BRB No. 08-0346 BLA

B.S.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA POCAHONTAS COAL COMPANY	)	DATE ISSUED: 02/25/2009
	)	
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (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 (07-BLA-5265) of Administrative Law Judge Linda S. Chapman (the administrative law judge) awarding benefits on a subsequent claim[1] 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 twenty-nine years of coal mine

[1] Claimant filed his first claim on June 2, 1995. Director's Exhibit 1. It was finally denied on July 30, 2002. *Id.* Claimant filed this claim on December 19, 2005. Director's Exhibit 3.

employment,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a),[4] 718.203. The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[5]

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[2] The record indicates that claimant was employed in the coal mining industry in Virginia. Director's Exhibits 1, 4, 8, 9. 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 (1989)(*en banc*).

[3] Employer concedes that the new medical evidence established total disability at 20 C.F.R. §718.204(b) and, thus, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Employer's Brief at 2, 3.

[4] Although the administrative law judge found that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), she found that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge then found that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a), based on her "weighing [of] all of the evidence relating to the existence of pneumoconiosis as a whole, including the x-ray evidence." Decision and Order at 19.

[5] Because the administrative law judge's length of coal mine employment finding and her findings at 20 C.F.R. §§718.203(b) and 718.204(b) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

EXISTENCE OF PNEUMOCONIOSIS
Section 718.202(a)(4)

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the treatment notes of Dr. Sutherland[6] and the reports of Drs. Forehand, Rasmussen, Castle, Hippensteel, Dahhan, Fino, and Selby. Dr. Forehand opined that claimant has coal workers' pneumoconiosis. Director's Exhibits 1, 13; Employer's Exhibit 1 (Dr. Forehand's Deposition at 34). Dr. Rasmussen opined that claimant has coal workers' pneumoconiosis and obstructive lung disease related to coal dust exposure and cigarette smoking. Claimant's Exhibit 1. By contrast, Dr. Castle diagnosed an airway obstruction due to chronic bronchitis and bronchial asthma related to tobacco smoke and opined that claimant does not have coal workers' pneumoconiosis. Director's Exhibits 1, 12; Employer's Exhibit 6 (Dr. Castle's Deposition at 33). Similarly, Dr. Hippensteel opined that claimant does not have medical or legal pneumoconiosis. Director's Exhibit 1; Employer's Exhibits 2, 6 (Dr. Hippensteel's Deposition at 20-21). Dr. Selby opined that claimant does not have coal workers' pneumoconiosis or a pulmonary impairment as a result of coal mine dust exposure. Director's Exhibit 1. Dr. Fino opined that claimant does not have coal workers' pneumoconiosis or any occupationally acquired pulmonary condition. Director's Exhibit 1. Lastly, Dr. Dahhan opined that claimant does not have coal workers' pneumoconiosis or any chronic lung disease related to coal mine dust exposure. Director's Exhibit 1.

[6] Although Dr. Sutherland indicated that claimant has chronic bronchitis and chronic obstructive pulmonary disease in his treatment notes, he did not render an opinion regarding the cause of these conditions. Claimant's Exhibit 2. The administrative law judge noted that "Dr. Sutherland's records do not include any findings of pneumoconiosis." Decision and Order at 19.

The administrative law judge discounted Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis because she found that the x-ray evidence did not establish the existence of pneumoconiosis and that claimant's coal mine dust exposure was insufficient to support a finding of pneumoconiosis. Decision and Order at 19. In addition, the administrative law judge discounted Dr. Rasmussen's diagnosis of obstructive lung disease related to coal mine dust exposure because it was based on generalizations and Dr. Rasmussen did not explain how he determined that coal mine dust exposure played a part in claimant's condition. *Id*. Further, the administrative law judge found that Dr. Forehand's opinion outweighed the contrary opinions of Drs. Castle and Hippensteel, because it was better reasoned and better supported by the objective evidence of record. *Id*. at 18-19, 20. The administrative law judge additionally found that Drs. Dahhan, Fino, and Selby did not explain why they categorically excluded claimant's coal mine dust exposure as a cause of his obstructive respiratory impairment.[7] *Id*. at 20. Consequently, the administrative law judge found that claimant met his burden of establishing the existence of pneumoconiosis. *Id*. at 19, 20-21.

Drs. Forehand and Rasmussen

Employer argues that the administrative law judge irrationally weighed Dr. Forehand's opinion, because her application of the law to Dr. Forehand's opinion was inconsistent with her application of the law to Dr. Rasmussen's opinion. Contrary to employer's assertion, the administrative law judge consistently applied the law to the opinions of Drs. Forehand and Rasmussen. As noted above, Dr. Forehand diagnosed coal workers' pneumoconiosis. Dr. Rasmussen diagnosed coal workers' pneumoconiosis and obstructive lung disease related to coal dust exposure. The administrative law judge properly discounted Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis, on the grounds that it was 1) based, in part, on a positive chest x-ray, while she found that the x-ray evidence did not establish the existence of pneumoconiosis, and 2) because claimant's coal mine dust exposure history alone was insufficient to support a finding of pneumoconiosis. Decision and Order at 19; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In addition, the administrative law judge properly discounted Dr. Rasmussen's diagnosis of obstructive lung disease related to coal mine dust exposure, on the grounds that "Dr. Rasmussen's conclusions are based on generalizations, and he has not explained how he determined that in [claimant's] specific case, coal dust exposure played a part in his disabling impairment." Decision and Order at 19; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985).

[7] Employer does not contest the administrative law judge's weighing of the opinions of Drs. Dahhan, Fino, and Selby.

Regarding Dr. Forehand's opinion, the administrative law judge noted that "Dr. Forehand relied, not only on [claimant's] history of coal mine employment and his positive x-ray findings, but on the results of his pulmonary testing and clinical findings on two separate occasions." Decision and Order at 18. Further, in considering Dr. Forehand's diagnosis of coal workers' pneumoconiosis, the administrative law judge indicated that Dr. Forehand specifically focused on claimant's examination, smoking history, coal mine dust exposure history, and objective test results. The administrative law judge stated:

> Dr. Forehand described how the effects of cigarette smoking and exposure to coal mine dust were additive, and affected the lung tissue in a similar manner, resulting in wheezing. He did not think that [claimant] had asthma; he had very severe lung disease, with minimal reversibility. Dr. Forehand pointed out that [claimant] worked for 29 years, much of it at the face as a roof bolter, the position with the highest association with the development of coal dust induced disease, as supported by studies from NIOSH. Dr. Forehand did not discount the effects of [claimant's] significant history of cigarette smoking, which resulted in his low FEV1. But [claimant] did not have an abnormally low DLCO, which is also the mark of cigarette smoking induced respiratory impairment. But he felt that [claimant's] 29 years of exposure to coal played a role in his lung damage, independently of the damage caused by his cigarette smoking. He did not feel that the x-ray showed any evidence of emphysema.

Id.

An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). In this case, the administrative law judge acted within her discretion in finding that Dr. Forehand's opinion was well-reasoned and amply supported by the objective medical evidence of record. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829, 1-832 (1985). Consequently, we reject employer's assertion that the administrative law judge irrationally weighed Dr. Forehand's opinion.

Drs. Castle and Hippensteel

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Castle and Hippensteel because they failed to explain why claimant's

impairment was not caused by coal mine dust exposure. In considering the opinions of Drs. Castle and Hippensteel, the administrative law judge considered the doctors' views regarding impairments that are caused by coal mine dust exposure. The administrative law judge stated:

> On the other hand, both Dr. Castle and Dr. Hippensteel relied, in large part, on their statement that pneumoconiosis, when it causes impairment, generally causes a mixed and obstructive type of impairment. Thus, as [claimant's] impairment was purely obstructive, they did not feel that it was consistent with impairment caused by pneumoconiosis. By qualifying their opinions in this manner, Dr. Castle and Dr. Hippensteel avoided running afoul of the Act, which recognizes that pneumoconiosis, in the legal sense, can cause a purely obstructive impairment. However, I find that their opinions rely too heavily on their assumption that, because [claimant's] impairment does not match the pattern "generally" seen with pneumoconiosis, it cannot be the result of pneumoconiosis.

Decision and Order at 18; *see Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *see also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).

The administrative law judge then noted that while Dr. Castle referred to Dr. Rasmussen's diffusing capacity test results, Dr. Castle did not address Dr. Forehand's diffusing capacity test results in finding that claimant's airways disease was related to severe tobacco smoke. Decision and Order at 18. The administrative law judge stated:

> Dr. Castle stated that all of the findings were consistent with severe tobacco smoke induced airways disease, noting that on Dr. Rasmussen's March 2007 examination, [claimant] had a significantly reduced diffusing capacity. However, he did not address the findings by Dr. Forehand on his two examinations of a relatively normal diffusing capacity, which Dr. Forehand indicated was not consistent with tobacco smoke induced obstruction.

Id.

Contrary to the administrative law judge's finding that Dr. Castle did not address Dr. Forehand's diffusing capacity test results, during the May 9, 2007 deposition, Dr. Castle specifically stated that he disagreed with Dr. Forehand's finding that claimant's diffusing capacity test results were relatively normal. Employer's Exhibit 5 (Dr. Castle's Deposition at 29-30); *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Dr. Castle further stated:

> The diffusing capacity is quite reduced, as noted by Dr. Rasmussen in his [March 27, 2007] report. It was 32 percent of predicted and remains significantly reduced after correction for alveolar volume. So I think that his diffusing capacity is quite typical of tobacco smoke-induced airway disease, and I would indicate that that is the finding that one would expect with that process.

Employer's Exhibit 5 (Dr. Castle's Deposition at 30).

The administrative law judge also found that Drs. Castle and Hippensteel failed to explain why they opined that coal dust exposure did not have an effect on claimant's respiratory condition. Decision and Order at 19. However, contrary to the administrative law judge's finding that Drs. Castle and Hippensteel did not explain why they opined that claimant's impairment was only due to cigarette smoking, and not coal mine dust exposure, during the May 9, 2007 deposition, Dr. Castle stated that claimant's physiological findings are typical of an airways disease related to tobacco smoke, as opposed to coal workers' pneumoconiosis. Employer's Exhibit 5 (Dr. Castle's Deposition at 31). Dr. Castle specifically stated:

> All the findings that he has, including his symptoms, physical findings and all the physiologic findings and arterial blood gas findings, are totally in keeping with that process with a significant degree of airway obstruction, with significant reversibility associated with hyperinflation, gas trapping, reduction in diffusing capacity and then increase in the pCO2 and reduction of the p02 with exercise, all those findings are in keeping with somebody that has severe tobacco smoke-induced airways disease.
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> ***
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> Again, for the reasons that I said, the physiologic changes here are typical of that progression due to tobacco smoking. Coal workers' pneumoconiosis does not cause a reversible process but generally causes a mixed, irreversible obstructive and restrictive ventilatory process. He does not have that.

Employer's Exhibit 5 (Dr. Castle's Deposition at 33).

In addition, during a May 10, 2007 deposition, Dr. Hippensteel explained why he opined that claimant's impairment was related to cigarette smoking, and not coal mine dust exposure. Dr. Hippensteel stated:

> I think that it is caused by his cigarette smoking. I think that, as I stated, he continued to smoke long after he left work in the mines. He had significant reversibility on occasion suggesting a bronchial asthma component to this, which again has no relationship to his coal mine employment but is a disease of the general public, and I noted that he didn't have any restrictive disease which would be expected if it were associated with coal workers' pneumoconiosis, while this combination of asthmatic and partially reversible air flow obstruction was compatible with his cigarette smoking and an asthmatic component, while coal workers' pneumoconiosis, even though it can cause obstruction, it is a fixed and irreversible process when it comes from that disease and so that didn't fit with the findings in this case, so I thought that there were - - that it wasn't just one issue here.

Employer's Exhibit 6 (Dr. Hippensteel's Deposition at 18-19). Dr. Hippensteel further stated:

> I didn't find evidence on his x-ray and there were a lot of other negative readings on this man's x-rays with regards to pneumoconiosis, but it also fit in with the pattern of development of obstruction that was variable, partly reversible, and became less variable over time after he left work in the mines without progression of any findings on his chest x-ray that really made this possible to state that coal workers' pneumoconiosis was not the cause of it but was related to these other problems that I've addressed with a reasonable degree of medical certainty.

Id.

Because the administrative law judge mischaracterized the opinions of Drs. Castle and Hippensteel, *Tackett*, 7 BLR at 1-706, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the medical opinion evidence thereunder. On remand, when reconsidering whether the medical opinion evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians,[8] the explanations for their conclusions, the documentation

[8] Employer's argues that the administrative law judge erred in failing to resolve the discrepancy in the qualifications of the physicians. The administrative law judge did not consider the physicians' qualifications that were relevant to her weighing of the medical opinion evidence at Section 718.202(a)(4). Drs. Castle and Hippensteel are Board-certified in internal medicine and pulmonary disease. Director's Exhibit 12; Employer's Exhibits 2, 5, 6. Dr. Forehand is Board-certified in allergy and immunology

underlying their medical judgments, and the sophistication of, and bases for, their opinions. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Section 718.202(a)(1)-(4)

Further, if the administrative law judge finds that the medical opinion evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), then she must weigh all of the relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether the evidence as a whole establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS
Section 718.204(c)

Employer next contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Forehand, Castle, Hippensteel, Dahhan, Fino, and Selby.[9] Dr. Forehand opined that claimant's respiratory impairment was due to cigarette smoking and coal mine dust exposure. Director's Exhibit 13; Claimant's Exhibit 2. By contrast, Drs. Castle, Hippensteel, Dahhan, Fino, and Selby opined that claimant does not have a disabling pulmonary impairment that resulted from coal workers' pneumoconiosis or coal mine dust exposure. Director's Exhibits 1, 12; Employer's Exhibit 2. The administrative law judge found that Dr. Forehand's opinion outweighed the contrary opinions of Drs. Castle, Hippensteel,

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medicine. Employer's Exhibit 1. Dr. Rasmussen's credentials are not in the record. Because the comparative qualifications of the physicians are relevant to the reliability of their opinions, the administrative law judge erred by failing to weigh the physicians' respective qualifications. *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).

[9] The administrative law judge did not consider Dr. Rasmussen's opinion at 20 C.F.R. §718.204(c). Dr. Rasmussen opined that coal mine dust exposure significantly contributed to claimant's disabling lung disease. Claimant's Exhibit 1. While an administrative law judge is not required to accept evidence that she determines is not credible, she nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Consequently, the administrative law judge erred in failing to consider Dr. Rasmussen's disability causation opinion at Section 718.204(c). *McCune*, 6 BLR at 1-988.

Dahhan, Fino, and Selby. D&O at 19, 20-21. Because we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case for further consideration of the evidence, if reached.[10] *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[10] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) 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).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge