**U.S. Department of Labor**

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

BRB No. 18-0274 BLA

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| RONALD L. DILLSWORTH | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| VIKING COAL COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND | ) | DATE ISSUED: 04/24/2019 |
| | ) | |
| 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 of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC) Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2017-BLA-5467) of Administrative Law Judge Natalie A. Appetta, awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on June 19, 2015.[1]

The administrative law judge found that because the evidence did not establish the existence of complicated pneumoconiosis, claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Because the administrative law judge credited claimant with eight years and eleven months of coal mine employment,[2] she also found claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant could establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found the evidence established the existence of both clinical pneumoconiosis[4] and legal pneumoconiosis,[5] in the form of obstructive lung disease and chronic bronchitis caused by coal mine dust exposure. 20 C.F.R. §718.202(a). The administrative law judge therefore

[1] Claimant's prior claim, filed on April 10, 2008, was finally denied by the district director on November 7, 2008 because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis where the evidence establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] "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).

[5] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is *significantly* related to, or *substantially* aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). (emphasis supplied)

found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). After accepting the parties' stipulation that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that claimant established that his totally disabling pulmonary impairment is due to legal pneumoconiosis. 20 C.F.R. §718.204(c). Accordingly, she awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established clinical and legal pneumoconiosis. Employer also argues that the administrative law judge erred in finding that claimant's total disability is due to legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. 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).

To be entitled to benefits under the Act, claimant must establish that he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his totally disabling impairment is due to pneumoconiosis. 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 an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

We decline to address employer's initial contention that the administrative law judge erred in finding that the CT scan evidence established the existence of clinical pneumoconiosis. Employer's Brief at 8-11. The administrative law judge accurately noted the only physicians to submit medical reports, Drs. Allen and Fino, did not diagnose clinical pneumoconiosis. Decision and Order at 15; Director's Exhibits 12, 27, 29. Thus, no physician opined that clinical pneumoconiosis played any role in claimant's disability. The regulations require that the cause of a miner's total disability "shall be established by means of a physician's documented and reasoned medical report." 20 C.F.R. §718.204(c)(2). As a result, the existence of clinical pneumoconiosis is immaterial because claimant cannot establish causation on this record. Error, if any, in the administrative law judge's finding of clinical pneumoconiosis is therefore harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 12 BLR 1-1276, 1-1278 (1984).

Employer next argues that the administrative law judge erred in finding that the medical opinion evidence established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). To establish legal pneumoconiosis, claimant must demonstrate that he has 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). In addressing this issue, the administrative law judge considered the opinions of Drs. Allen and Fino. In her initial report dated October 2, 2015, Dr. Allen diagnosed legal pneumoconiosis, in the form of obstructive lung disease and chronic bronchitis due to coal mine dust exposure and cigarette smoking. Director's Exhibit 12. Dr. Allen identified coal mine dust exposure as a "major contributor" and cigarette smoking as a "minor contributor." *Id.*

In a report dated March 29, 2016, Dr. Fino diagnosed "very severe pulmonary emphysema." Director's Exhibit 27. Based upon the "histories of exposure," Dr. Fino excluded coal mine dust and cigarette smoking as causes of claimant's emphysema, noting that he found no objective evidence that they were significant contributing factors. *Id.* Because claimant was only fifty-seven years old, Dr. Fino indicated that he would "strongly consider the possibility" of an alpha-1 antitrypsin[6] deficiency as the cause of claimant's severe emphysema. *Id.* However, Dr. Fino ultimately indicated that he was unable to determine the cause of claimant's emphysema because he did not have all the necessary records. *Id*. After reviewing additional medical evidence, Dr. Fino submitted an April 25, 2016 supplemental report, wherein he reaffirmed his previous opinions. *Id.*

Dr. Allen prepared a July 15, 2016 supplemental medical report, after reviewing additional medical information, including Dr. Fino's two reports. Dr. Allen noted "significant clarifications of [claimant's] medical chart, most notably [a] left upper lobectomy for tuberculosis in 1986 with discussion of bullous emphysema . . . ." Director's Exhibit 29. Based upon claimant's early history of bullous emphysema, Dr. Allen opined that there was a "significant chance" claimant has an alpha-1 antitrypsin deficiency.[7] *Id.* Dr. Allen opined that while not impossible, it was unlikely that claimant's short term exposure to coal mine dust would have caused such significant changes on its own. *Id.* Although Dr. Allen opined that coal mine dust exposure "could have" worsened claimant's underlying lung disease, she indicated that it would be "a minimal contributor." *Id.* Summarizing her diagnoses, Dr. Allen indicated that claimant's obstructive lung disease and chronic bronchitis "could be" caused by alpha-1 antitrypsin deficiency, in combination with his coal mine dust exposure and cigarette smoking. Director's Exhibit 29. Dr. Allen opined that if an alpha-1 antitrypsin deficiency was confirmed, it would be "the major

[6] Alpha-1 antitrypsin is a plasma protein, the "deficiency of [which] is associated with the development of emphysema." Dorland's lllustrated Medical Dictionary 163 (32d ed. 2012).

[7] Dr. Allen noted, however, that no lab testing was available to confirm the existence of an alpha-1 antitrypsin deficiency. Director's Exhibit 29.

contributor to his symptoms," with both coal mine dust exposure and cigarette smoking "being minor contributors." *Id*.

The administrative law judge accorded "reduced" weight to the opinions of Drs. Allen and Fino, finding that neither doctor adequately explained what alpha-1 antitrypsin deficiency was, what factors were important for considering it as a diagnosis, or why each considered it a likely diagnosis. Decision and Order at 16. The administrative law judge further discredited Dr. Fino's opinion because he did not adequately explain why he excluded claimant's coal mine dust exposure as a cause of his emphysema. *Id.* Conversely, the administrative law judge found that Dr. Allen's opinion was "adequately reasoned," noting that the doctor at least "minimally" explained "how the documentation supports her conclusion that [c]laimant's disease is worsened, in part, by coal mine dust exposure . . . ."[8] *Id*. The administrative law judge therefore found that the medical opinion evidence established legal pneumoconiosis.

Employer argues that the administrative law judge erred in relying upon Dr. Allen's opinion to establish legal pneumoconiosis. Employer's Brief at 11-12. Employer contends that Dr. Allen's opinion does not meet claimant's burden to establish that his lung disease is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id*. Upon review, we are unable to determine whether substantial evidence supports the administrative law judge's finding that Dr. Allen's opinion establishes legal pneumoconiosis because the administrative law judge has not adequately explained her finding.

In finding Dr. Allen's opinion supported legal pneumoconiosis, the administrative law judge found that Dr. Allen opined that claimant's lung disease was "worsened, in part, by coal mine dust exposure." Decision and Order at 16. However, Dr. Allen's statement in its entirety was that "[c]oal mine dust exposure *could have worsened* [claimant's] underlying [lung] disease . . . ." Director's Exhibit 29 (emphasis added). Additionally, as employer notes, the doctor further opined in the same sentence that claimant's coal mine dust exposure "would be a "*minimal contributor*" to his lung disease. *Id.* Dr. Allen also subsequently opined that, if an alpha-1 antitrypsin deficiency was confirmed, claimant's coal mine dust exposure would be a "minor contributor" to his impairment. *Id.*

Thus, Dr. Allen variously opined that claimant's coal mine dust exposure "could have worsened" his lung disease, made a "minimal" contribution, and made a "minor" contribution. Decision and Order at 16. The administrative law judge failed to address all aspects of Dr. Allen's opinion and explain how it satisfies claimant's burden to establish

[8] In evaluating the medical opinion evidence, the administrative law judge focused upon Dr. Allen's opinion set forth in her supplemental report. Decision and Order at 16.

that his lung disease is "is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Consequently, her analysis does not comport with the requirements of the Administrative Procedure Act (APA), which provide 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Therefore, we must vacate the administrative law judge's finding that the medical opinion evidence established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration. On remand, the administrative law judge is instructed to reconsider whether Dr. Allen's opinion, considering the record as a whole, establishes that claimant's lung disease "is significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[9] 20 C.F.R. §718.201(b). In reconsidering this issue, the administrative law judge should address Dr. Allen's credentials, her explanations for her conclusions, the documentation underlying her medical judgment, and the sophistication of, and bases for, her opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Because the administrative law judge must reevaluate whether the evidence establishes the existence of legal pneumoconiosis, an analysis that could affect her weighing of the evidence on the issue of disability causation, we also vacate her finding that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). If legal pneumoconiosis is established, the administrative law judge must determine whether it is a substantially contributing cause of claimant's total disability. Pneumoconiosis is a substantially contributing cause of a miner's total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i),(ii).

[9] The administrative law judge accorded less weight to Dr. Fino's opinion because she found that the doctor did not adequately explain why he excluded claimant's coal mine dust exposure as a cause of his emphysema. Decision and Order at 16. Because this finding is unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge