

BRB No. 09-0483 BLA

ADAM J. HOLBROOK)
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 Claimant-Petitioner)
)
 v.)
)
 ENTERPRISE COAL COMPANY)
)
 and) DATE ISSUED: 01/19/2010
)
 COASTAL STATES ENERGY COMPANY,)
 c/o COASTAL STATES MANAGEMENT)
 CORPORATION)
)
 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 on Remand of William S. Colwell,
Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates 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 on Remand (04-BLA-5702) of
Administrative Law Judge William S. Colwell denying benefits 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). This case, involving a subsequent claim filed

on October 7, 2002,¹ is before the Board for the second time. In the initial decision, the administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2002 claim on the merits. After crediting claimant with sixteen years of coal mine employment,² the administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the new medical evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(1). *A.J.H. [Holbrook] v. Enterprise Coal Co.*, BRB No. 07-0230 BLA (Nov. 29, 2007) (Hall, J., concurring and dissenting) (unpub.). The Board, therefore, also affirmed the administrative law judge's finding that a change in an applicable condition of entitlement was established. *Id.* However, the Board agreed with employer that the administrative law judge, after finding a change in an applicable condition of entitlement, should have considered claimant's 2002 claim on the merits, based on a weighing of all of the evidence of record, not merely the new evidence submitted with the current claim. *Id.* Consequently, the Board remanded the case to the administrative law judge for him to determine whether all of the x-ray evidence established the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(1), and, if not, to determine whether all of the medical opinion evidence of record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Further, the Board held that the administrative law judge erred in according greater weight to the opinions of Drs. Alam and Koura, diagnosing claimant with pneumoconiosis, and instructed the administrative law judge to reconsider whether their opinions were sufficiently reasoned and documented. *Id.* The Board also vacated the

¹ As set forth by the Board in its previous decision, claimant filed four prior claims for benefits, all of which were finally denied because claimant did not establish any element of entitlement. *A.J.H. [Holbrook] v. Enterprise Coal Co.*, BRB No. 07-0230 BLA slip op. at 2 n.1 (Nov. 29, 2007) (Hall, J., concurring and dissenting) (unpub.).

² The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 8. 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 (1989) (*en banc*).

administrative law judge's findings pursuant to 20 C.F.R. §718.204(b) and instructed him to reconsider the medical opinions regarding whether claimant is totally disabled, and to then weigh all the relevant evidence together to determine whether claimant established total disability. *Id.* The Board further vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), holding that, because Dr. Jarboe expressed an opinion regarding the cause of claimant's total disability assuming the presence of pneumoconiosis, the administrative law judge erred in discrediting Dr. Jarboe's opinion solely because the doctor did not diagnose pneumoconiosis. *Id.* Additionally, the Board instructed the administrative law judge that, before according additional weight to the disability causation opinions of Drs. Alam and Koura, based on their status as claimant's treating physicians, the administrative law judge should address whether their opinions are sufficiently reasoned. *Id.* Further, the Board held that the administrative law judge erred in failing to address the reasoning underlying the disability causation opinions of Drs. Younes and Baker, and should do so on remand. *Id.*

On remand, the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Having found that the x-ray evidence established the existence of pneumoconiosis, the administrative law judge found that it was unnecessary to address whether the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found that the evidence did not establish that claimant's 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 finding that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's finding that the evidence does not establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer challenges the administrative law judge's findings that pneumoconiosis and total disability were established pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(b). The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Total Disability Due to Pneumoconiosis

Claimant argues that the administrative law judge erred in finding that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).³

In considering whether the evidence established that claimant's total disability is due to pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Younes, Broudy, Fino, Baker, Koura, Alam, and Jarboe. While Drs. Younes, Baker, Koura, and Alam attributed claimant's total disability in part to his pneumoconiosis, Drs. Broudy, Fino, and Jarboe opined that claimant's total disability is unrelated to his pneumoconiosis or coal dust exposure.

The administrative law judge initially found that the belief of Drs. Broudy and Fino, that claimant does not suffer from pneumoconiosis, detracted from the credibility of

³ 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:

- (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).

their respective opinions regarding the source of claimant's respiratory impairment.⁴ Decision and Order on Remand at 15; Director's Exhibit 4. However, the administrative law judge found that Dr. Jarboe's disability causation opinion was entitled to the greatest weight, stating that:

Dr. Jarboe fully explained how he was able to rule out pneumoconiosis or coal dust inhalation as a cause of the miner's impairment. Dr. Jarboe would not change his opinion as to disability causation even assuming the existence of pneumoconiosis. He relied on Claimant's significantly increased residual volume, significantly reduced diffusing capacity, and the absence of dust deposition in the lungs. Dr. Jarboe testified that both the markedly increased residual volume and the significantly reduced diffusing capacity are nearly always caused by cigarette smoking and/or bronchial asthma, both of which are factors present in Claimant's case. I note that Dr. Jarboe allowed for the possibility that coal mine dust inhalation can be responsible for the residual volume and diffusing capacity in this case, acknowledging on cross-examination that the miner has a small but measurable deficit in his FEV₁ value caused by coal dust exposure. However, this portion of his opinion is not sufficient to establish that pneumoconiosis has had a materially adverse effect on the miner's respiratory condition because Dr. Jarboe clearly felt the contribution was negligible, inconsequential, or insignificant. Based on Dr. Jarboe's thoughtful and logical reasoning, supported by the miner's medical history, smoking history, and valid spirometric findings, in addition to Dr. Jarboe's credentials and his review of most of the evidence of record, I place great weight on his opinion.

Decision and Order on Remand at 13-14.

By contrast, the administrative law judge found that Dr. Younes' opinion was not sufficiently reasoned because he did not explain why he believed that claimant's coal dust exposure was a cause of his pulmonary disability. Decision and Order on Remand at 15; Director's Exhibit 4. Further, the administrative law judge found that Dr. Baker's disability causation finding was not well-reasoned, explaining that Dr. Baker based his opinion in part upon his belief that it is not possible to distinguish whether claimant's pulmonary disability was caused by smoking or coal dust exposure, a belief that was "clearly at odds" with the explanation provided by Dr. Jarboe. Decision and Order on

⁴ The administrative law judge further accorded less weight to Dr. Fino's opinion because the doctor did not find that claimant is totally disabled from a pulmonary standpoint. Decision and Order on Remand at 15.

Remand at 14; Director's Exhibit 11; Claimant's Exhibit 4. The administrative law judge found that Dr. Koura's opinion was not sufficiently reasoned because the doctor did not explain why he attributed claimant's pulmonary disability to smoking and coal dust exposure in his 2003 report, after earlier attributing claimant's pulmonary disability to asthma, in 1999. Decision and Order on Remand at 14; Director's Exhibit 28. The administrative law judge found that Dr. Alam's opinion was not sufficiently reasoned because the doctor did not explain how the spirometry and clinical findings supported his opinion that coal dust exposure was a cause of claimant's total disability. Decision and Order on Remand at 14-15; Director's Exhibit 27.

Consequently, having found that Dr. Jarboe's opinion was "the best documented and reasoned opinion of record," the administrative law judge found that the medical evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order on Remand at 15.

Claimant contends that the administrative law judge erred in crediting Dr. Jarboe's opinion, that claimant's total disability is not due to pneumoconiosis or coal dust exposure,⁵ over the contrary opinions of Drs. Younes, Baker, Koura, and Alam. Claimant asserts that Dr. Jarboe's disability causation opinion "is not directed specifically to [claimant's] condition." Claimant's Brief at 9. We disagree. Dr. Jarboe addressed claimant's coal mine employment and smoking histories, as well as the results of claimant's objective tests. Director's Exhibit 12. Based upon the facts of this case, Dr. Jarboe specifically explained how he was able to determine that claimant's pulmonary impairment was attributable to cigarette smoking and asthma, and not coal dust exposure.⁶ Claimant argues that Dr. Jarboe's opinion is contrary to the administrative law judge's finding that the evidence established the existence of coal workers' pneumoconiosis. However, as the Board previously held, because Dr. Jarboe expressed

⁵ Dr. Jarboe attributed claimant's disabling respiratory impairment to a combination of cigarette smoking and asthma. Employer's Exhibit 3. Dr. Jarboe found "no disease of the respiratory system that has been caused by or substantially contributed to by the inhalation of coal dust or the presence of coal workers' pneumoconiosis." *Id.*

⁶ Dr. Jarboe explained that the magnitude of the elevation in claimant's lung volumes is "nearly always caused by smoking and/or asthma or a combination thereof." Employer's Exhibit 5 at 20. Dr. Jarboe noted that such "marked hyperinflation is not characteristic of coal dust inhalation." *Id.* Dr. Jarboe also explained that claimant's significantly reduced diffusing capacity was not characteristic of an impairment caused by coal dust exposure. *Id.* at 21. Dr. Jarboe explained that, in this particular case, emphysema due to smoking was the likely cause of claimant's reduced diffusion capacity. *Id.*

an opinion regarding the cause of claimant's pulmonary impairment assuming the presence of simple pneumoconiosis, the administrative law judge could not discredit Dr. Jarboe's opinion solely because he did not diagnose pneumoconiosis. See *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214-15 (2002) (*en banc*); *Holbrook*, slip op. at 12-13. Finally, although claimant generally contends that Dr. Jarboe's opinion is "contrary to the regulations," Claimant's Brief at 9, he does not explain how Dr. Jarboe's opinion is contrary to the regulations.

The administrative law judge found that Dr. Jarboe fully explained how he was able to rule out pneumoconiosis or coal dust inhalation as a cause of claimant's pulmonary impairment. The administrative law judge permissibly found that Dr. Jarboe's disability causation opinion was the best reasoned opinion of record and was, therefore, entitled to the greatest weight. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

Claimant contends that the administrative law judge erred in according less weight to Dr. Younes' opinion because Dr. Younes could not apportion the contributions of the miner's smoking and coal dust exposure to his totally disabling pulmonary impairment. A physician is not required to specify the relative contributions of smoking and coal dust exposure as causes of a claimant's pulmonary impairment. *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). However, in this case, the administrative law judge did not accord less weight to Dr. Younes' opinion because he could not apportion the causes of claimant's pulmonary disability. The administrative law judge permissibly discredited Dr. Younes' opinion because the doctor did not provide a reasoned explanation for why he attributed claimant's pulmonary impairment to his coal dust exposure.⁷ See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

We also reject claimant's contention that the administrative law judge erred in according less weight to Dr. Baker's opinion. The administrative law judge permissibly discredited Dr. Baker's opinion because the doctor based his opinion in part upon his belief that it was not possible to distinguish whether claimant's pulmonary disability was caused by smoking or coal dust exposure, a belief that the administrative law judge found was called into question by Dr. Jarboe's detailed and well-reasoned explanation as to how

⁷ Although Dr. Younes opined that claimant's cigarette smoking was the primary cause of his pulmonary impairment, he opined that occupational dust exposure was a "contributing factor." Director's Exhibit 4. Dr. Younes, however, did not explain why he attributed claimant's pulmonary impairment to his coal dust exposure.

he was able to rule out pneumoconiosis and coal dust inhalation as causes of claimant's pulmonary impairment, based on the specific facts in this case. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Claimant argues that the administrative law judge erred in his consideration of the opinions of Drs. Koura and Alam. In regard to Dr. Koura's opinion, the administrative law judge initially complied with the Board's remand instruction to determine whether Dr. Koura's opinion was definitive enough to support a finding of total disability due to pneumoconiosis. The administrative law judge noted that Dr. Koura, when asked whether the miner's impairment was related to pneumoconiosis or another etiology, answered that it "could be secondary to tobacco use plus coal dust inhalation." Director's Exhibit 28. The administrative law judge found that this statement was "sufficient to mean that [claimant's] pneumoconiosis is a substantially contributing cause of his totally disabling pulmonary impairment." Decision and Order on Remand at 14. However, the administrative law judge permissibly discredited Dr. Koura's opinion because he found that Dr. Koura did not sufficiently explain why, after attributing claimant's pulmonary disability to asthma in 1999, he attributed claimant's pulmonary impairment to smoking and coal dust exposure in 2003. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Further, contrary to claimant's contention, the administrative law judge permissibly accorded less weight to Dr. Alam's opinion because he found that it was not sufficiently reasoned, as Dr. Alam failed to explain the basis for his conclusion that claimant's total disability is due in part to his coal dust exposure.⁸ Decision and Order on Remand at 14-15.

Thus, having found that Dr. Jarboe's opinion was "the best documented and reasoned opinion of record," Decision and Order on Remand at 15, the administrative law judge permissibly accorded the greatest weight to his opinion that claimant's totally disabling pulmonary impairment is not due to pneumoconiosis or coal dust exposure. Because it is based upon substantial evidence, we affirm the administrative law judge's

⁸ Dr. Alam attributed claimant's pulmonary impairment to "tobacco abuse and coal dust." Director's Exhibit 27. Dr. Alam provided no basis for this conclusion. We reject claimant's additional contention that the administrative law judge should have accorded greater weight to the opinions of Drs. Koura and Alam based upon their status as treating physicians. The administrative law judge reasonably found that, although Drs. Koura and Alam were claimant's treating physicians, their disability causation opinions are not sufficiently reasoned. Consequently, the administrative law judge was not required to accord their opinions greater weight based upon their status as claimant's treating physicians. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

finding that the evidence does not establish that claimant's total disability is due to pneumoconiosis.⁹ 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁹ In light of our affirmance of the administrative law judge's denial of benefits, we need not address employer's challenges to the administrative law judge's findings pursuant to 20 C.F.R §§718.202(a)(1) and 718.204(b). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).