BRB No. 09-0387 BLA

HARVEY THOMAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SAPPHIRE COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY	)	DATE ISSUED: 02/23/2010
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (07-BLA-6002) of Administrative Law Judge Janice K. Bullard rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited

claimant with at least eighteen years of coal mine employment,[1] based on the parties' stipulation. Decision and Order at 3. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Further, the administrative law judge found that although the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), since claimant did not establish the existence of pneumoconiosis, he could not establish that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence in determining that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1),(3),(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1),(3), the administrative law judge considered twelve readings of four x-rays, and considered the readers' radiological qualifications.[3]

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Dr. Poulos, a Board-certified radiologist and B reader, read the June 13, 2005 x-ray as positive for pneumoconiosis, while Dr. Wiot, a Board-certified radiologist and B

Weighing the conflicting readings of each individual x-ray, the administrative law judge accorded greater weight to the readings by dually-qualified, Board-certified radiologists and B readers, and found each x-ray to be inconclusive for the existence of either simple or complicated pneumoconiosis. The administrative law judge further considered that, overall, there were five positive and four negative interpretations by Board-certified radiologists and B readers. Based on this analysis of the x-ray readings, the administrative law judge found that the evidence was inconclusive and that, therefore, claimant did not establish the existence of pneumoconiosis.

Claimant contends that substantial evidence does not support the administrative law judge's finding, because the administrative law judge "failed to address the large opacity" on the July 18, 2005 and December 14, 2005 x-rays, and failed to consider that "the preponderance of the readings" of the most recent x-ray, dated January 18, 2006, is positive for pneumoconiosis. Claimant's Brief at 7-8. We disagree. Contrary to claimant's contention, the administrative law judge considered the positive readings for Category A large opacities on the July 18, 2005, December 14, 2005, and January 18, 2006 x-rays. Decision and Order at 5-6. However, in view of the conflicting readings by Board-certified radiologists and B readers, the administrative law judge permissibly found that these x-rays were inconclusive for either simple or complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389-90, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Further, contrary to claimant's suggestion, the administrative law judge was not required to determine that the January 18, 2006 x-ray was positive, based on a count of the positive and negative readings. *See Staton*, 65 F.3d at 60, 19 BLR at 2-280-81. The administrative law judge based her finding on a proper qualitative analysis of the x-ray evidence, and substantial evidence supports her finding.

---

reader, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibit 8. Dr. Alexander, a Board-certified radiologist and B reader, read the July 18, 2005 x-ray as positive for both simple pneumoconiosis and Category A large opacities of complicated pneumoconiosis, while Dr. Patel, a Board-certified radiologist, and Dr. Spitz, a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibit 2. Dr. Alexander read the December 14, 2005 x-ray as positive for simple pneumoconiosis and Category A large opacities, while Dr. Wiot read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 9. Finally, Drs. Alexander and Miller, Board-certified radiologists and B readers, read the January 18, 2006 x-ray as positive for simple pneumoconiosis and Category A large opacities, while Dr. Broudy, a B reader, and Dr. Spitz, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibits 2, 5; Employer's Exhibits 1, 3, 10.

See Staton, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Therefore, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of either simple or complicated pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the medical opinions relevant to the issue of the existence of pneumoconiosis are those submitted by Dr. Alam, who diagnosed legal pneumoconiosis,[4] and Drs. Broudy and Dahhan, who indicated that claimant does not have legal pneumoconiosis. Dr. Alam, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant on behalf of the Department of Labor (DOL) on July 18, 2005, and diagnosed him with chronic obstructive pulmonary disease (COPD) in the form of severe emphysema due to both coal dust exposure and tobacco abuse.[5] Director's Exhibit 12. In supplemental reports dated September 8, 2005, March 13, 2007, and April 2, 2008, Dr. Alam reiterated his diagnosis of legal pneumoconiosis, and explained that, although claimant's smoking may have initiated the emphysema, smoking and coal mine dust exposure combined to cause claimant's lung disease, with "at least 50%" of claimant's impairment caused by coal dust exposure. Director's Exhibit 16 at 2; Director's Exhibit 53 at 147; Claimant's Exhibit 6. Among other factors, Dr. Alam pointed out that claimant's condition progressively worsened despite his having quit smoking in 2005,[6] and he referred to the medical literature recognizing coal mine dust as a cause of pulmonary disease with emphysema. *Id.*

---

[4] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Clinical pneumoconiosis" is defined as "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" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] Dr. Alam also diagnosed claimant with clinical pneumoconiosis, in the form of pulmonary fibrosis seen on chest x-ray. The administrative law judge discounted Dr. Alam's diagnosis of clinical pneumoconiosis as a mere restatement of an x-ray, and claimant has not challenged that determination on appeal.

[6] In Dr. Alam's March 3, 2007 report, he noted that he had been treating claimant for approximately one year, and in his report of April 2, 2008, he stated that he had been treating claimant since 2005. Director's Exhibit 53 at 146; Claimant's Exhibit 6 at 1.

Dr. Broudy, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant on January 18, 2006 and diagnosed him with emphysema with severe obstructive airways disease, due solely to smoking. Director's Exhibits 17, 19; Employer's Exhibits 4, 6. Dr. Dahhan, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record, and diagnosed severe emphysema due to smoking. Employer's Exhibits 5, 7. As summarized by the administrative law judge, in attributing claimant's COPD entirely to smoking, Drs. Broudy and Dahhan set forth several rationales focusing on claimant's examination findings, the nature, pattern, and severity of his impairment, and his smoking history. Decision and Order at 8-11.

The administrative law judge found that Dr. Alam's diagnosis of legal pneumoconiosis was "adequately supported by the objective evidence he considered," and was "well-documented and reasoned." Decision and Order at 15. Finding Dr. Alam's opinion "bolstered by his advanced credentials and his familiarity with [c]laimant's particular condition as the treating physician," the administrative law judge accorded his opinion "substantial probative weight." *Id*. Similarly, the administrative law judge found the opinions of Drs. Broudy and Dahhan to be "well-reasoned and documented," as well as "bolstered by [their] advanced credentials," and she accorded their opinions "substantial probative weight." *Id*.

In view of the conflicting opinions from equally qualified physicians as to the etiology of claimant's COPD, the administrative law judge found that the evidence was inconclusive regarding legal pneumoconiosis:

> Drs. Broudy, Dahhan, and Alam are all internists and pulmonologists, and thus, comparably credentialed. Furthermore, they all concur that [c]laimant suffers from severe COPD. The only point of dissen[s]ion is the etiology of the COPD. All three physicians note that medical literature supports their diagnosis. Dr. Alam stated that [c]laimant's condition could be totally the result of tobacco abuse, and Dr. Broudy admitted that it is impossible to absolutely exclude coal dust exposure as a possible causative agent. Based on these factors, I find that the dispute in this matter does not come down to who provided a more detailed report, or who is more familiar with [c]laimant's specific physical condition. Since there is no definitive study or litmus test to prove the etiology of [c]laimant's COPD, and since the diagnosing physicians are equally qualified, I find that the causation evidence is inconclusive. Therefore, I find that [c]laimant has failed to prove that his COPD was caused or aggravated by coal dust exposure. Thus . . . the medical reports do not prove that [c]laimant suffers from legal pneumoconiosis.

Decision and Order at 15 (footnote omitted).

Claimant contends that the administrative law judge "failed to properly address the impact of" the treating physician rule set forth at 20 C.F.R. §718.104(d). Claimant's Brief at 12. Specifically, claimant argues that since the administrative law judge found Dr. Alam's opinion to be well-reasoned and supported by his qualifications, "as a matter of law, he should have controlling weight." Claimant's Brief at 13. Claimant further maintains that the administrative law judge did not provide an adequate rationale for finding that the opinions of Drs. Broudy and Dahhan were well-reasoned regarding the source of claimant's impairment. Claimant's Brief at 11. Specifically, claimant argues that the administrative law judge did not consider whether Drs. Broudy and Dahhan premised their opinions that claimant does not have legal pneumoconiosis on views regarding coal dust and obstructive lung disease that are contrary to DOL's findings as to the medical literature on that issue. Claimant's Brief at 11-12. These contentions have merit, in part.

Contrary to claimant's contention, under Section 718.104(d), the opinion of a treating physician is not automatically entitled to controlling weight if the administrative law judge finds that the physician's opinion is well-reasoned. Rather, the administrative law judge must determine the weight to be accorded to the treating physician's opinion viewed in context, "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003)(holding that "the opinions of treating physicians get the deference they deserve based on their power to persuade"). Therefore, we reject claimant's contention that, as a matter of law, the administrative law judge was bound to accord controlling weight to Dr. Alam's opinion.

However, as claimant contends, the administrative law judge did not address credibility issues that claimant raised below concerning the opinions of Drs. Broudy and Dahhan. The record reflects that claimant argued to the administrative law judge that the opinions of Drs. Broudy and Dahhan were not well-reasoned, because they were premised on assumptions contrary to the regulations, such as the belief that coal dust causes only focal emphysema, or that coal dust causes only minimal obstruction. Claimant's Brief at 11-12, filed July 28, 2008. On appeal, claimant argues that, in finding that Drs. Broudy and Dahhan supported their opinions with medical literature, the administrative law judge did not address that Drs. Broudy and Dahhan, contrary to medical literature credited by DOL, reasoned that coal dust causes only focal emphysema, that generally a restrictive impairment must be present in order for obstructive disease to be related to coal dust, and that coal dust causes only minimal obstruction. Claimant's Brief at 11-12, *citing* 65 Fed. Reg. 79942 (Dec. 20, 2000). A review of the record reveals that, in attributing claimant's obstructive impairment entirely

to smoking, Drs. Broudy and Dahhan made statements on these matters that, arguably, are at odds with pertinent DOL findings regarding the medical science on the types of impairments that can be caused or aggravated by coal mine dust exposure.[7] *See* 65 Fed. Reg. 79938-44.

Because the administrative law judge did not address these aspects of the opinions of Drs. Broudy and Dahhan when determining that they were well-reasoned and supported by medical literature on the issue of the existence of legal pneumoconiosis, the administrative law judge's Decision and Order does not comport 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 set forth the rationale underlying her findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We must, therefore, vacate the administrative law judge's decision to credit, as well-reasoned, the opinions of Drs. Broudy and Dahhan, and her attendant finding that these opinions merited substantial probative weight as to the existence of legal pneumoconiosis, and remand this case for further consideration. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

On remand, the administrative law judge must reconsider whether the medical opinions of record are reasoned and documented with respect to the presence or absence of legal pneumoconiosis, taking into account the respective analyses and the quality of the physicians' comparative reasoning, along with the physicians' qualifications, and explain the weight she accords their conclusions. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). In addressing the credibility issues raised by claimant, the administrative law judge, on

[7] As summarized by the administrative law judge, Dr. Broudy noted that if claimant's severe obstructive condition had been caused by coal dust exposure, Dr. Broudy would expect to see complicated pneumoconiosis, an advanced case of simple pneumoconiosis, or a restrictive impairment on claimant's pulmonary function study, none of which was present. Decision and Order at 9; Employer's Exhibit 6 at 16. Dr. Broudy noted further that, whereas coal dust exposure causes focal emphysema and a fibrotic process that makes the lungs smaller, claimant has bullous emphysema and large lungs. Decision and Order at 9-10; Employer's Exhibit 6 at 29. Dr. Dahhan noted that claimant has centriacinar emphysema, which, he stated, is not a type of emphysema that is caused by coal dust exposure. Decision and Order at 10; Employer's Exhibit 5 at 2. Dr. Dahhan noted further that claimant has no evidence of restriction. *Id.*; Employer's Exhibit 7 at 7. Dr. Dahhan additionally noted that, based on medical literature, the loss in claimant's FEV1 is too severe to be accounted for by coal dust inhalation. Decision and Order at 10; Employer's Exhibit 7 at 8.

remand, should bear in mind that a physician's statement of a view in conflict with the Act or regulations is not sufficient, standing alone, to bar consideration of the doctor's opinion; the administrative law judge must determine the extent to which such hostile opinions affected the physician's diagnosis. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, BLR (6th Cir. 2009). Apart from whether an opinion may be deemed "hostile," the administrative law judge, as the trier-of-fact, has the discretion to determine whether a medical opinion is supported by accepted scientific evidence, as determined by DOL when it revised the definition of pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. 2007); *J.O.* [*Obush*] *v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA (June 24, 2009). Further, we instruct the administrative law judge, on remand, to consider the entirety of each physician's reasoning, when determining the weight to accord the respective opinions.[8]

Lastly, claimant argues that the administrative law judge failed to address that Dr. Dahhan reviewed a medical report that was not admitted into evidence. Claimant's Brief at 12. The administrative law judge addressed this issue by noting that, even if she excluded Dr. Dahhan's report, she would still conclude that the evidence as to legal pneumoconiosis was inconclusive, based solely on Dr. Broudy's report. Decision and Order at 15, n.7. As we have vacated the administrative law judge's crediting of Dr. Broudy's report, the administrative law judge, on remand, should again address the impact, if any, that Dr. Dahhan's consideration of inadmissible evidence had on his medical opinion. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR at 1-229, 1-241-42 and n.15 (2007)(*en banc*).

Because we have vacated the administrative law judge's finding that the existence of legal pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that claimant did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). If, on

[8] As further summarized by the administrative law judge, the record reflects that Drs. Broudy and Dahhan provided additional reasons for their opinions that claimant's lung disease is due solely to smoking. For example, Dr. Broudy noted that claimant has clinical and objective findings of bullous emphysema, and objective evidence of ongoing smoking. Decision and Order at 9-10; Employer's Exhibit 4 at 2; Employer's Exhibit 6 at 9-13. Both Drs. Broudy and Dahhan also pointed to the fact that claimant's pulmonary impairment is partially reversible with bronchodilators. *Id.*; Employer's Exhibit 6 at 17; Employer's Exhibit 7 at 7. Additionally, Dr. Dahhan explained that claimant has bullous emphysema, a type of emphysema that is not related to coal dust exposure, and he noted that claimant's lengthy smoking history was sufficient to cause bullous emphysema. Decision and Order at 10-11; Employer's Exhibit 7 at 10.

remand, the administrative law judge finds the existence of legal pneumoconiosis established, she must reconsider the evidence as to the cause of claimant's total disability, pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge