BRB No. 08-0402 BLA

R.D.O.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 02/24/2009
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman and Martin J. Linnet (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-00564) of Administrative Law Judge Stuart A. Levin (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 is the third time that this case has been before the Board. In the Board's most recent Decision and Order, the Board vacated the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and remanded the case to the administrative law judge for reconsideration of the medical opinions of record.[2] [*R.D.O.*] *v. Peabody Coal Co.*, BRB No. 05-0704 BLA (June 29, 2006) (unpub.). On remand, the administrative law judge erroneously determined that the Board's remand instructions required him to find that the opinions in which Drs. Anderson and James diagnosed legal pneumoconiosis were unreasoned. The administrative law judge further found that he was required to credit the opinions in which Drs. Tuteur, Repsher, Fino and Renn indicated that claimant's chronic obstructive pulmonary disease (COPD) was not related to coal dust exposure. The administrative law judge concluded, therefore, that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(4) or total disability due to pneumoconiosis at Section 718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant argues on appeal that the Board's remand orders caused the administrative law judge to render erroneous findings under Sections 718.202(a)(4) and 718.204(c). Employer responds, urging the Board to reject claimant's untimely challenge to the Board's most recent Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief 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 rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

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[1] Claimant filed an application for benefits on January 11, 2000. Director's Exhibit 1. While this claim was pending before Administrative Law Judge Donald B. Jarvis, claimant died. His surviving spouse is pursuing the claim on behalf of his estate.

[2] The relevant procedural history of this case is set forth in the Board's most recent Decision and Order and is incorporated by reference herein. [*R.D.O.*] *v. Peabody Coal Co.*, BRB No. 05-0704 BLA, slip op. at 1-2 (June 29, 2006) (unpub.).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, as claimant's coal mine employment occurred in Montana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2.

We will first address employer's argument that claimant has not properly invoked Board review, as his appeal focuses on the remand orders set forth by the Board in its 2006 Decision and Order, rather than the findings made by the administrative law judge on remand. Employer maintains that claimant has filed, in essence, a request for reconsideration of the Board's Decision and Order that the Board must reject as untimely. We do not agree with employer. Despite the language used by claimant in his pleadings on appeal, claimant has identified errors in the administrative law judge's Decision and Order that resulted from the administrative law judge's attempt to interpret the Board's holdings and remand instructions.

The administrative law judge on remand erroneously determined that the Board made findings regarding the probative value of the relevant medical opinions that were binding upon him and which prohibited him from reviewing the medical literature admitted into the record. Rather, the Board found merit in some of employer's allegations of error regarding the manner in which the administrative law judge weighed the medical opinion evidence. In so doing, the Board recognized that under the Act and the implementing regulations, the administrative law judge is responsible for engaging in the *de novo* consideration of the evidence of record and rendering findings of fact and conclusions of law that are rational and supported by substantial evidence. *See* 33 U.S.C. 921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §§725.351(b), 725.477, 802.301. Claimant's arguments on appeal identify issues alleging that the administrative law judge did not perform his designated role based upon the administrative law judge's interpretation of the Board's holdings and remand instructions. Accordingly, we construe claimant's pleadings as allegations of error regarding the administrative law judge's disposition of these issues and will address them in turn.

With respect to whether the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), claimant contends that the administrative law judge's determination that Drs. Anderson and James did not set forth reasoned diagnoses of legal pneumoconiosis was erroneous. Dr. Anderson, claimant's treating physician, issued reports dated May 18, 2001 and March 18, 2002. Claimant's Exhibits 1, 2. Dr. Anderson diagnosed COPD and stated that coal dust exposure was "most probably" a contributing cause of the disease because the severity of claimant's COPD was greater than that expected in a smoker of his age and because claimant's CT scan revealed the presence of granulomas. Claimant's Exhibit 1. Dr. Anderson also indicated that claimant was totally disabled by his COPD. *Id*. Dr. James examined claimant on April 6, 2000 and reviewed his medical records. Director's Exhibits 11, 12. Dr. James diagnosed COPD and identified coal dust exposure as, "more likely than not," a contributing cause based upon the severity of claimant's obstructive impairment and medical literature recognizing a link between coal dust exposure and obstructive lung disease. Director's Exhibit 12; Employer's Exhibit 10. Dr. James

acknowledged that there are no tests that allow a physician to conclusively distinguish between the effects of smoking and the effects of coal dust inhalation. *Id*.

On remand, the administrative law judge indicated that the Board had determined that "the medical factors relied upon by Dr. Anderson" were "insufficient to establish etiology," and that he was bound by this determination. Decision and Order at 8-9. Regarding Dr. James's opinion, the administrative law judge initially addressed the Board's instruction that he consider the significance of Dr. James's assertion that there are no tests that can distinguish between the effects of smoking and the effects of coal dust exposure. The administrative law judge concluded that he could not resolve this issue, as "neither side presented medical literature which establishes or discounts the value of any particular clinical test in differentiating the etiologies of a respiratory impairment in a coal miner who smoked." *Id*. at 10.

The administrative law judge stated that he would next consider whether Dr. James's opinion regarding the cause of claimant's COPD was supported by other factors, including the medical literature that Dr. James cited. The administrative law judge reported that he could not perform this task, however, because the Board "prohibit[ed] the trial judge from reading the medical literature introduced into evidence and from entering findings regarding what the literature says." Decision and Order at 10. The administrative law judge concluded that he was required, therefore, to accept the assessments of the medical literature put forth by employer's experts "over anything the literature itself may actually contain." *Id*. at 14. The administrative law judge further determined that the Board had rejected, as unexplained, Dr. James's references to findings on examination that supported his identification of coal dust exposure as a cause of claimant's COPD. The administrative law judge stated:

> Under circumstances in which the opinions of Drs. Anderson and James must be deemed deficient while the contrary medical evidence has been determined by the appellate tribunal to be supported, "as employer argues," by "detailed explanations," it would be difficult not to conclude that [c]laimant has failed to establish the existence of legal or clinical pneumoconiosis pursuant to [Section] 718.202(a)(4).

Id. at 19, quoting [*R.D.O.*], BRB No. 05-0704 BLA, slip op. at 8.

Because the administrative law judge did not render findings regarding whether the diagnoses of legal pneumoconiosis made by Drs. Anderson and James are reasoned, we must vacate his determination that claimant did not establish the existence of legal

pneumoconiosis pursuant to Section 718.202(a)(4).[4] We remand this case to the administrative law judge for reconsideration of the medical opinions relevant to this issue. On remand, the administrative law judge must review the medical opinions of Drs. Anderson, James, Tuteur, Repsher, Fino and Renn and determine whether each opinion is reasoned and documented.[5] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In so doing, the administrative law judge must ensure that he has an accurate understanding of the entirety of each physician's opinion and must apply the same level of scrutiny to each opinion.[6] *See Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Once the administrative law judge has determined which opinions satisfy the threshold requirements of being reasoned and documented, he must resolve any conflicts among the opinions and render a finding as to the weight to which each opinion is entitled. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

With respect to the conflict among the medical opinions regarding the medical literature cited by Dr. James, the administrative law judge is permitted to review the medical literature admitted into the record for the purposes of determining whether Dr. James has accurately characterized the literature and whether the criticisms that employer's experts have raised concerning the studies have merit.[7] *See Peabody Coal*

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[4] We affirm the administrative law judge's finding that the language used by Drs. Anderson and James in their diagnoses of legal pneumoconiosis was sufficiently definitive, as this finding was within the administrative law judge's discretion as fact-finder. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501 (1984); Decision and Order at 7.

[5] A documented opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields*, 10 BLR at 1-22; *Fuller*, 6 BLR at 1-1294.

[6] As the Board indicated in its 2006 Decision and Order, the administrative law judge should reconsider the bases of the opinions in which Drs. Tuteur, Repsher, Fino and Renn indicated that coal dust exposure is not a contributing cause of claimant's chronic obstructive pulmonary disease. [*R.D.O.*], BRB No. 05-0704 BLA, slip op. at 8.

[7] Because we have vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4), we need not reach claimant's argument that the administrative

Co. v. McCandless, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). As the administrative law judge indicated, however, he cannot interpret the clinical data set forth in the medical literature. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order at 11-12. In rendering his findings on remand, the administrative law judge must comply with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Because the administrative law judge relied upon his analysis at Section 718.202(a)(4) to determine that total disability due to pneumoconiosis was not established under Section 718.204(c), we must also vacate this finding. If the administrative law judge determines on remand that the existence of legal pneumoconiosis has been proven pursuant to Section 718.202(a)(4), he must reconsider his finding under Section 718.204(c).

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law judge was required to consider the extent to which the views of the medical literature conform to the position adopted by the Department of Labor when promulgating the revised definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a).

Accordingly, the administrative law judge's Decision and Order is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further proceedings 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