

BRB No. 10-0295 BLA

PAUL WARD)
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 Claimant-Respondent)
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 v.)
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 CONSOLIDATION COAL COMPANY)
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 and)
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 CONSOL ENERGY, INCORPORATED) DATE ISSUED: 02/11/2011
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Second Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Second Remand (2003-BLA-5119) of Administrative Law Judge Alice M. Craft rendered on a claim filed on May 14, 2001, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the third time.¹ Pursuant to employer's most recent appeal, the Board vacated the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), which was based on the opinion of Dr. Crater. The Board remanded the case to the administrative law judge for reconsideration of Dr. Crater's opinion, along with the opinions of Drs. Dahhan and Jarboe on the issue of legal pneumoconiosis. Additionally, the Board vacated the administrative law judge's finding of disability causation at 20 C.F.R. §718.204(c), and instructed the administrative law judge to revisit that issue, if reached.² *P.W. [Ward] v. Consolidation Coal Co.*, BRB No. 07-0705 BLA (May 20, 2008) (unpub.).

On remand, the administrative law judge found legal pneumoconiosis established at Section 718.202(a)(4), based on the opinion of Dr. Crater.³ She also credited the opinion of Dr. Crater to find that claimant was totally disabled due to pneumoconiosis at Section 718.204(c). In addition, she again found total disability established at 20 C.F.R. §718.204(b) and that the causal relationship between pneumoconiosis and coal mine employment was established at 20 C.F.R. §718.203, based on her finding of legal pneumoconiosis. Therefore, the administrative law judge awarded benefits on the claim.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4). First, employer contends that the administrative law judge erred in crediting the opinion of Dr. Crater on the issue of legal pneumoconiosis, given that she found that Dr. Crater failed to explain the bases for his finding and relied on an incorrect smoking history. Next, employer asserts that, in crediting the opinion of Dr. Crater, the

¹ The history of this case is set forth in the Board's prior decision. *P.W. [Ward] v. Consolidation Coal Co.*, BRB No. 07-0705 BLA (May 20, 2008)(unpub.).

² The Board noted that it had previously affirmed, as unchallenged on appeal, the administrative law judge's finding of thirty-one years of coal mine employment and that total disability was established at 20 C.F.R. §718.204(b). *See P.W. [Ward]*, BRB No. 07-0705 BLA, slip. op. at 2; *see also P.W. [Ward] v. Consolidation Coal Co.*, 23 BLR 1-151 (2006).

³ The administrative law judge also found that clinical pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(4).

administrative law judge improperly substituted her own interpretation of the medical data for that of the doctors. Employer also argues that, in referencing the preamble to the Act, the administrative law judge improperly shifted the burden of proof to employer by requiring it to disprove the existence of legal pneumoconiosis. Additionally, employer argues that the administrative law judge improperly discredited the opinions of Drs. Jarboe and Dahhan by requiring them to “rule out” coal mine dust exposure as a cause of claimant’s respiratory impairment. Finally, employer suggests that, should the Board remand the case for a third time, reassignment to a different administrative law judge is warranted. Neither claimant, nor the Director, Office of Workers’ Compensation Programs (the Director), has filed a substantive response brief in this appeal.⁴

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.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he 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).

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge erred in crediting Dr. Crater’s opinion over those of Drs. Dahhan and Jarboe to find legal pneumoconiosis established. Specifically, employer contends that, in view of her acknowledgement that Dr. Crater failed to explain his diagnosis of legal pneumoconiosis and relied on an inaccurate smoking history, the administrative law judge’s finding that Dr. Crater’s opinion was well-reasoned is not supported by substantial evidence.⁶

⁴ As the Director, Office of Workers’ Compensation Programs (the Director), correctly asserts, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant claim, which was filed before January 1, 2005.

⁵ Because claimant’s last coal mine employment was in Tennessee, the Board will apply the law 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*).

⁶ “Legal pneumoconiosis” is defined under 20 C.F.R. §718.201(a)(2) as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.

In evaluating the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge found that Dr. Crater:

[d]id not offer any detailed explanation why he thought both factors [smoking and coal mine employment] contributed to the [c]laimant's pulmonary condition, but Dr. Crater's attribution of the [c]laimant's obstructive disease to a combination of factors is consistent with the regulations, and sufficient to meet the requirement that coal dust be a contributing cause to the claimant's impairment to make a diagnosis of legal pneumoconiosis. He attributed a lesser smoking history to the [c]laimant than I have found. But that difference affects only the relative contribution of coal dust and smoking to the claimant's impairment. Even assuming a greater smoking history, both would still be contributing factors under this reasoning.⁷

Decision and Order at 14.

While a physician's opinion that a miner's impairment is due to the combined effects of smoking and coal mine dust exposure need not apportion the relative contributions of each, it must be sufficient to establish that the miner's respiratory impairment is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." See 20 C.F.R. §718.201; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); see also *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). Whether a medical opinion is well-documented and well-reasoned is a matter within the discretion of the administrative law judge, and will be affirmed if supported by substantial evidence. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). Resolving conflicts in the medical evidence is the duty of the administrative law judge, as fact-finder. See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). However, an administrative law judge must resolve any conflicts based on the actual medical evidence in the record, and not on his or her own interpretation of the medical evidence. See *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

⁷ The administrative law judge found that claimant had a twenty to thirty pack-year smoking history, while Dr. Crater found a ten to twenty pack-year smoking history. The administrative law judge and Dr. Crater found that claimant had a thirty-year coal mine employment history. See Decision and Order at 3, 14; Director's Exhibit 8 at 34, 36.

Here, the administrative law judge credited Dr. Crater's diagnosis of legal pneumoconiosis, based on the doctor's opinion that "coal dust and cigarette smoking contributed to the claimant's emphysema," as well-reasoned and well-documented. Decision and Order at 14. However, we are unable to discern which items of evidence are encompassed in the administrative law judge's general observation that Dr. Crater's diagnosis of legal pneumoconiosis was "supported by the evidence available to him." *Id.* Without discussion of such medical evidence, the administrative law judge's decision to credit Dr. Crater's opinion on the issue of legal pneumoconiosis is not reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Marcum*, 11 BLR at 1-24.

Further, the administrative law judge found that Dr. Crater relied on a smoking history that is shorter than her own finding regarding the length of claimant's smoking history. The extent of a miner's smoking history is relevant to the credibility of a doctor's opinion concerning the cause of his respiratory impairment. *See* 20 C.F.R. §718.201(a)(2); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In this case, having found that there was a discrepancy between the smoking history relied upon by Dr. Crater and the one she found, the administrative law judge should explain the impact of that discrepancy on the credibility of Dr. Crater's opinion. *See Clark*, 12 BLR at 1-155.

Additionally, the administrative law judge correctly referenced the guidance provided by the preamble to the regulations, with respect to the additive effects of smoking and coal dust exposure to respiratory impairments. *See J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117 (2009). These regulations do not, however, impose a presumption that coal mine employment *always* causes a respiratory impairment. Rather, the burden of proof rests with claimant to establish that *his* respiratory impairment arose out of his coal mine employment. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); *see* 20 C.F.R. §718.201. Thus, in view of the administrative law judge's failure to identify the evidence that supported Dr. Crater's diagnosis of legal pneumoconiosis, and her failure to consider the discrepancy between her finding on smoking history and that relied upon by Dr. Crater, the administrative law judge erred in finding that claimant met his burden of establishing the existence of legal pneumoconiosis at Section 718.202(a)(4), based on Dr. Crater's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we are unable to affirm the administrative law judge's finding that Dr. Crater's opinion established the existence of legal pneumoconiosis at Section 718.202(a)(4), and vacate the administrative law judge's finding regarding the opinion of Dr. Crater.

Next, we consider employer's argument that the administrative law judge erred in rejecting the opinions of Drs. Dahhan⁸ and Jarboe⁹ by requiring them to "rule out" coal dust exposure as a cause of claimant's respiratory impairment. First, with respect to employer's argument that the administrative law judge erred in finding that Dr. Jarboe's opinion focused on the absence of clinical pneumoconiosis and is inconsistent with the premises underlying the regulations, *see* Decision and Order at 15-16, we note that an adjudicator may validly evaluate a medical opinion in conjunction with the Department of Labor's discussion of prevailing medical science in the preamble to the revised regulations. *Obush*, 24 BLR at 1-125. The preamble recognizes that coal mine dust exposure can be associated with significant deficits in lung function in the absence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79941 (Dec. 20, 2000); 20 C.F.R. §718.202(a)(2); *Obush*, 24 BLR at 1-125. Therefore, a medical opinion may be discounted for failure to adequately exclude coal mine dust exposure as a cause of a miner's impairment. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19-20 (2004).

However, in this case, Dr. Jarboe distinguished a pattern of smoking-induced disease from claimant's test results, which he determined indicated that claimant's respiratory impairment was unrelated to coal dust exposure. *See* Employer's Exhibit 8 at 13-14, 17-20. Similarly, Dr. Dahhan explained that claimant's respiratory impairment was not due to the inhalation of coal dust because "it is varying in severity from one [examination] to another, and shows various degrees of response to bronchodilator therapy." Employer's Exhibits 1 at 4, 7 at 16-17. Dr. Dahhan concluded that such

⁸ Dr. Dahhan diagnosed chronic obstructive airway disease resulting from smoking. He also noted that hyperactive airways disease contributed to claimant's respiratory impairment. He concluded that claimant's obstructive airway disease was unrelated to coal dust exposure, based on the "significant waxing and waning" reflected on claimant's pulmonary function studies, and the response of claimant to bronchodilator therapy. Employer's Exhibits 1 at 1, 4, 7 at 11, 16-17. Dr. Dahhan reported a coal mine employment history of thirty-seven years and a smoking history of "half a pack per day" for twenty years. Employer's Exhibit 1 at 1, 7 and 11.

⁹ Dr. Jarboe diagnosed reversible airway disease and pulmonary emphysema unrelated to coal dust exposure, based on his findings of moderate airflow obstruction and hyperinflation of the lungs. He also found a reduced diffusing capacity, a reversible component on airflow obstruction, and the absence of any significant restriction shown on objective testing. Employer's Exhibits 4 at 4-7, 8 at 12, 14-16, 18-20. Dr. Jarboe reported a coal mine employment history of thirty-six years and a smoking history of thirty-two pack years. Employer's Exhibit 4 at 1, 6, 8 and 12.

findings were “inconsistent with a fixed impairment that would be seen secondary to the inhalation of coal dust,” and were “inconsistent with the permanent adverse affects [sic] of coal dust on the respiratory system.”¹⁰ Employer’s Exhibits 1 at 4, 7 at 16-17. Because Drs. Jarboe and Dahhan explained how the test results obtained by them supported their findings that claimant’s respiratory impairment was due to smoking, and not coal mine employment, the doctors’ opinions may not be inconsistent with the regulations. The administrative law judge, however, failed to sufficiently discuss the bases for the opinions of Drs. Jarboe and Dahhan when she concluded that they were inconsistent with the regulations. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Consequently, we agree that the administrative law judge improperly shifted the burden of proof to employer to show that claimant’s respiratory impairment was not due to coal mine employment. Therefore, we vacate the administrative law judge’s findings regarding the opinions of Drs. Jarboe and Dahhan at Section 718.202(a)(4).

On remand, the administrative law judge must reevaluate and reweigh the opinions of Drs. Crater, Jarboe and Dahhan in determining whether legal pneumoconiosis is established at Section 718.202(a)(4).¹¹ In reconsidering the medical opinion evidence on remand, the administrative law judge should pay particular attention to its underlying documentation, and the explanatory rationale offered by each physician, to determine whether the weight of the evidence as a whole establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). If reached, the administrative law judge must then determine whether pneumoconiosis was a substantially contributing cause of claimant’s disability pursuant to 20 C.F.R. §718.204(c), in light of her finding at Section 718.202(a)(4).¹² *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th

¹⁰ Employer does not contest the administrative law judge’s determination that the October 3, 2001 medical opinion of Dr. Hudson, referenced by Drs. Jarboe and Dahhan in discussing the reversibility of claimant’s impairment, was not admitted into evidence. However, on remand, the administrative law judge should determine whether Drs. Jarboe and Dahhan relied primarily on the findings of Dr. Hudson, or if they offered their own explanations based on the evidence of record. *See* Decision and Order at 15; Employer’s Exhibit 1.

¹¹ The administrative law judge must accord the same level of scrutiny to all of the medical opinions. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999)(*en banc*); *Wright v. Director, OWCP*, 7 BLR 1-475, 1-477 (1985).

¹² We are not persuaded by employer that reassignment of this case is warranted.

Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Accordingly, the Decision and Order Awarding Benefits on Second Remand is vacated and the case is remanded to the administrative law judge for further consideration 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