BRB No. 08-0276 BLA

M.S.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
COVENANT COAL CORPORATION	)	
	)	DATE ISSUED: 12/30/2008
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-BLA-05448) of Administrative Law Judge Daniel F. Solomon 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). The administrative law judge credited claimant with 12.91 years of coal mine employment, based on a stipulation by the parties, and found that the evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge mischaracterized Dr. Robinette's opinion, that he erred in finding Dr. Rasmussen's opinion to be sufficient to establish that claimant suffers from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that he erred in rejecting the contrary opinions of Drs. Castle and Rosenberg, that claimant does not have any chronic lung condition due to coal dust exposure. Employer also argues that the administrative law judge erred in rejecting the disability causation opinions of Drs. Castle and Rosenberg at 20 C.F.R. §718.204(c) because they did not diagnose pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[1]

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.[2] 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 demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability 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 a finding of 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).

In this case, the administrative law judge's finding that the evidence was insufficient to establish that claimant has clinical pneumoconiosis is unchallenged on

[1] We affirm, as unchallenged on appeal, the administrative law judge's determination of 12.91 years of coal mine employment, and his findings that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), but that it was sufficient to establish that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *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); Decision and Order at 9-10.

[2] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 3. 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*).

appeal.[3] As to the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical reports by Drs. Robinette, Rasmussen, Rosenberg and Castle, along with treatment notes and an interrogatory completed by Dr. Sheikh. Director's Exhibits 5, 10, 15; Claimant's Exhibits 1-4; Employer's Exhibits 1, 22-23. The administrative law judge found that Dr. Robinette refused to offer an opinion as to whether the miner's respiratory disease was due to coal dust exposure. Decision and Order at 10-11. He also gave little weight to an interrogatory "purportedly" prepared by Dr. Sheikh, claimant's treating physician, which stated that claimant suffered from pneumoconiosis, since that interrogatory did not include a signature by Dr. Sheikh and "because he relied on an x-ray to misdiagnose clinical pneumoconiosis."[4] Decision and Order at 11.

With respect to Drs. Rasmussen, Castle and Rosenberg, the administrative law judge noted that they are in agreement that claimant suffers from chronic obstructive pulmonary disease (COPD), but they disagree as to the etiology of that condition. Decision and Order at 10. Dr. Rasmussen diagnosed that claimant suffers from severe COPD based on the significant reduction in the FEV1 on pulmonary function testing and the fact that claimant has hypoxemia as demonstrated on arterial blood gas testing. Claimant's Exhibit 2. Dr. Rasmussen stated that it is impossible to distinguish the independent but "additive" effects of smoking and coal dust exposure on claimant's respiratory condition since they manifest in the same type of obstructive respiratory pattern as seen in this case. *Id*. He opined that claimant's respiratory condition was primarily due to smoking, given a lengthy smoking habit, but that claimant's coal dust exposure and apparent asthma also contributed to his COPD. *Id*.

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[3] 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.

20 C.F.R. §718.201(a)(1). 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).

[4] We affirm the administrative law judge's determination to assign less weight to Dr. Sheikh's opinion at 20 C.F.R. §718.202(a)(4) as that determination has not been challenged on appeal. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

In contrast to Dr. Rasmussen's opinion, Drs. Rosenberg and Castle asserted that it is possible to distinguish between the effects of asthma, smoking and coal dust exposure, based on the results of claimant's objective testing. Employer's Exhibits 22, 23. Dr. Rosenberg maintained that claimant's pattern of respiratory impairment is inconsistent with coal dust exposure. Employer's Exhibit 22. Dr. Rosenberg explained that the definition of COPD rests on a decrease in the FEV1 divided by the FVC (FEV1/FVC ratio), but that the medical literature indicates that coal dust exposure does not result in any clinically significant reduction in the FEV1/FVC ratio, while the ratio is characteristically lowered with smoke-related COPD. *Id*. Because claimant's FEV1/FVC ratio was reduced to 52 percent, before and after the administration of bronchodilators, and since Dr. Rosenberg found no evidence of air trapping, he opined that claimant's respiratory condition was unrelated to his coal mine employment. *Id*. Dr. Castle also contended that claimant does not suffer from an obstructive respiratory disease due to coal dust exposure, noting that claimant's diffusion capacity is normal and that his pulmonary function results have been varied and show reversibility with the administration of bronchodilators, which is inconsistent with the fixed and irreversible impairment typically seen with respiratory impairment caused by coal dust exposure. Employer's Exhibit 1. Dr. Castle therefore attributed claimant's respiratory disease solely to his history of smoking and asthma. *Id*.

In weighing the conflicting medical opinions, the administrative law judge found that Dr. Rasmussen's opinion was reasoned and documented and entitled to controlling weight. In discounting the opinions of Drs. Rosenberg and Castle, the administrative law judge found that "both" doctors relied extensively on the FEV1/FVC ratio, but "wrongfully assume[d] that asthma and coal dust exposure are mutually exclusive." Decision and Order at 13. The administrative law judge noted that "a review of the literature cited does not elevate that ratio to status as dispositive." *Id*. The administrative law judge further noted that Drs. Rosenberg and Castle "did not address the argument [presented by Dr. Rasmussen] that smokers are twice as likely to have significant impairment than nonsmokers." *Id*. The administrative law judge also stated:

> It is more rational that if the Claimant had asthma and had smoked cigarettes during the era prior to 1992, when he was working and was exposed to work related dust and fumes, that the severity of the respiratory impairment would more likely be additive, consistent with Dr. Rasmussen's opinion.

Decision and Order at 14.

Employer contends that the administrative law judge erred in concluding that Dr. Rasmussen offered a reasoned and documented opinion that claimant's respiratory impairment is due, at least in part, to coal dust exposure. We disagree. The

administrative law judge correctly found that Dr. Rasmussen based his diagnosis of legal pneumoconiosis on the results of claimant's physical examination and objective testing, that he reviewed the examination findings of Drs. Rosenberg and Castle, that he had an accurate understanding of claimant's work and medical histories, and that Dr. Rasmussen was fully apprised of claimant's smoking history.[5] Decision and Order at 4-5. Because it is within the discretion of the trier-of-fact to determine whether a physician's opinion is reasoned and documented, we affirm the administrative law judge's findings that Dr. Rasmussen's opinion is sufficient to support claimant's burden of proof at 20 C.F.R. §718.202(a)(4). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

Notwithstanding, we agree with employer that the administrative law judge has failed to fully explain how he resolved the conflict in the opinions of Drs. Rasmussen, Rosenberg, and Castle, as to whether claimant's COPD is related to coal dust exposure. Therefore, the administrative law judge's Decision and Order is not in compliance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer correctly argues that the administrative law judge's citation to the FEV1/FVC ratio in support of his decision to reject the opinions of Drs. Rosenberg and Castle is not sufficiently explained. Contrary to the administrative law judge's finding, Dr. Castle did not cite to the FEV1/FVC ratio as grounds for his causation opinion. Dr. Rosenberg is the only physician to cite to the FEV1/FVC ratio to support his opinion that the miner's respiratory impairment is due solely to smoking. Employer's Exhibit 22.

[5] The administrative law judge noted that Dr. Rasmussen reported a history of asthma and that the physician diagnosed that it was likely that claimant suffered from asthma. Decision and Order at 11. Although the administrative law judge found 12.9 years of coal mine employment, which is less than the history of 17 years reported by Dr. Rasmussen, the administrative law judge found that "this disparity does not materially affect the validity of the evidence he had before him" since Dr. Rasmussen testified that his opinion would not change assuming claimant worked for only 12.9 years. Decision and Order at 11. We further note that while employer argued that there were inconsistencies in the record as to the length of claimant's smoking history, the administrative law judge specifically found that "Dr. Rasmussen had been provided, through the history he took and through questions at deposition, an adequate smoking history to render a documented and well reasoned medical opinion." Decision and Order at 12.

Although the administrative law judge has discretion to assess the credibility of Dr. Rosenberg's opinion in relation to the medical literature cited in the record, the administrative law judge must identify what specific literature contradicts Dr. Rosenberg's medical conclusions, and discuss with specificity why he concluded that Dr. Rosenberg's opinion is entitled to less weight in comparison to Dr. Rasmussen's opinion. Decision and Order at 13.

We also agree with employer that the administrative law judge gave claimant the benefit of an improper presumption that his asthma was due to coal dust exposure when he concluded that Drs. Castle and Rosenberg "wrongfully assume that asthma and coal dust exposure [are] mutually exclusive." Decision and Order at 11. Contrary to the administrative law judge's suggestion, while asthma may constitute legal pneumoconiosis under some circumstances, it is claimant's burden to establish, based on the medical evidence, that his asthma is significantly related to, or substantially aggravated by, coal dust exposure. *See* 20 C.F.R. §718.201. Because the administrative law judge has not specifically addressed whether there is any medical evidence in the record to establish that claimant's asthma is due to coal dust exposure, we are unable to affirm the administrative law judge's decision to reject the opinions of Drs. Rosenberg and Castle based on the grounds he provided.

Furthermore, we agree with employer that the administrative law judge erred in rejecting the opinions of Drs. Rosenberg and Castle because they did not address Dr. Rasmussen's testimony that "smokers are twice as likely to have significant impairment than nonsmokers." Decision and Order at 13. Because Drs. Rosenberg and Castle specifically opined that the primary cause of COPD is smoking, it is unclear why the administrative law judge considered this particular aspect of Dr. Rasmussen's opinion important in assessing the credibility of the medical experts. Thus, on remand, the administrative law judge must further explain why he finds the opinions of Drs. Rosenberg and Castle to be less persuasive as to the etiology of claimant's COPD.[6]

[6] We reject employer's contention that the administrative law judge improperly substituted his opinion for that of a medical expert in "speculating" that if claimant had asthma and smoked during the same years as his coal dust exposure, Dr. Rasmussen's explanation that these factors had an additive effect on claimant's respiratory condition was reasonable. Decision and Order at 13-14. Contrary to employer's contention, the administrative law judge outlined claimant's work, smoking and medical histories, and specifically found that the record showed that claimant was diagnosed with asthma prior to leaving his coal mine work in 1992, and that he smoked prior to 1992. Decision and Order at 12; Claimant's Exhibits 3-4. We see no error in the administrative law judge's finding that the medical, smoking and work histories presented in the record lend support

For the above-stated reasons, we conclude that the administrative law judge erred in failing to provide a sufficient explanation for the weight accorded to the conflicting medical opinions at 20 C.F.R. §718.202(a)(4), as required by the APA, and we vacate his finding that claimant established the existence of legal pneumoconiosis.[7] *Wojtowicz*, 12 BLR at 1-165. Furthermore, because the administrative law judge relied upon his findings as to the existence of legal pneumoconiosis in assessing the weight to be accorded to the conflicting medical opinions on the issue of disability causation, we vacate the administrative law judge's determination that claimant is totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 14.

On remand, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions.[8] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). If the administrative law judge finds that the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R.

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to Dr. Rasmussen's opinion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

[7] Employer is correct that to the extent that Dr. Robinette stated that he was unable to diagnose coal dust exposure as a "direct cause" of claimant's severe obstructive pulmonary disease, the administrative law judge erred in mischaracterizing Dr. Robinette as "refusing to render a diagnosis" relevant to the existence of legal pneumoconiosis. Decision and Order at 11; Employer's Brief at 7-8. However, because Dr. Robinette did not address whether claimant's chronic obstructive pulmonary disease was "substantially contributed to or substantially aggravated" by coal dust exposure, we consider the mischaracterization to be harmless, and affirm the administrative law judge's decision to accord Dr. Robinette's opinion less weight on the issue of whether claimant has legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] The administrative law judge correctly noted in his Decision and Order that the reversibility of pulmonary function studies after the administration of bronchodilator does not necessarily preclude the presence of a disabling respiratory condition due to coal dust exposure. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.). However, the administrative law judge did not specifically explain how the decisions in *Barrett* and *Swiger* are applicable to this case in relation to the credibility of the medical opinions, and should do so on remand.

§718.202(a)(4), he must then determine whether the evidence, when considered as a whole, is sufficient to establish the existence of the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If necessary, the administrative law judge must consider whether claimant has established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Toler v. Eastern Associated Coal Company*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-382-383 (4th Cir. 2002); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990). In addressing all of the entitlement issues, the administrative law judge must weigh all of the relevant evidence of record and set forth his findings, including the underlying rationale, as required by the APA.[9] *See* 5 U.S.C. §557(c)(3)(A); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993); *Wojtowicz,*, 12 BLR at 1-165.

[9] Dr. Iosif treated claimant for asthma and diagnosed chronic obstructive pulmonary disease. Employer asserts that the administrative law judge erred in failing to draw a negative inference from the fact that Dr. Iosif knew that claimant was a coal miner, but did not specifically diagnose that he suffered from pneumoconiosis. Employer's Brief at 10. We disagree. The administrative law judge was under no obligation to draw a negative inference from Dr. Iosif's treatment notes. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge