BRB No. 03-0400 BLA

GERALD H. TRIPLETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/27/2004
	)	
SEWELL COAL 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 Second Remand – Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand – Awarding Benefits (99-BLA-0094) of Administrative Law Judge Gerald M. Tierney (the administrative law judge) 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

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

the Board for the third time. Most recently, the Board, in *Triplett v. Sewell Coal Co.*, BRB No. 01-0537 BLA (Mar. 6, 2002)(unpublished), vacated the administrative law judge's finding that claimant's smoking history was eighteen pack-years ending in 1964. The administrative law judge had determined that the smoking histories noted by Drs. Crook and Mossburg, and by the Cleveland Clinic, were inflated when compared to the smoking histories recorded by other physicians of record, and thus were entitled to less weight.[2] The Board indicated that while the administrative law judge had considered claimant's direct testimony, that he smoked a pack or a little over a pack a day for eighteen years ending in 1964, Hearing Transcript at 20, the administrative law judge had failed to consider claimant's testimony on cross-examination that he "could" have smoked about a pack and one-half a day for eighteen years, Hearing Transcript at 22. The Board, in vacating the administrative law judge's smoking history finding, explained that claimant's testimony on cross-examination could, if credited, affect the administrative law judge's credibility determinations and his ultimate finding of an eighteen pack-year smoking history. *Triplett*, slip op. at 5.

The Board further vacated the administrative law judge's findings that the medical opinion evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). The Board instructed the administrative law judge to clarify his reasoning in according less weight to Dr. Bellotte's report. The Board further indicated that the administrative law judge's discrediting of Dr. Branscomb's opinion could not be affirmed since one of the administrative law judge's reasons for according it less weight was that the opinion was based on Dr. Bellotte's discredited opinion noting a thirty-five year smoking history. *Triplett*, slip op. at 5. The Board also held that in light of its decision to vacate the administrative law judge's finding regarding claimant's smoking history, the administrative law judge on remand must reconsider the opinions of Drs. Durham and Rasmussen. The Board further instructed the administrative law judge to reconsider Dr. Durham's opinion to determine whether it is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[3]

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[2] The Board noted, in *Triplett v. Sewell Coal Co.*, BRB No. 01-0537 BLA (Mar. 6, 2002)(unpublished), that Dr. Crook noted a fifty pack [-year] smoking history, Dr. Mossburg indicated that claimant smoked from twenty-seven to twenty-eight years, and claimant's records from the Cleveland Clinic revealed a thirty pack-year smoking history, ending in 1964. Employer's Exhibits 1, 2, 4. *Triplett*, slip op. at 4.

[3] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R.§718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R §718.204(c).

Finally, the Board instructed the administrative law judge to determine whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and at 20 C.F.R. §718.202(a), based on all the relevant evidence pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Accordingly, the Board remanded the case.

On remand, the administrative law judge again found that claimant had an eighteen pack-year cigarette smoking history. Decision and Order at 3. On the merits of the claim, the administrative law judge credited the opinions of Drs. Durham and Rasmussen, while according less weight to the contrary opinions of Drs. Bellotte and Branscomb, to find the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis established at 20 C.F.R. §718.204(c).[4] The administrative law judge also found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a) under *Compton*. On appeal, employer alleges that the administrative law judge erred in finding an eighteen pack-year smoking history, and the existence of pneumoconiosis and total disability due to pneumoconiosis. No party has filed a brief in response to employer's appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith,*

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[4] Specifically, the administrative law judge found that Dr. Bellotte's opinion is inadequately reasoned and lacks explanation. Decision and Order at 4-5. The administrative law judge also gave less weight to Dr. Branscomb's opinion because: the physician did not examine claimant; his opinion that claimant "probably" has asthma is equivocal or vague; and his March 3, 1999 opinion is not adequately supported by the underlying data and is inadequately reasoned and unexplained. *Id.* at 5. The administrative law judge further determined that Dr. Durham's opinion is entitled to more weight because he found: Dr. Durham was claimant's treating physician and he performed the most recent examination of claimant; his opinion is well documented and reasoned; and Dr. Durham, unlike Drs. Bellotte and Branscomb, thoroughly explained the effect of claimant's coal dust exposure on his condition. The administrative law judge accorded greater weight to Dr. Rasmussen's opinion because he found: it is well documented and reasoned; Dr. Rasmussen thoroughly explained and supported his opinion regarding the effect of coal dust exposure on claimant's condition; and this explanation is consistent with claimant's symptoms, the pulmonary function study results, claimant's thirty-two years of coal mine employment, claimant's eighteen pack-year smoking history, and because Dr. Rasmussen's opinion is buttressed by Dr. Durham's opinion. *Id.* at 6-7.

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Administrative Law Judge's Findings Regarding Claimant's Smoking History

Employer contends that the administrative law judge's finding, that claimant has an eighteen pack-year smoking history, is erroneous where the record supports a finding of greater than eighteen pack-years. Employer asserts that the administrative law judge did not follow the Board's remand instructions to resolve conflicts in claimant's testimony and did not sufficiently explain his findings as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer argues that the administrative law judge's finding, that the overall evidence supports a finding of an eighteen pack-year smoking history "is rather the minimal smoking history reported, not an evaluation of the overall evidence. This is error as review of the ALJ's reasoning is not possible." Employer's Brief at 7.

Employer's contentions lack merit. A review of the Decision and Order reveals that the administrative law judge followed the Board's remand instructions and resolved the conflict between claimant's direct and cross-examination testimonies. The administrative law judge permissibly found that while claimant testified on cross-examination that he could have smoked one and one-half packs of cigarettes daily, claimant's direct testimony, that he smoked a pack or maybe a little over a pack a day, was consistent with the overall weight of the evidence. The administrative law judge explained, "Although Claimant provided differing accounts concerning the amount of cigarettes he smoked a day, these amounts are not grossly disparate as to lead me to question the credibility of his direct-examination testimony. Claimant's direct-examination testimony is consistent with the overall weight of the evidence." *Harris v. Director, OWCP*, 3 F.3d 103, 106, 18 BLR 2-1, 2-5 (4th Cir. 1993); Decision and Order at 3. The administrative law judge provided a thorough explanation of how the relevant evidence supports his findings that claimant has an eighteen pack-year smoking history and that the opinions of Drs. Crook and Mossburg, and the reports of the Cleveland Clinic, were not credible because they were based on "a wide disparity" of inflated smoking histories ranging from twenty-seven or twenty-eight to fifty pack-years. Employer's assertions that the administrative law judge did not follow the Board's remand instructions, or adequately explain his findings on remand, are contrary to the record and are rejected.

Employer next contends that, contrary to the administrative law judge's finding, the smoking histories contained in the opinions of Drs. Crook and Mossburg, and those of the Cleveland Clinic, are credible. Employer asserts that these smoking histories "are the only smoking histories obtained prior to the onset of the litigation of this federal black lung claim" and thus, they are "uninfluenced by litigation and are likely to more accurately reflect Mr. Triplett's actual history of cigarette smoke abuse." Employer's Brief at 8. Employer asserts

that there is no basis in the record for finding these smoking histories inflated and states, "If anything these histories, uninfluenced by litigation deserve greater, not lesser, weight." *Id.*

Employer's contentions lack merit. As an initial matter, to the extent that employer seeks a reweighing of the evidence, its argument is rejected. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In the instant case, the administrative law judge properly explained that an eighteen pack-year smoking history was documented in Dr. Durham's opinion, Director's Exhibits 10, 11; in Dr. Rasmussen's opinion, Claimant's Exhibit 4; in Dr. Bellotte's opinion, Employer's Exhibit 5, and in claimant's direct testimony, Hearing Transcript at 20. The administrative law judge also noted the fact that claimant's statement, that he smoked one pack a day and quit smoking in 1964, appeared in claimant's response to employer's interrogatories, Employer's Exhibit 3; in the Cleveland Clinic's records, Employer's Exhibit 5; in Dr. Rasmussen's report, Claimant's Exhibit 4, and in claimant's testimony, Hearing Transcript at 20. The administrative law judge added:

> Claimant was reported to smoke one and one-half pack of cigarettes a day by the Cleveland Clinic. (EX 5). The record documents that Claimant smoked one pack of cigarettes a day for 18 years in four instances. However, Claimant is reported to smoke one and one-half pack a day in his cross examination testimony and in one medical report. I rely on the histories that are consistent with one another while the inflated figures from Dr. Crook, Dr. Mossburg, and the Cleveland Clinic evidence a wide disparity ranging from 27 or 28 packs a year to a 50-pack (sic) year. Accordingly, I find that Claimant smoked one pack of cigarettes a day for 18 years, ending in 1964.

Decision and Order at 3. The administrative law judge thereby included the bases for his findings regarding the nature and extent of claimant's smoking history and thus, his findings comport with the requirements of the APA.

Employer admits that the opinions of Drs. Durham and Bellotte support the administrative law judge's finding of an eighteen pack-year smoking history. Employer argues, however, that Dr. Rasmussen's opinion cannot support a finding of an eighteen pack-year smoking history because this smoking history, as noted by Dr. Rasmussen, was not based on claimant's statement but on Dr. Rasmussen's review of the record. Employer thus asserts that the eighteen pack-year smoking history relied on by Dr. Rasmussen, in his consultative opinion, cannot be given weight to prove claimant's actual smoking history. In a footnote, employer argues that the administrative law judge selectively analyzed the evidence by discrediting Dr. Branscomb's opinion because he relied on a thirty-five pack-year smoking history contained in the record, and by not discrediting Dr. Rasmussen's report for his similar reliance on the record to determine claimant's smoking history.

Employer's argument is specious and thus is rejected. A review of the record reveals that it was not the fact that Dr. Branscomb relied on the evidence of record to determine the nature and extent of claimant's smoking history that served as a basis for the administrative law judge's discrediting of Dr. Branscomb's opinion. Rather, the administrative law judge found that Dr. Branscomb did not make a specific finding concerning claimant's smoking history, but instead based his opinion on a thirty-five pack-year history contained in the record. Decision and Order at 3.

Administrative Law Judge's Discrediting of Dr. Bellotte's opinion at 20 C.F.R. §718.202(a)(4)

Employer next alleges error in the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge discredited the opinions of Drs. Bellotte and Branscomb and credited the contrary opinions of Drs. Durham and Rasmussen. Employer first challenges the administrative law judge's two bases for discrediting Dr. Bellotte's opinion. The administrative law judge found that although Dr. Bellotte indicated that he ruled out exposure to coal dust as a factor contributing to claimant's condition, based on the evidence of record, "I find that his opinion concentrates on the x-rays and pulmonary function study results." Decision and Order at 4. The administrative law judge concluded, "Since Dr. Bellotte based his opinion primarily on the chest x-ray and pulmonary function study results, I find that his opinion is inadequately reasoned." *Id.* The administrative law judge also found that Dr. Bellotte did not thoroughly explain why he discounted coal dust exposure as a factor in claimant's condition, and noted Dr. Bellotte's testimony on cross-examination that it would be possible for an individual with claimant's conditions to suffer from pneumoconiosis if he had sufficient exposure and was susceptible to the disease, see Employer's Exhibit 17 at 31. The administrative law judge added:

> Although Dr. Bellotte attempted to distinguish Claimant's impairment from individuals with the same conditions by stating that Claimant does not have pneumoconiosis because his x-rays do not exhibit changes consistent with higher grades of pneumoconiosis, I find that the physician opinion evidence is more probative than the chest-x-ray evidence. (EX 17) Physician opinion evidence takes into consideration a totality of factors as opposed to chest x-ray evidence which is isolated evidence. Accordingly, Dr. Bellotte's opinion shall be afforded less weight.

Decision and Order at 5. Employer asserts that the administrative law judge improperly found Dr. Bellotte's opinion to be inadequately reasoned based on the administrative law judge's own assumption that Dr. Bellotte relied primarily on the chest-x-ray and pulmonary functions study results. Employer argues that the administrative law judge thereby substituted his opinion for that of the medical experts. Employer also asserts that the

administrative law judge erred in failing to consider Dr. Bellotte's qualifications.

Employer's contention that the administrative law judge substituted his opinion for that of a medical expert has merit. As employer correctly contends, Dr. Bellotte specifically testified that he relied on many factors and test results to exclude coal mine dust exposure as a major contributing factor in claimant's disability, and set forth those factors in detail in his deposition testimony, *see* Employer's Exhibit 17 at 29-30, *see also* Employer's Exhibit 5. Thus, the administrative law judge's finding that Dr. Bellotte relied primarily on the x-ray and pulmonary function testing to eliminate exposure to coal mine dust as a major factor in claimant's disability was not based on Dr. Bellotte's testimony, but on the administrative law judge's own determination. The administrative law judge improperly substituted his opinion for that of a medical expert, *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987), and, therefore, his finding that Dr. Bellotte's opinion is inadequately reasoned cannot stand. On remand, the administrative law judge must reconsider the weight and credibility of Dr. Bellotte's opinion, and may address the impact, if any, of the respective qualifications of the physicians of record. *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987).

Employer further contends that the second reason offered by the administrative law judge to discredit Dr. Bellotte's opinion, namely that the physician did not thoroughly explain why he discounted exposure to coal mine dust as a contributing factor in claimant's condition, is contrary to the record where Dr. Bellotte provided a detailed explanation on deposition to support his opinion that claimant does not have clinical or legal pneumoconiosis and is not disabled by either disease. Employer's Brief at 16.

Employer's contention has merit. Dr. Bellotte, in his December 10, 1998 report, Employer's Exhibit 5, and in his April 23, 1999 deposition testimony, Employer's Exhibit 17 at 29-30, detailed the reasons why he discounted coal mine dust exposure as a factor contributing to claimant's condition. The administrative law judge thus mischaracterized the record when he found that Dr. Bellotte's opinion is unexplained. APA, *supra*. On remand, the administrative law judge must reconsider the totality of Dr. Bellotte's relevant findings.

Administrative Law Judge's Discrediting of Dr. Branscomb's Opinion at 20 C.F.R. §718.202(a)(4)

Employer next contends that the administrative law judge's finding that Dr. Branscomb's February 11, 1999 opinion is equivocal because he found that claimant "probably has asthma," Employer's Exhibit 7, ignores Dr. Branscomb's subsequent assessment in which he definitively agreed with Dr. Bellotte's diagnosis and stated, "It is asthma, a process which occurs in 6% of the total population." Employer's Exhibit 8. The administrative law judge discredited Dr. Branscomb's opinion because: he did not examine claimant; Dr. Branscomb's February 11, 1999 statement that claimant "probably has asthma"

is equivocal or vague; and Dr. Branscomb failed, in his March 3, 1999 opinion, to explain why coal mine dust exposure did not contribute to claimant's disability. The administrative law judge concluded that claimant's March 3, 1999 opinion was not based on underlying data sufficient to support his determination and thus was inadequately reasoned.

Employer's contention has merit. In his February 11, 1999 opinion, Dr. Branscomb stated, *inter alia*:

> I think Mr. Triplett probably has asthma. This is based on Dr. Uhem's description of the chest tightening up with exposure to cold, dampness, hairspray, etc. The medications which have been described would be appropriate for asthma although there is no record of a clear response for these medicines. The function studies, although invalid, suggest expiratory obstruction. The arterial blood gases are inconsistent with each other.

Employer's Exhibit 7. After reviewing what he characterized as "the extremely comprehensive examination report of Dr. Bellotte dated 12/10/98," Employer's Exhibit 8, Dr. Branscomb stated in his March 3, 1999 report:

> 2. There is disabling pulmonary disorder. It is asthma, a process which occurs in 6% of the total population. It is currently severe, although very variable in intensity. I would regard the data as indicating total disability at present although the process might improve greatly with better treatment. It is neither caused, aggrivated (sic) or worsened by coal dust exposure.
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> 3. The diagnosis of asthma is confirmed at a high level of medical probability.

Employer's Exhibit 8. Although the administrative law judge noted Dr. Bellotte's ultimate conclusion in March of 1999 that claimant has asthma, see Decision and Order at 5, he did not take it into account when he discounted Dr. Bellotte's earlier finding that claimant "probably had asthma." *Id.* Based on the foregoing, we hold that the administrative law judge erred in weighing these two reports rendered by Dr. Branscomb. On remand, the administrative law judge must reweigh Dr. Branscomb's reports and redetermine their credibility.

Employer argues that the administrative law judge erred in according less weight to Dr. Branscomb's opinion because he did not examine claimant, while crediting Dr. Rasmussen's report without acknowledging that he did not examine claimant. Employer contends that the administrative law judge thereby selectively analyzed the evidence.

As set forth above, the administrative law judge erred in weighing Dr. Branscomb's two 1999 reports. *See* discussion, *supra* at 8. On remand, the administrative law judge must reassess the weight of Dr. Branscomb's opinion, as well as the weight of the other relevant medical opinions of record.[5]

Administrative Law Judge's Crediting of Dr. Durham's Opinion at 20 C.F.R. §718.202(a)(4)

Employer next contends that the administrative law judge should not have credited the opinions of Drs. Durham and Rasmussen to find the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4). The administrative law judge found that the opinion of Dr. Durham, that claimant's total disability is due seventy-five percent to coal workers' pneumoconiosis arising out of coal mine employment and twenty-five percent to chronic obstructive pulmonary disease arising from tobacco abuse, Director's Exhibit 11, Employer's Exhibit 13, is entitled to more weight because: Dr. Durham is claimant's treating physician; Dr. Durham performed the most recent examination of claimant; and his opinion is well documented and reasoned. The administrative law judge also found that Dr. Durham's opinion was consistent with an eighteen pack-year smoking history. The administrative law judge specifically noted Dr. Durham's finding that if claimant had an eighteen pack-year smoking history, he would attribute seventy-five percent of his impairment to coal mine employment and twenty-five percent to smoking. He found that Dr. Durham, unlike Drs. Bellotte and Branscomb, "thoroughly explained the effect of Claimant's exposure to coal dust (DX 11)." Decision and Order at 6. Employer notes that, contrary to the administrative law judge's finding, Dr. Durham did not conduct the most recent examination of claimant in April of 1998; rather, Dr. Bellotte performed the most recent examination of claimant, in December 1998. Employer also asserts that the administrative law judge mechanically credited Dr. Durham's opinion based on his status as claimant's treating physician. Employer argues that, moreover, Dr. Durham cannot be considered a treating physician under the newly promulgated regulation at 20 C.F.R. §718.104(d), which the administrative law judge failed to apply. Applying the factors set forth in 20 C.F.R. §718.104(d), employer indicates that Dr. Durham treated claimant for non-respiratory conditions, unlike Dr. Bellotte; that Dr. Durham only treated claimant from March until April of 1998, and that Dr. Durham only examined claimant twice. Employer argues that because Drs. Bellotte and Branscomb had access to more information, records, or testing that both preceded and

[5] We note that the United States Court of Appeals for the Fourth Circuit held, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000), that an administrative law judge may not discredit a medical opinion solely on the basis that the rendering physician did not examine the miner.

followed Dr. Durham's examinations, the administrative law judge erred in according greater weight to Dr. Durham's opinion, over the opinions of Drs. Bellotte and Branscomb, based on Dr. Durham's status as claimant's treating physician.

Employer correctly contends that Dr. Durham did not conduct the most recent physical examination of claimant and insofar as the administrative law judge accorded greater weight to Dr. Durham's report on this basis, he erred. Dr. Bellotte provided the most recent examination of claimant, in December 1998. *Compare* Employer's Exhibits 13 and 17; *see* Decision and Order at 6 n.7 (administrative law judge paradoxically lists correct chronology of physical examinations of Drs. Bellotte and Durham.) The administrative law judge, however, did not mechanically credit Dr. Durham's report based on his status as claimant's treating physician, as employer alleges.[6] The record reveals that the administrative law judge critically analyzed the substance of the physician's findings. Decision and Order at 6. Further, contrary to employer's contention, the administrative law judge did not err by not applying the regulation at 20 C.F.R. §718.104(d) to Dr. Durham's 1998 report and 1999 deposition because this evidence was not developed after January 19, 2001. 20 C.F.R. §718.101(b). Ultimately, we hold that the administrative law judge's weighing of the evidence at 20 C.F.R. §718.202(a)(4) must be vacated based on his errors in weighing the opinions of Drs. Bellotte and Branscomb. On remand, the administrative law judge may reconsider the chronology of claimant's physical examinations of record in determining the weight and credibility of the medical opinion evidence.

Employer next argues that the administrative law judge provided no rationale for crediting Dr. Durham's opinion as well documented and reasoned while discrediting Dr. Bellotte's opinion as inadequately reasoned and unexplained. Employer also asserts that the administrative law judge erred in crediting Dr. Durham's opinion because it was consistent with the administrative law judge's finding of an eighteen pack-year smoking history, a finding which employer contests. Employer further notes that the administrative law judge referred to Dr. Durham's statement that if, in fact, claimant has an eighteen pack-year smoking history, as claimant reported to him, claimant's condition would be seventy-five percent attributable to coal workers' pneumoconiosis due to coal dust exposure and twenty-five percent attributable to chronic obstructive pulmonary disease due to tobacco abuse, Director's Exhibit 11, Employer's Exhibit 13 at 13, 25-27. Employer notes that the

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[6] Employer filed with the Board, on August 4, 2003, an Advisory of New Precedent wherein it indicated that *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003) is relevant to the treating physician issue in this case. This case, however, arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), and the Fourth Circuit has not adopted the holding in *Williams*.

administrative law judge, however, also found that Dr. Durham "explained that when a person smokes and is exposed to coal dust, smoking and coal dust contribute to the person's overall condition equally. (DX 11.)" Decision and Order at 6.

Contrary to employer's contention, the administrative law judge properly found that Dr. Durham's medical opinion was reasoned and documented as he found that it was based on "physical examinations, symptoms, work and social histories, and the underlying data which is sufficient to support his determination," Decision and Order at 6. Moreover, Dr. Durham noted a smoking history of eighteen pack-years, with claimant quitting smoking in 1981, Director's Exhibit 11; Employer's Exhibit 13 at 13; and the administrative law judge thus properly found that Dr. Durham's opinion supports the administrative law judge's finding of an eighteen pack-year smoking history. Further, inasmuch as we vacate the administrative law judge's weighing of the evidence and remand the case for, *inter alia*, the administrative law judge to reweigh Dr. Bellotte's opinion, we need not further address employer's contention that the administrative law judge erred in finding Dr. Durham's opinion reasoned and documented while finding Dr. Bellotte's opinion inadequately reasoned and unexplained. *See* discussion, *supra* at 7.

Employer further contends that the administrative law judge's decision to credit Dr. Durham's opinion is inconsistent with the decision of the Fourth Circuit in *U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999) because Dr. Durham testified that claimant "probably has coal workers' pneumoconiosis," Employer's Exhibit 13 at 31. Employer asserts that Dr. Durham's opinion is equivocal and is too speculative to be relied upon or credited by the administrative law judge.

Employer correctly notes that Dr. Durham equivocated on his diagnosis of coal workers' pneumoconiosis on deposition. Specifically, Dr. Durham testified "I felt pretty certain then and I still feel pretty strongly that [claimant] probably does have coal workers' pneumoconiosis. I think he may also have some airway disease that's being contributed to by his tobacco abuse history as well." Employer's Exhibit 13 at 31. The administrative law judge may address this equivocation by Dr. Durham in reconsidering the weight and credibility of the medical opinion evidence on remand.

Administrative Law Judge's Crediting of Dr. Rasmussen's opinion at 20 C.F.R. §718.202(a)(4)

Employer next contends that the administrative law judge offered no credible rationale for finding Dr. Rasmussen's opinion to be well reasoned and documented. The administrative law judge explained that he accorded greater weight to Dr. Rasmussen's opinion, that claimant's "coal workers' pneumoconiosis which arose from his coal mine employment [] is a major contributing factor to his totally disabling respiratory insufficiency," Claimant's Exhibit 4, because his opinion is reasoned and documented. The

administrative law judge found that Dr. Rasmussen thoroughly explained and supported his opinion regarding "the effect of coal dust exposure on the Claimant." Decision and Order at 7. The administrative law judge specifically noted that Dr. Rasmussen provided "an extensive list of articles which discuss how exposure to coal dust is capable of producing chronic obstructive lung disease, bronchitis, and emphysema." *Id.* The administrative law judge found that Dr. Rasmussen's opinion was consistent with claimant's symptoms, the pulmonary function study results, claimant's thirty-two years of coal mine employment, and is buttressed by Dr. Durham's opinion. *Id.* Employer argues that the medical articles relied upon by Dr. Rasmussen "only discuss potential connections between coal dust exposure and breathing problems," and asserts that the physician did not explain why or how claimant's symptoms or test results support a conclusion that this claimant's respiratory ailments arose from coal dust exposure as opposed to other conditions or diseases. Employer's Brief at 24.

Substantial evidence in the record supports the administrative law judge's determination that Dr. Rasmussen's opinion is reasoned and documented because Dr. Rasmussen thoroughly explained and supported his opinion regarding the effect of coal dust exposure on claimant's condition. The administrative law judge specifically noted that Dr. Rasmussen provided a list of medical articles that discuss how exposure to coal dust is capable of producing chronic obstructive lung disease, bronchitis, and emphysema. Claimant's Exhibit 4. The administrative law judge thereby properly evaluated the evidence upon which Dr. Rasmussen's conclusions were based, *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, [*Carmines*], 138 F.3d 134, 32 BRBS 48 (CRT)(4th Cir. 1998), and employer's attempt to interpret the import of those medical articles is unavailing.

Administrative Law Judge's Finding of the Existence of Pneumoconiosis at 20 C.F.R. §718.202(a)

Employer contends that the administrative law judge's finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a) is not consistent with *Compton* because the administrative law judge did not set forth the x-ray evidence, but instead relied on his previous determination that the weight of the x-ray evidence is negative, a finding which employer acknowledges was previously affirmed by the Board. *Triplett v. Sewell Coal Co.*, BRB No. 00-0133 BLA (Oct. 6, 2000)(unpublished.) Employer also argues that the administrative law judge did not provide a reason for finding the medical opinions more reliable than the x-ray evidence in finding the existence of pneumoconiosis established in this case.

Employer's contention lacks merit. The Board previously affirmed, in *Triplett v. Sewell Coal Co.*, BRB No. 00-0133 BLA (Oct. 6, 2000)(unpublished), slip op. at 2 n.1, the administrative law judge's findings that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1) through (a)(3). In the instant case, the administrative law judge referred to

the fact that the Board had affirmed his findings at 20 C.F.R. §718.202(a)(1) through (a)(3). Decision and Order at 7. Consistent with *Compton*, the administrative law judge considered the negative weight of the x-ray evidence and found pneumoconiosis established based on the weight of the medical opinions. The administrative law judge rationally explained, "In addition, I have previously found and I find again that the medical opinion evidence is more reliable and probative than the x-ray evidence… As discussed above, physician opinion evidence takes into account a totality of factors whereas; x-ray evidence is isolated evidence." *Id.* Contrary to employer's argument, the fact that the administrative law judge did not set forth the x-ray evidence itself does not render his finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a) inconsistent with *Compton*. On remand, should the administrative law judge again find the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4), his decision at 20 C.F.R. §718.202(a) under *Compton* must stand.

Administrative Law Judge's Findings on Disability Causation at 20 C.F.R. §718.204(c)

Lastly, employer contends that the administrative law judge inadequately addressed the issue of disability causation at 20 C.F.R. §718.204(c) and simply restated his crediting at 20 C.F.R. §718.202(a)(4) of the opinions of Drs. Durham and Rasmussen over the opinions of Drs. Bellotte and Branscomb.[7] Employer further asserts, "The ALJ seemingly relies on the fact that Dr. Branscomb based his assessment on the negative x-ray evidence, a significant smoking history, and Dr. Bellotte's assessment. The ALJ disregards Dr. Branscomb's statement that his evaluation of disability causation was based on the entire record." Employer's Brief at 19.

Employer's contentions have merit. A review of the Decision and Order reveals that the administrative law judge, in determining that claimant met his burden on disability causation at 20 C.F.R. §718.204(c), simply relied on his credibility findings at 20 C.F.R. §718.202(a)(4). Specifically, the administrative law judge stated:

> For the reasons stated above, I rely on the opinions of Drs. Durham and Rasmussen over the opinions of Drs. Bellotte and Branscomb. Therefore, because both Drs. Durham and Rasmussen concluded that Claimant was totally disabled and his disability was due to pneumoconiosis, I find that Claimant has

[7] Employer notes that the administrative law judge considered the evidence relevant to total respiratory or pulmonary disability at 20 C.F.R. §718.204(b), *see* Decision and Order at 8, after having found this element of entitlement established by virtue of the parties' stipulation, *id.* at 7. Employer, however, specifies no error in this regard. Thus, we need not address this issue.

> proved, by a preponderance of the evidence, total disability due to pneumoconiosis at [20 C.F.R.] §718.204(c).

Decision and Order at 8. Further, as discussed herein, the administrative law judge's consideration of the medical opinion evidence at 20 C.F.R. §718.202(a)(4) is not without error, including his erroneous weighing of Dr. Branscomb's opinion. *See* discussion, *supra* at 8. Consequently, we vacate the administrative law judge's finding at 20 C.F.R. §718.204(c) and further remand the case. The administrative law judge, in considering this case on remand, must make findings at 20 C.F.R. §718.204(c), if reached, that are separate from his findings at 20 C.F.R. §718.202(a)(4).[8]

[8] Employer asserts that Dr. Rasmussen's opinion is insufficient to carry claimant's burden to establish disability causation at 20 C.F.R. §718.204(c). Dr. Rasmussen opined that claimant's coal workers' pneumoconiosis "is a major contributing factor to his totally disabling respiratory insufficiency." Claimant's Exhibit 4. To the contrary, Dr. Rasmussen's opinion is legally sufficient, if credited, to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). 20 C.F.R. §718.204(c); *see Robinson v. Pickands Mater & Co.*, 914 F.2d 790, 14 BLR 2-68 (4th Cir. 1990).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge