BRB No. 02-0775 BLA

DENNIS E. COMPTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	08/28/2003 _____
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

Appeal of the Decision and Order on Remand--Award of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Dennis E. Compton, Amherstdale, West Virginia, pro se.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand--Award of Benefits (1996-BLA-01445) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. ' 901 *et seq*. (the Act).[1] This case is before the Board for the third time. Initially, the administrative law judge found that claimant did not establish the

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

existence of pneumoconiosis by chest x-ray evidence but established the existence of pneumoconiosis by medical opinion evidence, and established further that he is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. Upon consideration of employer=s appeal, the Board affirmed the award of benefits. *Compton v. Island Creek Coal Co.*, BRB No. 97-1477 BLA (Jun. 26, 1998)(unpub.).

Employer appealed to the United States Court of Appeals for the Fourth Circuit, which held that the administrative law judge erred by weighing the x-ray evidence and medical opinions separately, and instructed him to weigh all of the relevant evidence together to determine whether a preponderance the evidence established the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The court also held that the administrative law judge erred in evaluating certain medical opinions. Specifically, the court held that the administrative law judge erred in finding Dr. Gaziano=s opinion to be well documented and reasoned when it was based solely on a chest x-ray reading, and erred in discounting Dr. Fino=s opinion that claimant does not have pneumoconiosis solely because Dr. Fino did not examine claimant. *Compton*, 211 F.3d at 211-12, 22 BLR at 2-175, 2-177. The court held further that substantial evidence supported the administrative law judge=s finding that Dr. Carrillo=s opinion diagnosing pulmonary disease due in part to coal dust exposure was documented and reasoned, and also supported the administrative law judge=s decision to accord less weight to the opinions of Drs. Zaldivar and Castle because Dr. Zaldivar did not consider whether coal dust exposure aggravated claimant=s respiratory impairment and because Dr. Castle understated claimant=s exposure to coal dust. *Compton*, 211 F.3d at 212-13, 22 BLR at 2-176-78. On the issue of disability causation, the court held that the administrative law judge properly accorded less weight to the opinions of Drs. Zaldivar and Castle, but erred in discrediting Dr. Fino=s opinion because he did not examine claimant and did not diagnose pneumoconiosis. *Compton*, 211 F.3d at 214, 22 BLR at 2-179-80. Consequently, the court vacated the Board=s decision and remanded the case with instructions for the Board to remand the case to the administrative law judge for further consideration.

On remand, the administrative law judge credited the opinion of Dr. Carrillo as supportive of a finding of the existence of legal pneumoconiosis. In so doing, he again accorded less weight to Dr. Fino=s opinion that claimant=s obstructive pulmonary impairment is due to smoking, because Dr. Fino=s interpretation of a pulmonary function study conflicted with the interpretation of an examining physician. The administrative law judge found further that the negative x-ray evidence weighed with the medical opinions did not negate the evidence of the existence of legal pneumoconiosis. The administrative law judge additionally credited Dr. Carrillo=s opinion to find that claimant=s total disability is due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. Upon consideration of employer=s appeal, the Board held that the administrative law judge

supplied an invalid rationale for discounting Dr. Fino=s opinion because he merely relied on the fact that Dr. Fino did not examine claimant. *Compton v. Island Creek Coal Co.*, BRB No. 01-0415 BLA, slip op. at 3-4 (Jan. 17, 2002)(unpub.). Consequently, the Board vacated the administrative law judge=s finding pursuant to 20 C.F.R. ' 718.202(a)(4) and remanded the case for him to reconsider the medical opinion evidence regarding the existence of pneumoconiosis as defined in the Act and regulations. The Board further instructed the administrative law judge to again weigh together the x-ray and medical opinion evidence to determine whether the existence of pneumoconiosis was established, and to then determine whether pneumoconiosis, if found established, was a substantially contributing cause of claimant=s total disability as defined in revised 20 C.F.R. ' 718.204(c). *Compton*, slip op. at 4.

On remand, the administrative law judge found that Dr. Carrillo=s opinion was well-reasoned, persuasive, and supported by the opinion of Dr. Cabauatan diagnosing claimant with chronic obstructive pulmonary disease (COPD) related to coal mine dust exposure. The administrative law judge found Dr. Fino=s opinion less persuasive because the administrative law judge determined that Dr. Fino did not adequately consider whether claimant=s obstructive lung disease was substantially aggravated by dust exposure in his thirty-two and one-half years of coal mine employment. Finding Dr. Carrillo=s opinion Aworthy of greater weight,@ the administrative law judge determined that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(4). Decision and Order on Remand at 4. Weighing the x-ray evidence and medical opinion evidence together, the administrative law judge found that Athe absence of clinical pneumoconiosis, as established by the x-ray evidence, does not negate the possibility of the existence of legal pneumoconiosis.@ Decision and Order on Remand at 5. Consequently, he found that the weight of the medical opinion evidence established the existence of legal pneumoconiosis. For the same reasons the administrative law judge gave regarding the existence of pneumoconiosis, he found that Dr. Carrillo=s opinion attributing claimant=s severe obstructive pulmonary disease to both coal dust exposure and smoking outweighed Dr. Fino=s opinion attributing claimant=s lung impairment to smoking. The administrative law judge therefore found that pneumoconiosis was a substantially contributing cause of claimant=s totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. ' 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical opinions regarding the existence of pneumoconiosis, and did not properly weigh together the x-ray evidence and medical opinions to determine whether the existence of pneumoconiosis was established. Employer argues further that the administrative law judge erred in his weighing of the medical opinions when he found that claimant=s total disability is due to pneumoconiosis. Claimant has not filed a response to employer=s appeal, and the Director, Office of Workers= Compensation Programs (the Director), has declined to

participate in this 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 supported by substantial evidence, is rational, and is in accordance with law. 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).

To be entitled 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).

Employer contends that the administrative law judge erred in considering Dr. Carrillo=s physical examination report a well-reasoned and documented opinion diagnosing legal pneumoconiosis. Employer=s Brief at 7-8. Employer=s contention lacks merit, as the Fourth Circuit court has already held that the administrative law judge acted within his discretion in finding Dr. Carrillo=s opinion well-reasoned and documented. Compton, 211 F.3d at 212, 22 BLR 2-175-76.

Employer further asserts that Dr. Carrillo=s opinion does not satisfy the legal definition of pneumoconiosis because Dr. Carrillo did not Aquantify the respective contributions of coal dust and cigarette smoke exposure to the Claimant=s pulmonary impairment. . . .@ Employer=s Brief at 7. Contrary to employer=s contention, a medical opinion need not Aspecifically apportion the effects of the miner=s smoking and his dust exposure in coal mine employment upon the miner=s condition@ to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. ''718.201, 718.202(a)(4). *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-107-08 (1998)(*en banc*); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001)(A[D]octors need not make such particularized findings@ regarding etiology.). Review of the record reflects that Dr. Carrillo diagnosed A[s]evere obstructive pulmonary disease@ which he explicitly attributed to both A[e]xposure to coal dust and cigarette smoke.@ Director=s Exhibit 11 at 4. Dr. Carrillo=s report constitutes a diagnosis of a chronic respiratory or pulmonary impairment Asignificantly related to, or substantially aggravated by, dust exposure in coal mine employment.@ 20 C.F.R. '718.201(b); *see Jones*, 21 BLR at 1-107-08. Therefore, we reject employer=s contention.

Employer alleges that the administrative law judge erred in finding Dr. Cabauatan=s opinion sufficient to support Dr. Carrillo=s diagnosis of legal pneumoconiosis, when Dr.

Cabauatan merely checked a AYes@ box on a Department of Labor physical examination form to indicate that claimant=s COPD was related to dust exposure in coal mine employment. Employer's Brief at 8; Director=s Exhibit 36 at 2. In the case at bar, the Fourth Circuit court explained that an administrative law judge may, but need not, discount a less-than-thoroughly explained opinion, because the detail of the physician=s analysis is only one of several factors the administrative law judge must take into account. *Compton*, 211 F.3d at 212, 22 BLR 2-176, citing *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). Additionally, an administrative law judge need not discount a physician=s etiology opinion consisting of responses to questions on a standardized physical examination form. *See Perry v. Director, OWCP*, 9 BLR 1-1, 1-3 (1986)(*en banc*). Consequently, we hold that the administrative law judge acted within his discretion in treating Dr. Cabauatan=s diagnosis of COPD related to coal dust as adequately reasoned to at least support Dr. Carrillo=s diagnosis of obstructive pulmonary disease due to both coal dust exposure and smoking. *See Compton*, 211 F.3d at 212, 22 BLR 2-176; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Therefore, we reject employer=s allegation of error.

Employer contends that the administrative law judge did not provide a valid rationale for crediting Dr. Carrillo=s opinion that claimant has pneumoconiosis over Dr. Fino=s contrary opinion, because the administrative law judge selectively analyzed Dr. Fino=s opinion and shifted the burden of proof to employer. Employer's Brief at 9-12. The administrative law judge found Dr. Fino=s opinion less persuasive because Dr. Fino did not consider whether thirty-two and one-half years of coal mine dust exposure aggravated claimant=s obstructive respiratory impairment. We hold that substantial evidence supports the administrative law judge=s permissible determination that Dr. Fino did not adequately consider legal pneumoconiosis.

After properly crediting the opinions of Drs. Carrillo and Cabauatan finding the existence of legal pneumoconiosis, the administrative law judge weighed these against Dr. Fino=s opinion. He did not, as employer argues, shift the burden of persuasion to employer. He determined that Dr. Fino=s opinion did not undermine the opinions of Drs. Carrillo and Cabauatan because it did not A sufficiently exclude[] the possibility of >legal pneumoconiosis,= *i.e.*, a condition which is substantially aggravated by dust exposure in coal mine employment.@ Decision and Order on Remand at 4. It is for the administrative law judge to interpret medical opinions. *See Mays v. Piney Mountain Coal Co.*, 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting)(The administrative law judge exercises broad discretion in evaluating the evidence.) *aff=d*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). His interpretation is reasonable here where Dr. Fino=s opinion is Athat this man does not suffer from an occupationally acquired condition.@ Employer=s Exhibit 9 at 14. Dr. Fino offered seven reasons to support his conclusion that claimant=s condition was produced or caused by smoking. Employer=s Exhibit 9 at 12-15. Since the administrative law judge reasonably interpreted Dr. Fino=s opinion as failing to address whether coal mine

employment *aggravated* the smoking-induced condition, it was unnecessary for the administrative law judge to discuss the seven reasons Dr. Fino proffered for finding the condition smoking-induced. *See Compton*, 211 F.3d at 213, 22 BLR at 2-177 (Upholding the administrative law judge=s decision to discount a physician=s opinion that did not explain why claimant=s substantial exposure to coal mine dust could not have aggravated his lung impairment.).

The administrative law judge offered valid criticism of Dr. Fino=s opinion regarding fibrosis. Substantial evidence supports the administrative law judge=s finding that Dr. Fino=s focus on the absence of lung fibrosis or interstitial abnormality associated with claimant=s obstruction reflected Dr. Fino=s concern with features of clinical pneumoconiosis rather than legal pneumoconiosis. Employer=s Exhibit 9 at 13; compare 20 C.F.R. '718.201(a)(1)(describing AClinical Pneumoconiosis@ as a Afibrotic reaction of the lung tissue to@ dust deposition), with 20 C.F.R. '718.201(a)(2)(b)(defining ALegal Pneumoconiosis@ as Aany chronic restrictive or obstructive pulmonary disease@ that is Asignificantly related to, or substantially aggravated by, dust exposure in coal mine employment.@). In the case at bar, the court stressed the need for the administrative law judges to distinguish between clinical and legal pneumoconiosis when weighing medical evidence. *Compton*, 211 F.3d at 210 and n.8, 22 BLR at 2-173 and n.8. Additionally, although not binding in this appeal, the opinion of the United States Court of Appeals for the Sixth Circuit in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) is relevant, because the court considered a similar opinion by Dr. Fino regarding fibrosis and held that the administrative law judge erred by failing to consider whether Dr. Fino employed the more restrictive medical definition of pneumoconiosis when he opined that Mr. Cornett=s obstructive impairment was not pneumoconiosis. *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-22.

In sum, the administrative law judge analyzed the quality of Dr. Fino=s opinion and properly discredited it as flawed by the failure to consider legal pneumoconiosis. *See Compton*, 211 F.3d at 213, 22 BLR at 2-177; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). Because the administrative law judge provided a valid reason for discrediting Dr. Fino=s opinion and for crediting Dr. Carrillo=s opinion, as supported by the opinion of Dr. Cabauatan, we affirm the administrative law judge=s finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. ''718.201(a)(2), 718.202(a)(4).

Employer argues further that the administrative law judge did not weigh together the x-ray evidence and medical opinions but merely rejected the x-ray evidence as irrelevant. Employer= Brief at 13. Contrary to employer=s contention, the administrative law judge followed the Compton court=s teaching to weigh the relevant evidence together while bearing in mind the distinction between clinical and legal pneumoconiosis. *See Compton*,

211 F.3d at 210, 22 BLR at 2-173 (AEvidence that does not establish medical pneumoconiosis, e.g., an x-ray read as negative for coal workers= pneumoconiosis, should not necessarily be treated as weighing against a finding of legal pneumoconiosis.@)(emphasis in original). The administrative law judge thus did not err when he found that Athe absence of clinical pneumoconiosis, as established by the x-ray evidence, d[id] not negate the possibility of the existence of legal pneumoconiosis@ in the medical opinions. Decision and Order on Remand at 5. Consequently, we affirm the administrative law judge=s finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. '718.202(a).

Employer contends that the administrative law judge=s finding that claimant=s total disability is due to pneumoconiosis is not supported by substantial evidence because he did not provide a valid reason for discounting Dr. Fino=s opinion. Employer's Brief at 15. This contention lacks merit. Review of the administrative law judge=s Decision and Order reflects that he found Dr. Fino=s opinion outweighed by that of Dr. Carrillo for the same reasons given regarding his finding of the existence of pneumoconiosis, specifically, that Dr. Fino did not adequately address whether coal dust aggravated claimant=s obstructive impairment.[2] Decision and Order on Remand at 5-6; *see Compton*, 211 F.3d at 213, 22 BLR at 2-177; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335. Additionally, contrary to employer=s contention, the administrative law judge did not err in finding Dr. Carrillo=s opinion sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant=s total disability. Review of Dr. Carrillo=s report reflects that he diagnosed A[s]evere obstructive pulmonary disease,@ contributing A100%@ to claimant=s A[s]evere impairment.@ Director=s Exhibit 11 at 4. Dr. Carrillo unequivocally attributed claimant=s A[s]evere obstructive pulmonary disease@ to both A[e]xposure to coal dust and cigarette smoke.@ *Id*. Dr. Carrillo=s opinion therefore suffices to establish that pneumoconiosis is a substantially contributing cause of claimant=s totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. '718.204(c)(1)(i), (ii). Therefore, we affirm the administrative law judge=s

[2] The administrative law judge was correct in discounting Dr. Fino=s opinion on causation based on Dr. Fino=s additional statement: AObstructive lung disease may also arise from coal workers= pneumoconiosis when significant fibrosis is present. The fibrosis results in the obstruction.@ Employer=s Exhibit 9 at 13. In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 and n.7, 22 BLR 2-265, 2-281 and n.7 (7th Cir. 2001), the court upheld the administrative law judge=s discounting Dr. Fino=s opinion on causation because it was premised on essentially the same basis as that set forth in the case at bar.

finding pursuant to 20 C.F.R. ' 718.204(c).

Accordingly, the administrative law judge=s Decision and Order on Remand--Award of Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority=s affirmance of the administrative law judge=s Decision and Order on Remand awarding benefits. Because I believe that employer has raised valid arguments with respect to the administrative law judge=s weighing of the evidence of record I do not believe that the administrative law judge=s findings that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(4) and that claimant=s total disability is due to pneumoconiosis pursuant to 20 C.F.R. ' 718.204(c) can be affirmed. An administrative law judge must not selectively analyze a medical opinion, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-93 (1988), and must give valid reasons both for crediting certain medical opinions and for discrediting others. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). The administrative law judge in this case failed to provide a valid reason for discrediting the opinion of Dr. Fino.

The administrative law judge selectively analyzed Dr. Fino=s opinion and effectively shifted the burden of proof to employer. The administrative law judge=s determination that legal pneumoconiosis does not require the presence of fibrosis or an interstitial abnormality addresses only two of the several reasons that Dr. Fino provided as support for his opinion that claimant=s obstructive impairment is unrelated to coal mine dust exposure. Employer=s

Exhibit 9 at 12-15; *see Justice*, 11 BLR at 1-93. Additionally, the administrative law judge improperly discredited Dr. Fino=s opinion for failing to rule out the Apossibility@ that coal dust exposure aggravated claimant=s obstructive respiratory impairment, Decision and Order on Remand at 3, when it is claimant=s burden affirmatively to establish that his respiratory impairment arose out of coal mine employment. 20 C.F.R. ''725.103, 718.201; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). Contrary to the majority=s view, Dr. Fino=s explanation of his reasons for concluding that claimant=s obstructive impairment is unrelated to coal mine dust exposure distinguishes his opinion from that of Dr. Zaldivar, which was held to be permissibly discounted because it was conclusory and unexplained. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213, 22 BLR 2-162, 2-177 (4th Cir. 2000).

Because the administrative law judge evaluated only part of Dr. Fino=s opinion, and required employer to disprove that claimant=s obstructive impairment arose out of coal mine employment, he did not provide a valid reason for discounting Dr. Fino=s opinion. *Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Consequently, I would vacate the administrative law judge=s finding pursuant to 20 C.F.R. '718.202(a)(4) and remand this case for him to fully consider and weigh the relevant evidence, with the burden of proof on claimant. Accordingly, I would also instruct him to again weigh together the x-ray and medical opinion evidence to determine whether the existence of pneumoconiosis is established, *see Compton*, 211 F.3d at 208-11, 22 BLR at 2-168-74, and to determine whether pneumoconiosis, if found established, is a substantially contributing cause of claimant=s total disability pursuant to 20 C.F.R. '718.204(c).

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NANCY S. DOLDER, Chief
Administrative Appeals Judge