

BRB No. 09-0308 BLA

THURMOND L. ROBERTS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PRATT MINING COMPANY)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS’)	DATE ISSUED: 01/12/2010
PNEUMOCONIOSIS FUND)	
)	
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 on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Seth P. Hayes (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 Remand (05-BLA-5136) of Administrative Law Judge Ralph A. Romano awarding benefits on a subsequent 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 the Board for the second time. Initially, the administrative law judge credited claimant with sixteen years of coal mine employment,² as stipulated by the parties, and found that the medical evidence developed since the denial of claimant's prior claim established the existence of legal pneumoconiosis,³ in the form of chronic bronchitis due to both smoking and coal mine dust exposure pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board vacated the administrative law judge's finding of legal pneumoconiosis, holding that the administrative law judge erred in according greater weight to the opinions of Drs. Rasmussen and Gaziano, that claimant has pneumoconiosis, than to the contrary opinions of Drs. Zaldivar and Crisalli. *T.R. [Roberts] v. Pratt Mining Co.*, BRB No. 07-0774 BLA slip op. at 2, 4 (June 27, 2008)(unpub.). The Board instructed the administrative law judge, on remand, to reassess the conflicting medical opinions of record under 20 C.F.R. §718.202(a)(4), and provide a valid rationale for his credibility determinations in compliance 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). [*Roberts*], slip op. at 4. The Board also vacated the administrative law judge's finding of total disability, because the administrative law judge erred in his analysis of the blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii). [*Roberts*], slip op. at 5. The Board instructed the administrative law judge, on remand, to reconsider the blood gas study evidence, and to then reconsider all of the contrary probative evidence in

¹ Claimant's first claim for benefits, filed on December 21, 1994, was denied on May 23, 1995, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

² The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 2-4.

³ "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

determining whether claimant established that he is totally disabled.⁴ [Roberts], slip op. at 5. Additionally, because the Board vacated the administrative law judge's findings on the issues of pneumoconiosis and total disability, the Board also vacated his finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instructed him to reconsider this issue on remand. [Roberts], slip op. at 5. Finally, the Board instructed the administrative law judge, on remand, to determine whether the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) and, if so, to weigh all of the relevant evidence of record, old and new, in determining whether claimant established every element of entitlement. [Roberts], slip op. at 7.

On remand, the administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203. The administrative law judge further found that the medical opinion evidence established the existence of a totally disabling respiratory impairment due to pneumoconiosis, pursuant to 20 C.F.R. §§718.204(b)(2), 718.204(c), and thereby established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination to credit the opinions of Drs. Rasmussen and Gaziano over those of Drs. Zaldivar and Crisalli, in finding the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4), and in finding total disability due to pneumoconiosis established at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.⁵

⁴ The Board noted that, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately found that all four physicians agreed that claimant lacks the respiratory or pulmonary capacity to perform his last coal mine employment. *T.R. [Roberts] v. Pratt Mining Co.*, BRB No. 07-0774 BLA slip op. at 5 (June 27, 2008)(unpub.).

⁵ The administrative law judge's findings that claimant established total disability based on the new evidence, and thereby established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d), are unchallenged on appeal. Those findings are therefore affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7, 9.

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 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

We first address employer's contention that, in finding the medical evidence sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge erred in according less weight to the opinions of Drs. Zaldivar and Crisalli, that claimant does not suffer from any coal dust-related lung disease, than to the contrary opinions of Drs. Rasmussen and Gaziano, who diagnosed claimant with pneumoconiosis.⁶ Employer's Brief at 5-7. Employer's contention has merit.

⁶ Dr. Rasmussen, a Board-certified internist, examined claimant on April 5, 2004, in connection with the Department of Labor-sponsored pulmonary evaluation. Dr. Rasmussen diagnosed coal workers' pneumoconiosis, due to coal mine dust exposure, and chronic bronchitis, due to both coal mine dust exposure and cigarette smoking. Dr. Rasmussen opined that both smoking and coal dust exposure contributed to claimant's totally disabling respiratory impairment. Director's Exhibit 9. Dr. Gaziano, who is a Board-certified pulmonologist, examined claimant on December 8, 2005. In his report dated December 14, 2005, Dr. Gaziano diagnosed coal workers' pneumoconiosis with a moderately severe degree of pulmonary functional impairment. Claimant's Exhibit 3. In a January 26, 2006 addendum to his report, Dr. Gaziano clarified that claimant's pulmonary impairment is due to his occupational pneumoconiosis, and that it is totally disabling. Claimant's Exhibit 4. Dr. Zaldivar, a Board-certified pulmonologist, examined claimant on June 30, 2004. In his report dated July 7, 2004, Dr. Zaldivar opined that there was no evidence to justify a diagnosis of coal workers' pneumoconiosis or any dust disease of the lungs. Director's Exhibit 10. Dr. Zaldivar diagnosed a totally disabling pulmonary impairment, in the form of emphysema and pulmonary fibrosis due to smoking. Director's Exhibit 10. Dr. Crisalli, who is a Board-certified pulmonologist, examined claimant on March 20, 2006. In a report dated May 30, 2006, Dr. Crisalli opined that there is not sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis or any chronic dust disease of the lungs caused by, significantly related to, or substantially aggravated by, coal mine dust exposure.

Initially, we agree with employer that the administrative law judge erred in his evaluation of Dr. Zaldivar's opinion, that claimant does not suffer from coal workers' pneumoconiosis or any coal dust-related lung disease. Employer's Brief at 6. The administrative law judge accorded diminished weight to the opinion of Dr. Zaldivar, on the ground that "Dr. Zaldivar is essentially taking [c]laimant's coal dust exposure out of the equation, and not accounting for any effect [c]laimant's years of coal dust exposure may have had on him." Decision and Order on Remand at 5.

As employer contends, a review of the record reveals that the administrative law judge mischaracterized Dr. Zaldivar's opinion. Employer's Brief at 6. In his report dated July 7, 2004, Dr. Zaldivar described the mechanism by which coal dust produces emphysema and the findings that would be present in such a case, and explained why the specific pattern of objective evidence in this case supported his conclusion that claimant's emphysema is due to smoking.⁷ Director's Exhibit 10 at 3. During his deposition, Dr.

Employer's Exhibit 3. While Dr. Crisalli initially opined that claimant has a disabling pulmonary impairment due to smoking, with some contribution from his cardiac disease, when deposed on November 13, 2006, Dr. Crisalli clarified that claimant's disabling pulmonary symptoms are due mainly to his cardiac condition. Employer's Exhibit 7 at 32.

⁷ Dr. Zaldivar focused on the lack of any indication that claimant inhaled sufficient coal dust to cause any damage to his lungs to explain his pulmonary impairment:

It is my opinion that coal mine dust did not cause nor contribute to the impairment. The only evidence that we have regarding any reaction of the lungs to retained dust is the chest x-ray. The profusion in the chest x-ray correlates with the amount of dust retained within the lungs and the reaction of the lungs to such dust. The damage to the lungs by inhaled coal dust is a mechanical damage caused by the reaction of the lungs. This reaction results in the macules seen by tissue biopsy by the pathologist. Distal to the macules there is emphysema present, which is what causes the airway obstruction when emphysema is severe enough. In this case, no such reaction is visible and therefore the logical explanation for the emphysema is his adult life history of smoking, which will not leave any tell tale signs in the chest x-ray, except when advanced by hyperinflation. Had Mr. Roberts not given a history of ever working in the coal mines, the pulmonary impairment, which he has, would be absolutely indistinguishable from that of anyone who smokes and develops emphysema and there would not have been any search for any occupational exposure that could conceivably have contributed to such obstruction. The

Zaldivar further explained why the radiographic findings, claimant's low diffusion capacity, the worsening of his blood gas values with exercise, and the pattern of claimant's pulmonary fibrosis, were not consistent with coal workers' pneumoconiosis or any coal dust-induced lung disease. Employer's Exhibit 8 at 25-31. Thus, substantial evidence does not support the administrative law judge's determination that Dr. Zaldivar ignored whether claimant's coal mine dust exposure could have affected his impairment. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); Decision and Order on Remand at 5.

In addition, substantial evidence does not support the administrative law judge's analysis of Dr. Crisalli's opinion that claimant does not have pneumoconiosis. The administrative law judge accorded diminished weight to Dr. Crisalli's opinion because Dr. Crisalli "does not account for the fact that pneumoconiosis is a 'progressive and degenerative disease' that may have illuminated [sic] after [c]laimant's coal mine employment ended and caused his shortness of breath." Decision and Order on Remand at 5. As employer contends, and contrary to the administrative law judge's finding, Dr. Crisalli specifically referred to, and relied in part on, the progressivity of pneumoconiosis to support his conclusion that claimant does not suffer from the disease.⁸ See *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; Employer's Exhibit 7 at 19-21, 27; Employer's Brief at 9.

low diffusion capacity, which he has, is also the result of this very same emphysema.

Director's Exhibit 10 at 3.

⁸ In his November 13, 2006 deposition, Dr. Crisalli noted that over the course of four examinations performed between 2004 and 2006, claimant's blood gas exchange abnormality was somewhat variable, and improved twice. Specifically, Dr. Crisalli noted that claimant had a PO₂ of sixty-two in April of 2004, a PO₂ of seventy-seven in June of 2004, a PO₂ of only fifty-nine in December of 2005, and a PO₂ of seventy in March of 2006. Employer's Exhibit 7 at 19-21. When asked whether he would expect such oxygenation variability if coal worker's pneumoconiosis was responsible for the blood gas abnormality, Dr. Crisalli answered "No," and explained that he "would not expect it to vary in an upward or improving fashion . . . [b]ecause coal workers' pneumoconiosis is a disease that either is stable or becomes progressively worse." Employer's Exhibit 7 at 27.

We, therefore, vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case to him for further consideration of all the medical opinions. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Hicks*, 138 F.3d at 528, 21 BLR at 2-326. In addition, we agree with employer that, as before, the administrative law judge did not subject the documentation and reasoning of the opinions of Drs. Rasmussen and Gaziano to the same level of scrutiny as those of Drs. Zaldivar and Crisalli.⁹ *See Roberts*, slip op. at 4; Employer's Brief at 15-16. On remand, the administrative law judge must sufficiently discuss the evidence, including the quality of the reasoning and documentation of each opinion, and explain his reasons for crediting or discrediting a medical opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Because the administrative law judge's findings on the issue of legal pneumoconiosis affected his weighing of the medical opinions as to the cause of claimant's disabling respiratory impairment, we must also vacate his finding at 20 C.F.R. §718.204(c). Moreover, we agree with employer that, in evaluating the medical opinions as to disability causation, the administrative law judge selectively analyzed Dr. Crisalli's opinion as "agree[ing] that [c]laimant's desaturation from the blood gas studies could occur as a result of impairment from coal workers' pneumoconiosis; and [c]laimant's desaturation is the reason why Dr. Crisalli believed Claimant could not perform[] his last coal mine employment." Decision and Order on Remand at 8 (internal citations omitted). As employer asserts, Dr. Crisalli went on to explain why he believes that claimant's

⁹ The administrative law judge noted that Dr. Rasmussen considered claimant's coal mine employment and smoking histories, and the x-ray evidence, and stated that, "Based upon his examination of [c]laimant, along with Dr. Patel's positive X-ray reading, and [c]laimant's significant history of exposure to coal mine dust, Dr. Rasmussen concluded that Claimant has coal workers' pneumoconiosis. Buttressed by the information, I find Dr. Rasmussen's conclusion to be reasoned and documented." Decision and Order on Remand at 4-5 (internal citations omitted). As employer asserts, however, Drs. Zaldivar and Crisalli also based their conclusions on claimant's employment and smoking histories, the results of their physical examinations, and the objective test results. Employer's Brief at 15 n. 16. Moreover, unlike with his discussion of the opinions of Drs. Zaldivar and Crisalli, the administrative law judge did not analyze the documentation or rationale underlying Dr. Rasmussen's opinion. Employer's Brief at 12. In addition, as employer contends, the administrative law judge also failed to independently analyze the documentation and rationale underlying Dr. Gaziano's opinion, and instead accorded his opinion "some weight" because "he reaches the same conclusion as Dr. Rasmussen, whose report I find to be well reasoned and documented." Employer's Brief at 13-15; Decision and Order on Remand at 5.

desaturation is *not* related to either coal worker's pneumoconiosis or claimant's history of coal dust exposure. Employer's Brief at 9-10; Employer's Exhibit 7 at 28-32. On remand, if reached, the administrative law judge must assess the entirety of Dr. Crisalli's opinion as to the cause of claimant's disabling impairment, together with the remaining medical opinions of record, and provide valid reasons for his credibility determinations, in compliance with the APA.

Accordingly, the administrative law judge's Decision and Order on Remand 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge