

BRB Nos. 11-0303 BLA
and 11-0428 BLA

STARLET TACKETT)
(o/b/o and Widow of RONNIE TACKETT))
)
Claimant-Respondent)
)
v.)
)
H.J. MINING COMPANY,) DATE ISSUED: 01/30/2012
INCORPORATED)
)
and)
)
BITUMINOUS CASUALTY)
CORPORATION,)
OLD REPUBLIC INSURANCE COMPANY)
)
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 in the Living Miner's Claim and Awarding Benefits in the Survivor's Claim of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the December 14, 2010 Decision and Order Awarding Benefits in the Living Miner's Claim and Awarding Benefits in the Survivor's Claim (04-BLA-0538 and 08-BLA-5324) of Administrative Law Judge Janice K. Bullard rendered on claims 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). This case involves a miner's subsequent claim¹ filed on April 25, 2002, and a survivor's claim filed on August 3, 2006. The miner's subsequent claim is before the Board for the third time, and the survivor's claim is before the Board for the second time.² Because of the lengthy procedural history³ in these claims, we will discuss them separately.

Miner's Claim

The sole issue before the administrative law judge in the miner's claim is whether the evidence establishes that the miner is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).⁴ When this case was most recently before the Board, the Board vacated the administrative law judge's award of benefits in the miner's claim and remanded the case to the administrative law judge to reconsider the evidence relevant to

¹ The miner's previous claims, filed on March 9, 1992 and June 25, 2000, were denied on August 18, 1992 and October 16, 2000, respectively, for failure to establish any element of entitlement. DXLM-1. The miner died on July 20, 2005, while his subsequent claim was pending before the administrative law judge. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

² In her previous 2009 Decision and Order, the administrative law judge consolidated the survivor's claim with the miner's subsequent claim.

³ The lengthy procedural history of these claims is set forth in the Board's most recent Decision and Order. *Tackett v. H.J. Mining Co.*, BRB Nos. 09-0610 BLA and 09-0611 BLA (June 3, 2010)(unpub.)(2010 Board Decision and Order).

⁴ The administrative law judge's previous findings that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309, that clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2), (4), that clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), and that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b), have been affirmed by the Board. *See* 2010 Board Decision and Order; *Tackett v. H.J. Mining Co.*, BRB No. 06-0873 BLA (July 31, 2007)(unpub.).

disability causation at Section 718.204(c). Specifically, the Board, citing 20 C.F.R. §718.104(d) and *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), held that the administrative law judge erred in crediting the opinion of Dr. Forehand, finding claimant totally disabled due to clinical pneumoconiosis, solely because he was a treating physician, without first considering whether his opinion was sufficiently reasoned. Additionally, the Board held that the administrative law judge erred in according greater weight to the opinion of Dr. Forehand because it was supported by the opinions of the miner's other treating physicians, namely the opinions of Drs. Ammisetty, Mettu and Olano. The Board held that the administrative law judge erred in finding the opinions of Drs. Ammisetty, Mettu and Olano to be supportive of Dr. Forehand's opinion, without sufficiently explaining her reasoning, given the various deficiencies in those opinions.⁵ The Board also held that the administrative law judge erred in failing to explain how a physician's mere diagnosis of clinical pneumoconiosis, rendered when the miner was being evaluated for a lung transplant, supported Dr. Forehand's opinion that the miner was totally disabled due to pneumoconiosis. Further, the Board held that the administrative law judge erred in selectively analyzing the evidence and in improperly substituting her opinion for that of Dr. Rosenberg. Specifically, employer contends that the administrative law judge failed to subject Dr. Forehand's opinion to the same scrutiny as Dr. Rosenberg's opinion, when she credited the opinion of Dr. Forehand over the opinion of Dr. Rosenberg, who acknowledged the presence of clinical pneumoconiosis, but found that the miner's total disability was due solely to smoking. Finally, the Board remanded the case for the administrative law judge to determine whether the miner had legal pneumoconiosis⁶ pursuant to 20 C.F.R. §718.202(a)(4). Although the Board noted that the administrative law judge's finding of clinical pneumoconiosis would normally obviate the need for a finding on the issue of

⁵ The Board held that the opinion of Dr. Mettu could not support Dr. Forehand's opinion because Dr. Mettu did not diagnose clinical pneumoconiosis. The Board also held that Dr. Ammisetty's opinion was insufficient to establish disability causation, because it did not assess the extent to which smoking and coal dust exposure affected the miner's disability. Finally, the Board held that the administrative law judge properly accorded less weight to Dr. Olano's opinion because the doctor did not address the effect of the miner's significant smoking history on his pulmonary condition. 2010 Board Decision and Order.

⁶ Legal pneumoconiosis is defined as any chronic lung disease or impairment and its sequelae arising out of coal mine employment. It includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. Further, a disease "arising out of coal mine employment" includes 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(a)(2), (b).

legal pneumoconiosis, the Board held that because there was evidence in the record supportive of a finding of legal pneumoconiosis, namely chronic obstructive pulmonary disease (COPD) due in part to coal mine employment, and that the miner's disability was due to legal pneumoconiosis, the administrative law judge must, if she determined that disability is not due to clinical pneumoconiosis, determine whether the disability is due to legal pneumoconiosis. On remand, the administrative law judge found that the evidence failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), but once again found that the evidence established that the miner's total disability was due to his clinical pneumoconiosis pursuant to Section 718.204(c), and awarded benefits in the miner's claim. Decision and Order at 16.

On appeal, employer contends that the administrative law judge erred in finding that the miner's total disability was due to his clinical pneumoconiosis pursuant to Section 718.204(c).⁷ Specifically, employer argues that the administrative law judge's decision is inconsistent, that she selectively evaluated the evidence, that she repeated the same errors she made in her previous analysis of the evidence, and that she again failed to sufficiently analyze the medical opinion evidence. In response, claimant contends that the administrative law judge properly awarded benefits in the miner's claim. In reply, employer reiterates its contentions. The Director, Office of Workers' Compensation Programs (the Director), has not responded to employer's appeal.⁸

⁷ 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).

⁸ When this case was previously before the Board, employer and the Director, Office of Workers' Compensation Programs (the Director), correctly represented that the recent amendments to the Act, reviving, in pertinent part, the Section 411(c)(4) rebuttable presumption of totally disabling pneumoconiosis, 30 U.S.C. §921(c)(4), which became

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.⁹ 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).

Our review of the administrative law judge's decision on remand, and the record before us, indicates that, as employer argues, the administrative law judge failed to re-evaluate the evidence, as directed by the Board, and either repeated her previous findings or did not provide sufficient new analysis of the evidence.

At the outset, the administrative law judge, as directed by the Board, determined that the "preponderance of the reliable physician opinion evidence fail[ed] to establish the presence of legal pneumoconiosis." Decision and Order at 16. Turning to the issue of whether the miner's total disability was due to clinical pneumoconiosis, the administrative law judge found that Dr. Forehand's opinion established that the miner's clinical pneumoconiosis substantially contributed to his total disability. In so finding, the administrative law judge stated:

[Dr. Forehand] found that the [m]iner's disability was caused in part by pneumoconiosis, and the physician explained that the Miner's FEV₁ value would have been greater if pneumoconiosis had not been present.¹⁰ I find

effective on March 23, 2010, and which applies to claims filed on or after January 1, 2005, did not apply to the miner's claim because it was filed before January 1, 2005.

The Director additionally noted that, although the miner's claim had been successful to that point, his award had been challenged and had not become final. Consequently, the Director indicated that only if an award in the miner's claim became final would claimant be derivatively entitled to survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

⁹ The record reflects that the miner's most recent coal mine employment was in Kentucky. Director's Exhibits 7, 9, 10. Accordingly, 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 (1989)(*en banc*).

¹⁰ The administrative law judge appears to have extrapolated from Dr. Forehand's remark that:

I have explained why I think [the miner] has a severe lung disease of mixed causes. If [he] had not been exposed to coal mine dust he would not be as

that this reasonably supports according weight to Dr. Forehand's opinion that the [m]iner's clinical pneumoconiosis contributed to his total disability.

Decision and Order at 14. Additionally, the administrative law judge noted:

I accord more weight to Dr. Forehand's opinion that five years of exposure to coal dust is sufficient for a susceptible individual to develop disabling dust-induced pulmonary disease.

Decision and Order at 16.

A more complete review of Dr. Forehand's medical report, however, also reflects that he found the following:

Twenty-five years of smoking cigarettes alone would not impair [his] lungs to the degree I measured on May 27, 2004 (FEV₁=0.56 liters (17% of predicted). Cigarette smoking is the leading cause of obstructive lung disease but affects only 15% of smokers. Occupational exposure is the second leading cause of obstructive lung disease. Moreover legal coal workers' pneumoconiosis and cigarette smoker's lung disease both cause the type of emphysema that effects [sic] [his] lungs. Therefore I believe I have clear cut reasons to conclude that [his] totally and permanently disabling respiratory impairment was not due solely to the effects of cigarette smoking but to the combined effects of cigarette smoking and inhaling coal mine dust. That [he] inhaled toxic coal mine dust further aggravated his obstructive lung disease caused in part by smoking cigarettes and materially worsened his complaints of shortness of breath on exertion.

While I cannot prove that [the miner] worked in coal mining for 12 full years, I believe that he worked in and inhaled coal mine dust for more than 4.5 years, as he claimed and that he had a significant exposure to coal mine dust including silica, toxic to the lung. Furthermore, intense exposure and inhalation of coal mine dust including toxic silica will damage the lungs with as little as 4.5 years of coal mine employment.

Claimant's Exhibit 2(K) at 3, 4.

impaired. If cigarettes were the sole cause of [his] respiratory impairment (FEV₁ of 17% of predicted) then [he] would be a sicker man with many more health problems. Claimant's Exhibit 7.

Initially, we note that the administrative law judge erred in finding Dr. Forehand's opinion sufficient to establish that the miner's disability is due to clinical pneumoconiosis. 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge has not sufficiently explained how Dr. Forehand's statements, in light of the entirety of his opinion, support a finding that the miner's total disability is due to his clinical pneumoconiosis.

Moreover, on consideration of Dr. Forehand's opinion in its entirety, the administrative law judge found that, because smoking and occupational exposure are the two leading causes of obstructive lung disease, the portion of the miner's respiratory impairment that is not attributable to smoking must be due to coal mine employment. This finding, however, impermissibly conflates the issues of clinical and legal pneumoconiosis, because Dr. Forehand appears to use evidence of legal pneumoconiosis, namely that the miner's COPD arose, in part, out of coal mine employment, as a basis for finding that the miner had clinical pneumoconiosis.¹¹ *See* 20 C.F.R. §718.201. However, because the administrative law judge found that Dr. Forehand's opinion did not establish legal pneumoconiosis, Decision and Order at 14, she cannot use evidence in the opinion that is supportive of a finding of legal pneumoconiosis, to conclude that Dr. Forehand's opinion establishes that the miner is disabled due to clinical pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202(a)(4), 718.204(c).

In particular, the administrative law judge's decision to credit Dr. Forehand's opinion, as attributing the miner's FEV₁ values to the effects of (legal) pneumoconiosis, appears inconsistent, when she credited Dr. Rosenberg's opinion that "the miner's pulmonary impairment was not due to coal mine induced legal pneumoconiosis[,]"¹²

¹¹ It is unclear whether the part of Dr. Forehand's opinion contained at Director's Exhibit DSX-19 applies to his diagnosis of clinical or legal pneumoconiosis, as his reference to "coal workers' pneumoconiosis" occurs in the section of his medical report concerning the arterial blood gas testing. While Dr. Forehand interpreted his arterial blood gas test as showing "obstructive ventilatory pattern," he did not provide any analysis indicating that the values obtained are attributable to pneumoconiosis, rather than smoking. *See* Claimant's Exhibits 4, 7.

¹² Dr. Rosenberg opined that:

[The miner] obviously developed severe airflow obstruction, characterized by a markedly reduced FEV₁ in relationship to FVC, such that his FEV₁%

based on his FEV₁ values. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999)(*en banc*). The administrative law judge failed to adequately explain the basis for her finding that the opinion of Dr. Forehand was superior to that of Dr. Rosenberg, who acknowledged the presence of minimal coal workers' pneumoconiosis but, on review of the record, found total disability to be due solely to smoking.¹³ *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Next, the administrative law judge placed significant emphasis on the mention of pneumoconiosis in the miner's lung transplant work-up documents, in discrediting the opinion of Dr. Rosenberg. *Id.* at 15, 17. Specifically, the administrative law judge faulted Dr. Rosenberg for failing "to address Dr. Mullet's diagnosis of pneumoconiosis upon transplant work-up." *Id.* However, since Dr. Rosenberg independently diagnosed clinical pneumoconiosis, this is not a proper basis upon which to reject his opinion. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

Finally, the administrative law judge rejected the opinion of Dr. Rosenberg because he failed to "fully address" the opinions of the other treating physicians. *Id.* However, since the administrative law judge also discredited the medical opinions of Drs. Ammisetty, Younes, and Mettu on the issue of legal pneumoconiosis, and the Board previously held that their opinions were insufficient to establish the presence of clinical pneumoconiosis, it is unclear what portions of their opinions would have been relevant to Dr. Rosenberg's opinion.

was severely reduced. This characteristic pattern of obstruction is not related to past coal dust exposure In addition, he had a bronchodilator response with marked air trapping and a low diffusing capacity, all of which are characteristic of smoking-related COPD and not that of obstructive lung disease related to past coal dust exposure. This is totally consistent with the pathological findings of panlobular emphysema. . . . [T]his type of emphysema is not related to past coal dust exposure.

Employer's Exhibit 1. Dr. Rosenberg also opined that the miner's "very minimal degree of [coal workers' pneumoconiosis]" would not have caused "any significant ventilatory impairment." *Id.* 2010 Board Decision and Order at 10.

¹³ Additionally, as employer points out, the administrative law judge did not follow the Board's directive to address the significance of Dr. Rosenberg's opinion that the "statement that Dr. Forehand makes that, [the miner's] COPD could only be smoking-related if he had associated peripheral vascular disease, coronary artery disease and diabetes, has no scientific foundation." *See* Employer's Brief at 23-24; Employer's Exhibit 1; *see also* Employer's Exhibit 3 at 27-28.

Thus, as the administrative law judge's basis for crediting the opinion of Dr. Forehand is not reasoned, and as she did not identify any other reasoned medical opinion evidence attributing the miner's totally disabling respiratory impairment to his clinical pneumoconiosis, we are unable to conclude that substantial evidence supports the administrative law judge's finding that the miner's total disability was due to clinical pneumoconiosis. She has, therefore, failed to render a rational analysis of the evidence or provide sufficient support for her determination that the evidence establishes that the miner was totally disabled due to his clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c).¹⁴ See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The award of benefits in the miner's claim is, therefore, vacated, and the miner's claim is remanded for further consideration of the evidence relevant to disability causation.

Survivor's Claim

When this case was most recently before the Board, the Board held that the administrative law judge's analysis regarding whether the miner's death was due to pneumoconiosis was flawed by her failure to address whether the miner's COPD constituted legal pneumoconiosis. Consequently, the Board held that the administrative law judge erred in weighing the medical reports, as if they established the existence of legal pneumoconiosis in the form of COPD attributable to coal dust exposure. Next, the Board observed that, although the administrative law judge found the presence of clinical pneumoconiosis established at 20 C.F.R. §718.202(a)(2), (4), she did not specifically address whether and how clinical pneumoconiosis hastened the miner's death. In conclusion, the Board held that the administrative law judge failed to make specific, reviewable findings on: (1) whether clinical pneumoconiosis hastened the miner's death, and (2) whether the miner's COPD constituted legal pneumoconiosis, and (3) if so, whether the miner's death was due to, or hastened by, legal pneumoconiosis at Section 718.205(c). See *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 24 BLR 2-257 (6th Cir. 2010) and *Williams*, 338 F.3d at 518, 22 BLR at 2-655.

On remand, the administrative law judge found that, as the reliable medical opinion evidence failed to establish the presence of legal pneumoconiosis, she could not find that the miner's death was related to legal pneumoconiosis. Decision and Order at

¹⁴ The administrative law judge was instructed to consider whether Dr. Forehand's opinion, as that of a treating physician, was entitled to greater weight pursuant to 20 C.F.R. §718.104(d) and *Eastover Mining Co. v. Williams*, 338 F.3d 501, 508, 22 BLR 2-625, 2-638 (6th Cir. 2003). Although, on remand, the administrative law judge did not accord greater weight to Dr. Forehand's opinion because he was a treating physician, this is a proper factor for consideration on remand. See 20 C.F.R. §718.104(d); *Williams*, 338 F.3d at 508, 22 BLR at 2-638.

16. Turning to whether the miner's death was caused by clinical pneumoconiosis, the administrative law judge found that, "[t]he record clearly establishes that the [m]iner died due to pulmonary conditions." Decision and Order at 16. She then credited Dr. Forehand's opinion. Specifically, the administrative law judge stated:

I credit his rationale that the [m]iner's pulmonary condition deteriorated to the point that he needed a lung transplant, and that clinical pneumoconiosis contributed to that deterioration.

Decision and Order at 16.

On appeal, employer contends that the administrative law judge erred in finding that Dr. Forehand's opinion was sufficient to establish that the miner's death was due to clinical pneumoconiosis pursuant to Section 718.205(c). We agree.

The Sixth Circuit has explained that, "[a] medical opinion that pneumoconiosis expedited death through a 'specifically defined process' must explain why that is so and generally should be able to explain how and to what extent - customarily through a range of time - that process hastened a specific patient's death." *Conley*, 595 F.3d at 303, 24 BLR at 2-266-67; *see Williams*, 338 F.3d at 518, 22 BLR at 2-655. In summarily crediting Dr. Forehand's opinion, the administrative law judge has failed to comply with the standard set forth in *Conley* and *Williams*. Accordingly, we are unable to conclude that the administrative law judge acted reasonably in crediting Dr. Forehand's opinion. *See* Decision and Order at 16-17; Claimant's Exhibit 2. We, therefore, vacate the administrative law judge's award of benefits in the survivor's claim and remand the case for further consideration.

Finally, we are mindful that the necessity of repeated remands have occasioned delay and frustrated the efficient disposition of these claims. Reluctantly, therefore, we hold that it is in the interest of justice and judicial economy to remand this case for assignment to a new administrative law judge for a fresh look at the evidence and proper application of the law to the evidence. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the Decision and Order Awarding Benefits on the Living Miner's Claim and Awarding Benefits on the Survivor's Claim is vacated, and the case is remanded for reassignment to a different administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge