

BRB No. 08-0664 BLA  
Case No. 2004-BLA-05587

LENVILLE BOGGS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRANHAM & BAKER UNDERGROUND CORPORATION	)	DATE ISSUED: 01/31/2011
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER ON RECONSIDERATION
	)	
Party-in-Interest	)	<i>EN BANC</i>

Appeal of the Decision and Order and the Decision on Remand of Director's Motion for Reconsideration of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer has filed a timely Motion for Reconsideration *En Banc* of the Board's Decision and Order in *L.B. [Boggs] v. Branham & Baker Underground Corp.*, BRB No. 08-0664 BLA (July 31, 2009)(unpub.)(Dolder, C.J., dissenting). In *Boggs*, the Board considered claimant's appeal of the Decision on Remand of Director's Motion for Reconsideration of Administrative Law Judge Janice K. Bullard denying benefits on a claim filed 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).<sup>1</sup>

In her Decision and Order, the administrative law judge found that claimant established at least twenty-one years of coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found, however, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant appealed to the Board, and the Director, Office of Workers' Compensation Programs (the Director), concurrently filed a Motion for Reconsideration with the administrative law judge, who dismissed the motion because she lacked jurisdiction. The Director subsequently filed a Second Motion for Reconsideration with the administrative law judge, which she dismissed on similar grounds. Consequently, the Director also filed an appeal with the Board, challenging the administrative law judge's jurisdictional rulings, as well as her findings on the merits of entitlement.

The Board consolidated the appeals filed by claimant and the Director and held that the administrative law judge had jurisdiction to consider the Director's motions for reconsideration. The Board dismissed the consolidated appeals, without prejudice, and remanded the case to the administrative law judge with instructions to consider the Director's outstanding motions. *L.B. [Boggs] v. Branham & Baker Underground Corp.*, BRB Nos. 06-0420 BLA and 06-0606 BLA-A (May 25, 2007)(unpub.).

On remand, the administrative law judge considered the merits of the Director's initial Motion for Reconsideration, but again found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total pulmonary disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c), and denied benefits.

Claimant appealed, contending that the administrative law judge erred in her consideration, under 20 C.F.R. §718.202(a)(4), of whether claimant established the existence of legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2). Employer responded, urging affirmance of the denial of benefits. The Director did not file a brief. In a 2-1 decision, the majority of the panel held that the reasons provided by the administrative law judge for discrediting the opinions of Drs. Baker and Forehand at 20

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<sup>1</sup> The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005.

C.F.R. §§718.202(a)(4) and 718.204(c) were not valid. Consequently, the majority reversed the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Boggs*, BRB No. 08-0664 BLA, slip op. at 14. Accordingly, the administrative law judge's Decision and Order and the Decision on Remand of Director's Motion for Reconsideration (Decision on Remand), both denying benefits, were reversed, and the case was remanded to the district director for reinstatement of the award of benefits.<sup>2</sup>

On reconsideration, employer asserts that the majority of the panel made findings that exceeded its scope of review, noting that the Board is not "authorized to find facts and render credibility findings." Employer's Reconsideration Brief at 11. Employer maintains that the administrative law judge's findings are conclusive, as they are supported by substantial evidence and, therefore, the Board was required to affirm her denial of benefits. Claimant responds, urging denial of employer's motion for reconsideration. Employer has filed a reply, reiterating the arguments raised in its motion. The Director has not responded. Finding merit in employer's arguments, we hereby grant employer's motion for reconsideration *en banc*, vacate the Board's previous Decision and Order and affirm the administrative law judge's Decision and Order and her Decision on Remand.

In determining whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Baker, Broudy and Dahhan. Dr. Baker examined claimant on June 17, 2002 and diagnosed: 1) clinical pneumoconiosis due to coal mine employment based on a chest x-ray and claimant's work history,<sup>3</sup> and 2) chronic obstructive pulmonary disease (COPD), based on a pulmonary function study (PFS), with moderate obstructive defect and bronchitis, due to both coal mine employment and smoking. Director's Exhibit 9. Dr. Baker noted that claimant's PFS showed a moderate defect, with decreased FEV1, and concluded that claimant was disabled from mining work. *Id.* On November 6, 2002, Dr. Baker responded to a questionnaire and indicated that it was his opinion that claimant has

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<sup>2</sup> In her dissent, Chief Administrative Appeals Judge Nancy S. Dolder indicated that she would have affirmed the administrative law judge's weighing of the medical opinions, and her finding that claimant did not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), resulting in an affirmance of the denial of benefits.

<sup>3</sup> Although Dr. Baker diagnosed both clinical and legal pneumoconiosis, his diagnosis of clinical pneumoconiosis was discredited and is not an issue on reconsideration.

legal pneumoconiosis. Dr. Baker stated, “[claimant] has a long history of coal dust exposure, symptoms of bronchitis, abnormal PFS as well as a cigarette smoking history. It is felt that at least part of his symptoms are related to coal dust exposure, if not a significant portion.” Director’s Exhibit 30 at 2. Dr. Baker also noted that claimant’s “COPD, coal workers’ pneumoconiosis and chronic bronchitis have all [been] significantly contributed to[,] or substantially aggravated by[,] coal dust exposure,” and concluded that “the pulmonary impairment is probably related to both the cigarette smoking and coal dust exposure in an undefinable percentage.” *Id.*

In a report dated May 1, 2005, Dr. Baker indicated that his diagnoses were based on abnormal x-ray findings, a history of coal dust exposure with no other condition responsible for the x-ray changes, and his finding of COPD due to a combination of smoking and coal dust exposure. Claimant’s Exhibit 6. Dr. Baker acknowledged that smoking is the most common cause of obstructive airways disease, but disagreed with Dr. Broudy’s opinion that claimant’s pulmonary impairment was entirely due to smoking. *Id.* Dr. Baker opined that it would be difficult to “clearly rule out coal dust exposure [as a cause of claimant’s condition] as there is no way to partition the effects of coal dust exposure or cigarette smoking” because both coal dust exposure and smoking can cause obstructive airways disease, and claimant had exposure to both. *Id.* Dr. Baker stated that, because of the known impact of both coal mine employment and smoking on lung impairment, and because underground coal mine employment has a greater impact, he considered claimant’s sixty-pack year smoking history and his twenty-two year coal mine employment history to be combined causes of claimant’s impairment and stated that “approximately 25 to 35% [of claimant’s symptoms] may be due to coal dust exposure.” *Id.* Dr. Baker further stated that, although one-fourth to one-third of claimant’s symptoms are due to coal dust exposure and the remainder are due to cigarette smoking, “his condition has been significantly related to[,] and substantially aggravated by[,] dust exposure in coal mine employment and his obstructive airway[s] disease is due at least in part, again, in a 25 to 35% range[,] secondary to coal dust exposure.” *Id.*

Dr. Broudy examined claimant on October 15, 2003 and diagnosed severe chronic obstructive airways disease due to cigarette smoking based, in part, on an x-ray showing emphysema and the inability to find evidence of coal workers’ pneumoconiosis.<sup>4</sup> Employer’s Exhibits 1, 2. The PFS performed by Dr. Broudy was qualifying and was described as showing “severe obstruction with no responsiveness to bronchodilation.” Employer’s Exhibit 1. The blood gas study was non-qualifying and was described as

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<sup>4</sup> The administrative law judge stated that Dr. Broudy’s report is dated October 13, 2005. Decision and Order at 14; Decision on Remand of Director’s Motion for Reconsideration at 9. However, the correct date is October 15, 2003. Employer’s Exhibit 1.

showing “mild hypoxemia with elevation of carboxyhemoglobin, indicating continued exposure to smoke.” Employer’s Exhibits 1, 2 at 8. Dr. Broudy testified at his deposition that he was able, as a pulmonary physician, “to distinguish between pulmonary impairment caused by smoking and that caused by the inhalation of dust and/or coal workers’ pneumoconiosis.” Employer’s Exhibit 2 at 9. Dr. Broudy stated:

I arrived at that opinion by obtaining the history of heavy smoking for many years, he has the typical impairment due to cigarette smoking, that is, irreversible airways obstruction, there’s no other apparent cause of the impairment, the chest x-ray showed no evidence of pneumoconiosis and in fact showed hyperexpansion, suggesting emphysema and hyperinflated lungs, which is typical of findings in smoking. If pneumoconiosis had caused impairment of this severity, one would certainly expect to see some radiographic changes suggesting pneumoconiosis, and this is not the case in this instance.

*Id.* at 10.

Dr. Dahhan examined claimant on June 28, 2003 and concluded that there was no evidence of occupational pneumoconiosis or pulmonary disability secondary to coal dust exposure. Employer’s Exhibit 4. Dr. Dahhan further indicated that claimant has a severe obstructive abnormality due solely to cigarette smoking. In support of his opinion, Dr. Dahhan cited the PFS he obtained, which produced results consistent with a reversible obstruction, which is not typical of a pulmonary impairment caused by pneumoconiosis. *Id.* at 9.

In her Decision on Remand, the administrative law judge noted that the Director argued in his motion that she should have credited Dr. Baker’s opinion, that claimant’s COPD was a causative factor in his disability, because: Dr. Baker relied upon medical studies that showed that coal mine work can cause COPD and studies that show that the effects of one to one-half years of coal dust exposure are equivalent to the effects of one year of smoking; Dr. Baker’s conclusion that it would be impossible to separate the causes of claimant’s COPD was entitled to weight; and Dr. Baker’s causation diagnosis was supported by the opinions of Drs. Forehand<sup>5</sup> and King,<sup>6</sup> both of whom determined that claimant’s coal mine work played a role in his disability. Decision on Remand at 11.

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<sup>5</sup> Dr. Forehand examined claimant on March 11, 2005 and in his report, diagnosed coal workers’ pneumoconiosis, “cigarette smokers lung disease,” and a totally disabling pulmonary impairment. Claimant’s Exhibit 3. In a letter dated April 12, 2005, Dr. Forehand indicated that claimant “was found to have complex lung disease that has led to a totally and permanently disabling respiratory impairment, which arose from a combination of occupational exposure to coal mine dust and smoking cigarettes.” *Id.* Dr.

The administrative law judge, however, found that Dr. Baker's opinion, that claimant's COPD was due to pneumoconiosis, was conclusory and rested solely upon claimant's exposure to coal dust during coal mine employment. Decision on Remand at 11. The administrative law judge acknowledged that such exposure *may* contribute to COPD, but found that Dr. Baker provided no adequate explanation for his conclusion that coal dust exposure caused claimant's COPD. The administrative law judge stated:

The doctor acknowledged that [c]laimant's smoking history was the primary cause of [c]laimant's symptoms, but nevertheless rejected the opinion of pulmonary expert Dr. Broudy that [c]laimant's pulmonary disability was due to smoking induced emphysema. Claimant's physical examinations by Drs. Broudy, Forehand and Dahhan produced findings consistent with smoking induced emphysema. Dr. Baker did not address the impact of reversibility upon [the administration of] bronchodilators upon his opinion.

Dr. Baker's opinion regarding the contribution of legal pneumoconiosis to [c]laimant's disability is also speculative and not reliable. The doctor stated that approximately 25% to 35% of [c]laimant's symptoms may be due to coal dust exposure, but also opined that he could not separate the causes of [c]laimant's disabling COPD. I find these opinions are inconsistent, and undermine the overall reliability of Dr. Baker's opinion.

Decision on Remand at 11-12.

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Forehand identified the "key factors" supporting his diagnosis as "a history of working in underground coal mining for 21 years[,] including 12 years as a driller, a job with higher than expected association with coal worker's pneumoconiosis . . . and a history of smoking cigarettes for 47 years." *Id.*

<sup>6</sup> Dr. King, one of claimant's treating physicians, diagnosed severe chronic obstructive pulmonary disease (COPD), in the form of emphysema, and coal workers' pneumoconiosis based on x-rays, pulmonary function and arterial blood gas studies, and claimant's shortness of breath. Claimant's Exhibit 1. Dr. King checked a box on a questionnaire indicating that claimant has clinical pneumoconiosis and further indicated that claimant had severe COPD, emphysema, coal workers pneumoconiosis, and shortness of breath, all of which were caused by coal dust exposure and smoking. *Id.* In addition, Dr. King concluded that claimant is "totally and perm[anently] disabled for any and all occupations due to [a] pulmonary impairment" related to coal dust exposure. *Id.*

We agree with employer that the administrative law judge's findings at 20 C.F.R. §718.202(a)(4) are rational and supported by substantial evidence. The determination of whether a medical opinion is documented and reasoned rests within the discretion of the administrative law judge, as does the assessment of the weight and credibility to be accorded to the conflicting medical evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). In cases involving medical opinions in which the physicians disagree as to whether smoking and coal dust exposure can be differentiated as causes of a claimant's impairment, the United States Court of Appeals for Sixth Circuit has consistently upheld the administrative law judge's credibility determinations when the adjudicator has accurately discussed "the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Director, OWCP, v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see Crockett Collieries, Inc. v. Director, OWCP [Barrett]*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *cf. Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004). Moreover, the Sixth Circuit has held that the reviewing authority is required to defer to the administrative law judge's credibility determinations. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).

In this case, the administrative law judge rationally found that Dr. Baker's opinion was insufficient to establish the existence of legal pneumoconiosis because it was inconsistent and based upon generalities, rather than claimant's circumstances in the present case. Decision on Remand at 11-12; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. In addition, the administrative law judge's finding, discrediting Dr. Forehand's diagnosis of legal pneumoconiosis, is also supported by substantial evidence. As the administrative law judge determined, Dr. Forehand did not explain how the results of claimant's PFS, which showed a partially reversible obstructive ventilatory pattern, are consistent with the permanent nature of pneumoconiosis. Decision on Remand at 10; *see Fuller v. Gibraltar Corp.*, 6 BLR 1-1292 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983).

Further, when evaluating Dr. King's opinion, the administrative law judge properly considered whether it was entitled to controlling weight based on Dr. King's status as claimant's treating physician pursuant to 20 C.F.R. §718.104(d)(1)-(4). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-623, 2-625 (6th Cir. 2003); 20 C.F.R. §718.104(d)(5); Decision on Remand at 12; Decision and Order at 14. The administrative law judge rationally found that Dr. King's opinion was, in fact, entitled to diminished weight because he provided no explanation of his determination

that claimant's pulmonary impairment was caused by smoking and coal dust exposure. *Id.*

With respect to the materials submitted by Dr. Rogers, the administrative law judge indicated in her Decision and Order that she had excluded a questionnaire in which Dr. Rogers stated that claimant had clinical pneumoconiosis, based upon "an abnormal chest x-ray[,] per records from Dr. King." Decision and Order at 2, 4. The administrative law judge admitted the treatment records attached to the questionnaire and summarized them in detail, noting that Dr. Rogers began treating claimant in 1998. *Id.* at 5; Claimant's Exhibit 4. The administrative law judge indicated that Dr. Rogers's records include a report from October 2, 2003, listing claimant's conditions as COPD, bronchitis, tobacco abuse and coal workers' pneumoconiosis. Decision and Order at 6-7; Claimant's Exhibit 4. However, the administrative law judge did not render a finding as to the probative value of Dr. Rogers's treatment records in either of her decisions.

As an initial matter, we affirm the administrative law judge's exclusion of the questionnaire completed by Dr. Rogers, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also hold that remand of the case to the administrative law judge for consideration of Dr. Rogers's treatment records is not required. The administrative law judge's omission of a finding with respect to Dr. Rogers's records is harmless, as the records do not contain any documentation of his diagnosis of clinical pneumoconiosis and Dr. Rogers did not link claimant's COPD, or other respiratory problems, to coal dust exposure as is required under 20 C.F.R. §718.201(a)(2). 20 C.F.R. §718.104(d)(5); *see Williams*, 338 F.3d at 514, 22 BLR at 2-647-49; *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because the administrative law judge provided valid reasons for determining that the medical opinion evidence supportive of claimant's burden was insufficient to establish the existence of legal pneumoconiosis, we affirm the administrative law judge's finding that claimant did not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We need not address, therefore, the allegations of error made by claimant with respect to the administrative law judge's weighing of the opinions of Drs. Dahhan and Broudy, or by employer with respect to the deposition of Dr. Kraman, as error, if any, is harmless. *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278.

In light of our affirmance of the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement under 20 C.F.R. Part 718, we also affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).



Accordingly, Employer's Motion for Reconsideration *En Banc*, and the relief requested, are granted, and the Board's Decision and Order of July 31, 2009, is vacated, and the administrative law judge's Decision and Order and the Decision on Remand of Director's Motion for Reconsideration, both denying benefits, are hereby reinstated and affirmed.<sup>7</sup>

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

We concur:

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>7</sup> Following the issuance of the Board's Decision and Order reversing the administrative law judge's denial of benefits, claimant's counsel requested a fee of \$6,825.00 for services performed before the Board. In light of our reinstatement of the administrative law judge's Decision and Order denying benefits, it is not necessary to address claimant's counsel fee petition, as claimant's counsel is entitled to an attorney's fee only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a).

McGRANERY, Administrative Appeals Judge, dissenting:

In the case at bar, the Director, Office of Workers' Compensation Programs (the Director), has diligently performed his duty to carry forth the intent of Congress by actively participating in the adjudication of the claim at issue. *See Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. [Harcum]*, 514 U.S. 122, 140 (1995). He has done so both to vindicate claimant's entitlement to benefits and to educate the administrative law judge, the Board, and the court, on the proper application of the revised regulation on legal pneumoconiosis at 20 C.F.R. §718.202(a)(2) and on the medical science which supports it. In reversing the panel's decision awarding benefits, the Board majority has ignored the Director's compelling arguments, both legal and factual. For that reason, I must respectfully dissent from the majority's decision.

After the administrative law judge issued an order denying claimant benefits, and claimant appealed that decision, the Director filed a motion for reconsideration in which he explained that a correct application of the law to the facts would mandate an award of benefits. The administrative law judge denied the Director's motion on the ground that she lacked jurisdiction. The Director filed another motion for reconsideration in which he explained the jurisdictional status of the case. Again, the administrative law judge denied the Director's motion; whereupon, the Director appealed that decision and the Board vacated it, remanding the case for consideration of the Director's first motion. The administrative law judge purported to address the Director's arguments and concluded that the opinions of Drs. Dahhan and Broudy are better reasoned and documented than the opinions of Drs. Baker and Forehand. Decision on Remand of Director's Motion for Reconsideration (Decision on Remand) at 10. Accordingly, she denied benefits. Claimant appealed to the Board, which reversed the denial in a split decision. The majority of the panel reviewed the administrative law judge's decision in light of the Director's discussion of the development of the law on legal pneumoconiosis to include coal dust exposure as a possible cause of chronic obstructive pulmonary disease (COPD), and his analysis of the record in light of the law.<sup>8</sup> *See* 20 C.F.R. §718.201(a)(2); 62 Fed. Reg. 3,343 (Jan. 22, 1977); 65 Fed. Reg. 79,938, 79,941 (Dec. 20, 2000). Employer petitioned for reconsideration *en banc* and a majority of the Board has now voted to grant

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<sup>8</sup> Pursuant to 20 C.F.R. §718.201(a)(2), legal pneumoconiosis:

[I]ncludes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 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).

employer's petition, to vacate the panel's decision and affirm the administrative law judge's denial of benefits. Like the administrative law judge, the Board majority has evaded the Director's arguments, refusing to discuss his contention that the administrative law judge erred in crediting the opinions of employer's doctors, even though her discrediting of claimant's medical opinion evidence was based on a comparative analysis of their opinions with the opinions of employer's expert, Dr. Dahhan.

It is undisputed that claimant had been employed in underground coal mine employment for at least twenty-one years, that he had smoked cigarettes for at least forty years, and that he has COPD and a totally disabling respiratory impairment. In his first motion for reconsideration, the Director explained that in 2000, the Department promulgated a revised definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2) to include COPD because:

After two hearings, two comment periods, painstaking review of the submitted comments, and consultation with the National Institute for Occupational Safety and Health ("NIOSH"), the Department [had] concluded the relevant scientific data showed that coal dust exposure can cause significant [COPD], including emphysema, and can do so even absent complicated pneumoconiosis. 65 Fed. Reg. 79,938-43 (Dec. 20, 2000).

Director's First Motion for Reconsideration at 7. The regulation was revised to make clear that medical opinion evidence which failed to recognize that coal dust exposure can cause an obstructive respiratory impairment is contrary to the Act, and, by exclusion of such evidence, the Secretary sought to obtain consistent, and just, adjudication of claims. *Id.* at 6.

The Director further argued that all of the reasons given by Drs. Dahhan and Broudy to exclude coal mine employment as a cause of claimant's obstructive impairment are invalid. Director's First Motion for Reconsideration at 8-11. The Director pointed out that, *inter alia*, both doctors had relied on the absence of x-ray evidence of pneumoconiosis to determine that coal mine employment was not a cause of claimant's disabling obstructive pulmonary impairment.<sup>9</sup> *Id.* at 9-10. In her decision on

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<sup>9</sup> Dr. Broudy explained his determination to exclude coal dust exposure as a cause of claimant's obstructive impairment by asserting that the x-ray had shown emphysema, and not pneumoconiosis. Employer's Exhibit 2 at 10. As the Director, Office of Workers' Compensation Programs (the Director), observed, this comment demonstrates the doctor's failure to understand that coal dust exposure can cause an obstructive impairment. Director's First Motion for Reconsideration at 9. Dr. Broudy also stated:

remand, the administrative law judge acknowledged the Director's points and explained that she had properly credited both medical opinions because neither doctor had meant what he had plainly said.<sup>10</sup> In the panel decision, the majority fully discussed all of the Director's allegations of error in the administrative law judge's crediting of the opinions of Drs. Dahhan and Broudy, and in her discrediting of the opinions of Drs. Baker and Forehand. *L.B. [Boggs] v. Branham & Baker Underground Corp.*, BRB No. 08-0664 BLA, slip op. at 8-15 (July 31, 2009)(unpub.)(Dolder, C.J., dissenting). Careful analysis of the record in light of the applicable law vindicated claimant and the Director, who had both steadfastly maintained that the order denying benefits was contrary to law.

In reversing the panel decision, the Board majority purports to affirm the administrative law judge's decision denying benefits without addressing any of the Director's arguments that the administrative law judge erroneously credited the opinions of Drs. Dahhan and Broudy. The majority attempts to do this by upholding the reasons the administrative law judge provided for discounting the opinions of Drs. Baker and Forehand. In particular, the majority affirms the administrative law judge's discounting of the opinions of both Dr. Baker and Dr. Forehand because they, unlike Dr. Dahhan, had not addressed how the reversibility of claimant's impairment upon administration of

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“[i]f pneumoconiosis had caused impairment of this severity, one would certainly expect to see radiographic changes suggesting pneumoconiosis, and this is not the case in this instance.” Employer's Exhibit 2 at 10. Again, the Director identified the error in crediting the doctor's opinion: “[I]t is inconsistent with section [413(b)] of the Act, 30 U.S.C. 923(b), which specifically provides that no claim may be denied solely upon the results of an x-ray analysis.” Director's First Motion for Reconsideration at 9.

Similarly, Dr. Dahhan attributed claimant's pulmonary impairment exclusively to smoking because claimant “has no evidence of complicated coal worker[s'] pneumoconiosis that may cause secondary obstructive abnormality.” Employer's Exhibit 4 at 10. Dr. Dahhan's insistence on evidence of complicated pneumoconiosis to identify coal dust exposure as a cause of a severe obstructive impairment is obviously contrary to the Act.

<sup>10</sup> As to Dr. Broudy's opinion, the administrative law judge wrote: “It is clear that any analysis of Dr. Broudy's opinion on this issue and more significantly, my final determination in this claim, did not rest solely upon x-ray analysis.” Decision on Remand of Director's Motion for Reconsideration at 6. As to Dr. Dahhan's opinion, the administrative law judge wrote: “In reading Dr. Dahhan's opinion in its entirety, I do not conclude that he opined that only complicated pneumoconiosis would cause obstructive abnormality.” *Id.* at 8.

bronchodilators had affected their opinions. Decision on Remand at 10-12. Dr. Dahhan had opined that claimant's significant response to bronchodilator therapy indicated that his impairment was flexible, not fixed, as when the obstruction is secondary to coal dust inhalation. Employer's Exhibit 4 at 9-10. The Board majority does not examine the reasonableness of Dr. Dahhan's opinion, which the administrative law judge made the measuring stick for the opinions of Drs. Baker and Forehand. Yet the doctors' failure to discuss the partial reversibility of claimant's impairment cannot be deemed significant unless the administrative law judge properly determined to credit Dr. Dahhan's reversibility analysis. Since the Board majority has refused to undertake that analysis, its decision has no rational basis.

Furthermore, as the Director persuasively reasoned, the fact that the impairment is only partially reversible, "suggest[s] that a disability existed that was not responsive to bronchodilators." Director's First Motion for Reconsideration at 10. The administrative law judge rejected this argument from logic, as based on conjecture. Decision on Remand at 7. The Director also observed that the Merck Manual at 576 (17<sup>th</sup> ed. 1999), which is frequently cited by the United States Court of Appeals for the Sixth Circuit, provides that COPD is responsive to bronchodilator treatment. Director's Motion for Reconsideration at 10. Since the revised regulations recognize that COPD can be legal pneumoconiosis, 20 C.F.R. §718.201(a)(2), the reversibility of COPD is not a valid basis to exclude coal dust exposure as a cause of claimant's impairment. The administrative law judge again refused to address the reasonableness of the Director's point, stating, "I do not find that this additional information adds anything to [the] evidence." Decision on Remand at 7. The majority in the panel decision observed:

The administrative law judge could not address the logic of the Director's argument because if she did so, she would have to acknowledge that by pointing to the reversibility of claimant's COPD as showing that it was not caused by dust exposure, the doctor was denying that COPD can be caused by coal dust exposure, an opinion which is flatly contrary to the revised regulations. The inescapable conclusion from this argument is that it was error for the administrative law judge to credit Dr. Dahhan's opinion excluding coal dust exposure as a cause of claimant's COPD based on the reversibility of claimant's impairment. The conclusion must also be that it was error for the administrative law judge to discredit the opinions of both Drs. Baker and Forehand for failing to discuss the reversibility of the impairment.

*Boggs*, slip op. at 12.

Similarly inescapable is the conclusion that the Board majority errs in affirming the administrative law judge's determination to discredit the opinions of Drs. Baker and

Forehand for failing to discuss the partial reversibility of claimant's impairment. The majority seeks to affirm the denial of benefits without addressing the Director's arguments concerning the credibility of the opinions of Drs. Dahhan and Broudy, not only because the Director has demonstrated that all of the bases provided for their opinions are invalid but, also, because the panel majority demonstrated that, at its heart, the administrative law judge's decision to credit both doctors' opinions is irrational. The panel majority stated:

It is particularly puzzling that the lynchpin of the administrative law judge's decision is Dr. Dahhan's testimony that the reversibility of claimant's obstructive impairment proves that it is unrelated to coal dust exposure in coal mine employment. That is the principal reason that the administrative law judge accorded Dr. Dahhan's opinion substantial weight. 2008 Decision on Remand at 9. The failure of Drs. Baker and Forehand to discuss this reversibility is the principal reason the administrative law judge provided for according their opinions diminished weight. *Id.* Yet, the administrative law judge did not acknowledge the glaring inconsistency at the heart of her decision: she credited the opinions of both Drs. Dahhan and Broudy that claimant's disabling obstructive impairment was unrelated to coal mine employment, when Dr. Dahhan stated that his opinion was based on the reversibility of claimant's impairment, Employer's Exhibit 4 at 10, and Dr. Broudy stated that his opinion was based on the irreversibility of claimant's impairment ("he has the typical impairment due to cigarette smoking, that is irreversible airways obstruction . . ."), Employer's Exhibit 2 at 10. The administrative law judge did not attempt to reconcile the fundamental difference in the opinions of the two pulmonary experts she credited, nor did she acknowledge that the irreversibility of claimant's impairment was the first reason that Dr. Broudy provided for his opinion excluding coal mine employment as a cause of claimant's impairment. It was incumbent upon the administrative law judge to address the contradiction at the heart of these opinions before determining to credit them both. Moreover, it was irrational for the administrative law judge to discredit the opinions of Drs. Baker and Forehand for failing to discuss the reversibility of claimant's impairment when the experts she credited reached opposite conclusions on the significance of reversibility. Because there is a basic contradiction at the core of the administrative law judge's decision, it is irrational.

*Boggs*, slip op. at 13.

In sum, the Director has conscientiously discharged his duty in this case by repeatedly intervening to correct the injustice of the administrative law judge's denial of

Black Lung benefits, due to her failure to appreciate the import of the change in the regulatory definition of legal pneumoconiosis to include COPD arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). In this decision, the Director's efforts have been thwarted by the Board majority, which evaded the Director's arguments by purporting to affirm the administrative law judge's decision by affirming her discrediting of the opinions by Drs. Baker and Forehand, principally for their failure to discuss Dr. Dahhan's finding that claimant's impairment is partially reversible. But that omission is significant only if Dr. Dahhan was correct, both in finding claimant's impairment to be reversible, and in opining that this reversibility shows that the impairment was not caused by coal dust exposure. The credibility of Dr. Dahhan's opinion is necessarily drawn into question by its conflict with the opinion of Dr. Broudy, employer's other expert, who flatly contradicted Dr. Dahhan on both the reversibility of claimant's impairment and the significance of reversibility. Since the administrative law judge did not grapple with these contradictions, it was irrational for her to credit both the opinions of Drs. Dahhan and Broudy, and to discredit the opinions of Drs. Baker and Forehand, based on the opinion of Dr. Dahhan.

The Board majority's unwillingness to address the credibility of Dr. Dahhan's opinion suggests that the majority recognizes that the record does not support the administrative law judge's credibility finding, but the majority fails to understand that logic precludes affirmance of the administrative law judge's discrediting of the opinions of Drs. Baker and Forehand unless the administrative law judge's crediting of Dr. Dahhan's opinion is affirmed. The Board majority's decision to affirm the administrative law judge's discrediting of the opinions of Drs. Baker and Forehand, based on Dr. Dahhan's opinion, regardless of the credibility of that opinion, is irrational; likewise irrational is the Board majority's decision to affirm the administrative law judge's decision crediting flatly contradictory medical opinions. Hence, the Board majority's decision is irrational both because its reasoning is flawed and the decision it affirms is





unreasoned. The Director's efforts to correct the injustice perpetrated by the administrative law judge may be for naught, unless he intervenes again in this case, to correct the injustice perpetrated by the Board majority.

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REGINA C. McGRANERY  
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL  
Administrative Appeals Judge