and Order at 31. The administrative law judge thus rationally determined that Dr. Gagon's opinion in his written report that claimant's blood gas tests are "abnormal" and that claimant had a moderate impairment that prevented him from walking less than a half a mile without shortness of breath would prevent him from performing the heavy labor his job required. *See, e.g., Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000) (administrative law judge may reasonably compare a physician's opinion expressed in terms of physical limitations with the exertional requirements of a miner's usual coal mine work); *Poole v. Freeman Mining Co*, 897 F.2d 888, 894, 13 BLR at 2-348, 2-356 (7th Cir. 1990) (a medical opinion may support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that a miner is unable to do his last coal mine job.).

Finally, we reject employer's argument that the administrative law judge erred in according little weight to Dr. Tomashefski's opinion. Dr. Tomashefski similarly failed to adequately explain the fundamental shift in his primary conclusion. In his initial January 3, 2014 report, Dr. Tomashefski stated that claimant is "totally disabled by his chronic lung disease." Employer's Exhibit 6. In his supplemental March 17, 2014 report, however, Dr. Tomashefski explained that his initial opinion was based on claimant's "self[-]description in the Miner's Claim for Benefits form in which he describes use of a scooter, oxygen, confusion due to lack of oxygen, and incapacitation due to breathing problems." Employer's Exhibit 8. Dr. Tomashefski stated that it was now his opinion that claimant does not have a totally disabling respiratory or pulmonary impairment based, in part, on "clarification in the records that [claimant's] supplemental oxygen use is mainly during sleep (related to sleep apnea)[.]" *Id*.

As the administrative law judge permissibly found, Dr. Tomashefski did not explain his opinion in light of the qualifying blood gas studies and he erred in concluding that claimant used supplemental oxygen only while sleeping: claimant's treatment records indicate that he was prescribed "lifetime" use of oxygen fourteen to twenty hours a day.[9]

[9] On discharge instructions, dated October 4, 2012, it states that "[t]he patient's hypoxia cannot be treated effectively so I have discussed oxygen with the patient/guardian and ordered home oxygen: Oxygen at 2 LPM (To be used continually), Mode/Delivery device (Nasal cannula), Expected length of therapy (Lifetime) . . . ." Claimant's Exhibit 2 at 167. On October 21, 2012, Dr. Carr observed that "[a]t this point I do not believe [claimant] needs to have oxygen when at rest but I have told him to continue to use 1 liter as needed with ambulation and activity. When he sees Dr. Cahill back in follow[]up she can double check the values that I had today and make sure that it is safe to stop oxygen at that point." *Id*. at 163. On August 5, 2014, Dr. Cahill noted that claimant estimated that he is wearing his oxygen for approximately fourteen hours a day and stated that she "encouraged [claimant] to try and wear his oxygen at a minimum of [twenty] hours per day

See Northern Coal Co. v. Director, OWCP [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); Decision and Order at 31; Claimant's Exhibits 1, 2; Employer's Exhibit 8. Consequently, we affirm the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), based on Dr. Gagon's written report.[10] Decision and Order at 33. We further affirm the administrative law judge's conclusions that claimant established total disability at 20 C.F.R. §718.204(b)(2) based on a weighing of the evidence as a whole and properly invoked the rebuttable Section 411(c)(4) presumption.

II. Rebuttal of the Presumption

A. Existence of Legal Pneumoconiosis

When a claimant has invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[11] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer rebutted the presumed existence of clinical pneumoconiosis but failed to establish that the miner did not have legal pneumoconiosis or that it played no part in his disability.

. . . ." *Id*. at 112. In addition, at the hearing, claimant testified that he is supposed to be using oxygen sixteen hours a day. Hearing Transcript at 16.

[10] Employer does not challenge the administrative law judge's discrediting of Dr. Farney's opinion on the basis that Dr. Farney did not offer a clear opinion as to whether claimant has a totally disabling respiratory or pulmonary impairment due to any cause. Decision and Order at 30. We, therefore, affirm it. *See Skrack*, 6 BLR at 1-711.

[11] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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." 20 C.F.R. §718.201(a)(1).

In order to disprove the existence of legal pneumoconiosis, employer must show by a preponderance of the evidence that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 1-159. Employer argues that the opinions of Drs. Farney and Tomashefski are sufficient to rebut the presumed existence of legal pneumoconiosis and that the administrative law judge erred in rejecting their opinions. We disagree. The administrative law judge accurately found that to exclude a contribution from coal dust, Dr. Farney relied on his belief that claimant's work at the mine was performed during the "down shift" when coal extraction was not being performed. Decision and Order at 40; Director's Exhibit 32. At the hearing, claimant testified that he was a belt man for five years on the "graveyard maintenance shift" and agreed that there was limited coal production going on at that time. Hearing Transcript at 19. Claimant also testified, however, that for the first fifteen years of coal mine employment, he was a shear operator, which regularly exposed him to coal dust.[12] Therefore, the administrative law judge permissibly gave less weight to Dr. Farney's opinion for relying on inaccurate assumptions concerning the extent of claimant's exposure to coal dust. *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; Decision and Order at 40.

In addition, the administrative law judge permissibly gave less weight to Dr. Farney's opinion because he stated that coal workers' pneumoconiosis rarely occurs in Utah, but he did not explain how this statement applied to the specific facts of the current case.[13] *See Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-

[12] The administrative law judge found that:

> [T]he record establishes that, although [c]laimant worked the "downshift" for the last five years of his coal mine employment, he worked for the preceding [twenty-three] years during actual coal mine extraction. Specifically, [c]laimant testified that he worked near the shearing machine at the face, which was "very dusty."

Decision and Order at 40. Claimant testified that his work required him to "[b]e in the coal dust, run up and down, pulling props, the top – the shields that hold the top up as the shear came by." Hearing Transcript at 14.

[13] Dr. Farney stated: "[g]iven that the prevalence of [coal workers' pneumoconiosis] in the western United States is relatively low, the likelihood of [claimant] developing [coal workers' pneumoconiosis] or [chronic obstructive pulmonary disease] due to coal dust inhalation from his work would be low." Director's Exhibit 32.

46, 25 BLR 2-549, 2-568 (10th Cir. 2014);[14] *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-59; Decision and Order at 41. Moreover, Dr. Farney did not adequately explain why his diagnosis of usual interstitial pneumonia excluded any contribution from coal dust exposure.[15] *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-59; Decision and Order at 41. Similarly, the administrative law judge permissibly gave less weight to Dr. Tomashefski's opinion, as he did not sufficiently explain why coal dust could not have contributed to the constrictive bronchiolitis and interstitial fibrosis that he diagnosed.[16] *Id*. Thus, we affirm

[14] Employer argues that "[*Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-46, 25 BLR 2-549, 2-568 (10th Cir. 2014)] is inapposite" because "Dr. Farney had mountains of relevant evidence supporting his assessment and diagnosis including a lung biopsy." Employer's Brief at 43-44. However, similar to *Goodin*, Dr. Farney in this case relied on a generalization to determine that claimant's risk of developing a respiratory impairment due to coal dust is low.

[15] Dr. Farney acknowledged that, based on claimant's coal mine employment history, "he would appear to have a substantial risk for developing pulmonary disease related to coal dust exposure." Director's Exhibit 32. However, Dr. Farney further stated:

> [T]here is insufficient evidence to conclude that he has any respiratory condition significantly related to, or substantially aggravated by exposure to coal dust. [Claimant] has a history of chronic non-productive cough, abnormal physical findings on the chest examination (i.e. fine inspiratory crackles) and radiographic abnormalities characterized principally by bilateral heterogeneous subpleural irregular interstitial fibrosis. These findings are most consistent with the diagnosis of "usual interstitial pneumonia (UIP)" or possibly non-specific interstitial pneumonitis (NSIP), neither of which are caused by or associated with coal dust exposure.

Director's Exhibit 32.

[16] Dr. Tomashefski observed:

> The cause of constrictive bronchiolitis and interstitial fibrosis is not determined histologically. The differential diagnosis includes underlying collagen vascular disease, chronic hypersensitivity pneumonitis, toxic inhalational lung injury, pulmonary drug toxicity, or a combination of idiopathic pulmonary fibrosis and constrictive bronchiolitis. Within reasonable medical certainty, neither the constrictive bronchiolitis nor the UIP pattern of interstitial fibrosis identified in [claimant's] lung biopsy specimens is the result of coal[]workers' pneumoconiosis, mineral dust-

the administrative law judge's determination that employer did not rebut the existence of legal pneumoconiosis and, therefore, did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i).[17] *See Minich*, 25 BLR at 1-154-56.

B. Total Disability Causation

Pursuant to 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge determined that employer is also unable to establish rebuttal by showing that the miner was not totally disabled due to pneumoconiosis. Decision and Order at 44. Employer raises no separate allegations of error with respect to the administrative law judge's finding that employer failed to disprove the presumed causal relationship between claimant's total disability and pneumoconiosis. We therefore affirm the administrative law judge's determination that employer failed to rebut the presumption by establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we further affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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related small airways disease, or diffuse interstitial fibrosis due to coal dust exposure.

Employer's Exhibit 6.

[17]We need not address employer's arguments concerning rebuttal of the presumed existence of clinical pneumoconiosis, as the party opposing entitlement must establish that claimant does not have legal pneumoconiosis *and* clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring:

I agree with my colleagues' decision to affirm the award of benefits, with the exception of their decision to affirm the administrative law judge's crediting of Dr. Gagon's alleged diagnosis of a totally disabling respiratory or pulmonary impairment. To be clear, I would still affirm the administrative law judge's finding that claimant established total disability and entitlement to benefits, but through an alternative rationale.

I believe that employer is correct in alleging that the administrative law judge did not sufficiently explain, in violation of the Administrative Procedure Act,[18] his decision to rely on Dr. Gagon's written medical opinion over his subsequent deposition testimony. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 31. However, employer concedes that the two blood gas studies of record are qualifying based on the standards in Appendix C to 20 C.F.R. Part 718 and does not explain why the Department of Labor standards, which are adjusted for altitude, should be disregarded. Employer's Brief at 24. Because the administrative law judge rationally discredited the contrary probative evidence in the form of Dr. Gagon's deposition testimony and the medical opinions of Drs. Farney and Tomashefski, the two qualifying blood gas studies of record established claimant's total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 31. Accordingly, any error by the administrative law judge in crediting Dr.

[18] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Gagon's written opinion is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge again did not sufficiently explain his decision to give more weight to Dr. Gagon's initial report diagnosing legal pneumoconiosis, over his conflicting deposition testimony. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 39. However, this error is also harmless because employer failed to meet its burden of establishing rebuttal. *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-278.

RYAN GILLIGAN
Administrative Appeals Judge