BRB No. 05-0762 BLA

MICHAEL A. TULLIO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, LLC	)	
	)	DATE ISSUED: 07/03/2006
Employer-Petitioner	)	
	)	
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 – Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William J. Evans and John P. Ball (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (01-BLA-0920) of Administrative Law Judge Daniel J. Roketenetz on a miner's duplicate 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

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726

the Board for the second time. Initially, the administrative law judge credited the miner with nineteen years of coal mine employment pursuant to the parties' stipulation. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b) and, therefore, that claimant[2] demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Considering all of the evidence in the record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204. Accordingly, the administrative law judge awarded benefits, commencing as of August 2000. Subsequently, the administrative law judge awarded attorney's fees to claimant's counsel totaling $11,544.12, representing 53.8 hours of legal services rendered at a rate of $200.00 per hour and $784.12 for expenses.

In response to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Tullio v. U.S. Steel Mining Company, Inc.*, BRB No. 03-0258 BLA (Dec. 19, 2003)(unpub.). Specifically, the Board vacated the administrative law judge's finding of pneumoconiosis pursuant to Section 718.202(a)(4) because he erred in weighing the medical opinions of Drs. Farney and Poitras. *Id.* Additionally, the Board vacated the administrative law judge's finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305 because he erred in applying the rebuttable presumption, contained in this regulation, to this case which was filed after January 1, 1982. *Id.* The Board affirmed the administrative law judge's findings regarding length of coal mine employment, and pursuant to Sections 718.202(a)(1)-(3), 718.203(b), and 718.204(b)(2)(i)-(iv), as well as Section 725.309 (2000), because they were unchallenged on appeal. *Id.* The Board also affirmed, as unchallenged on appeal, the administrative law judge's Supplemental

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant is Michael Anthony Tullio, who filed his first claim for benefits on February 17, 1994, which the district director denied on July 1, 1994. Director's Exhibit 29. No further action was taken on the 1994 claim. Claimant filed a second claim for benefits on August 28, 2000. Director' Exhibit 1.

[3]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.309 in the amended regulations, these revisions only apply to claims filed after January 19, 2001.

Decision and Order Awarding Attorney's Fees. *Id.* Claimant subsequently filed a motion for reconsideration, which the Board denied.

On remand, the administrative law judge found Dr. Poitras' opinion to be sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits, commencing as of August 2000.

In the present appeal, employer argues that the administrative law judge erred in weighing the opinions of Drs. Farney and Poitras pursuant to Sections 718.202(a)(4) and 718.204(c). Additionally, employer asserts that the administrative law judge's finding of a nine pack year smoking history is irrational and unsupported by the record. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief, reiterating the arguments set forth in its Petition for Review and brief. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

Pursuant to Section 718.202(a)(4), employer first asserts that the administrative law judge erred in discrediting Dr. Farney's opinion and in crediting Dr. Poitras' opinion to find that claimant established the existence of pneumoconiosis.[4] In response to employer's previous appeal, the Board vacated the administrative law judge's weighing of the opinions of Drs. Farney and Poitras for several reasons. Specifically, the Board held that (1) the administrative law judge erred in characterizing Dr. Poitras' opinion as being based on a nine pack year[5] history when, in his third opinion, Dr. Poitras relied on a cigarette smoking history of nine to thirty pack years; (2) contrary to the administrative law judge's finding, Dr. Farney did not consider claimant to be a habitual smoker; (3) the administrative law judge's rejection of Dr. Farney's opinion on the basis that Dr. Farney relied on an inaccurate assumption concerning claimant's coal dust exposure is not supported by substantial evidence; (4) the administrative law judge irrationally relied on Dr. Farney's answers to his hypothetical question at the hearing because the hypothetical contained an inaccurate smoking history.

In reconsidering Dr. Farney's opinion on remand, the administrative law judge continued to accord less weight to this physician's opinion, even though he "[a]ssum[ed]

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[4]Dr. Farney found chronic obstructive pulmonary disease due to tobacco smoke exposure. Hearing Transcript at 95; Director's Exhibit 24. Dr. Poitras opined that claimant's coal dust exposure played a significant role in causing his lung disease. Director's Exhibits 8, 9; Claimant's Exhibit 1.

[5]A pack year is defined as "one package of cigarettes consumed per day per year." *In re Simon Litigation*, 211 F.R.D. 86, 2002 WL 31375510 (E.D.N.Y.).

that Dr. Farney's opinion was based upon accurate smoking and coal mine employment histories and [assumed that he] plac[ed] no reliance on his hypothetical answers to [the administrative law judge's] questions." Decision and Order on Remand at 3. In doing so, the administrative law judge stated that Dr. Farney noted in his report dated April 3, 2001 "that he conducted a physical examination and corresponding objective medical testing" and "that he also listed that he reviewed medical records provided to him by the Employer's counsel." *Id.* Nonetheless, the administrative law judge accorded less weight to Dr. Farney's opinion because he found that this physician "failed to expressly state which medical evidence that he relied upon from Employer's counsel or even if the evidence was in the record" and, therefore, the administrative law judge found that "it is unclear what evidence Dr. Farney relie[d] upon in his findings." *Id.*

Employer asserts that the administrative law judge erred in according less weight to Dr. Farney's opinion on this basis. Employer maintains that in his April 10, 2001 report and during his hearing testimony, Dr. Farney identified the medical evidence he relied on in rendering his findings and that it is clear that this evidence is contained in the record. Employer's assertion has merit. At the beginning of his 2001 report, Dr. Farney noted that in preparation for this report, he reviewed claimant's medical records provided by employer's counsel. Director's Exhibit 24. Dr. Farney also stated that he "conducted a detailed history and physical examination, obtained an occupational history, and standard laboratory studies, including complete blood count, urinalysis, urine measurement of products of nicotine, pulmonary function measurements, arterial blood gas measurements, oximetry measurements during exercise and a high resolution CT scan of the chest" and discussed in detail the results he obtained on claimant's electrocardiogram, pulmonary function and blood gas tests, and claimant's CT scan. *Id.* In rendering his conclusion in his 2001 report, Dr. Farney stated that "[t]he constellation of data in this case is diagnostic of chronic obstructive pulmonary disease (emphysema). Pulmonary function measurements indicate the presence of severe air flow obstruction with minimal reversibility, air trapping, and marked reduction of the diffusion capacity. The diagnosis of emphysema is further indicated by the characteristic radiographic findings." Director's Exhibit 24. Dr. Farney further stated that "[t]he natural course of his pulmonary disease and current findings are typical of ordinary cigarette smoke related emphysema." *Id.* At the hearing, when Dr. Farney was asked, in conjunction with his 2001 report, whether he reviewed "the medical records that are contained in the Director's exhibits" he answered, "[y]es, I have."[6] Hearing Transcript at 71. Moreover, as

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[6]Claimant asserts in his response brief that the administrative law judge properly gave less weight to Dr. Farney's opinion because he relied on the March 30, 1994 report of Dr. Feuerstein, which is not in the record. Claimant's Response Brief at 4-5. Specifically, claimant states that, on the issue of claimant's smoking history, Dr. Farney noted that Dr. Feuerstein indicated that claimant had a thirty pack year smoking history.

employer asserts,[7] Dr. Farney's hearing testimony is replete with references to medical evidence contained in the record, that support his finding that claimant's emphysema is unrelated to his coal dust exposure.[8] *Id.* at 73-95. Because Dr. Farney clearly identified the evidentiary basis of his opinion, citing medical evidence in the record that supports his conclusion that claimant's emphysema is unrelated to his coal dust exposure, the administrative law judge erred in finding that it is unclear what evidence this physician relied on in rendering his opinions. *See generally Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Accordingly, we vacate the administrative law judge's Section 718.202(a)(4) finding and remand this case for the administrative law judge to reconsider Dr. Farney's opinion.

Moreover, based on the following, it is unclear, as employer asserts, how the administrative law judge found that Dr. Poitras' opinion is well reasoned and documented but found that Dr. Farney failed to identify what evidence he relied upon. In his

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Id. at 4. In its reply brief, employer acknowledges that Dr. Farney reviewed the report of Dr. Feuerstein, whose report was provided to him by employer's counsel with claimant's authorization. Employer's Reply Brief at 3. However, employer argues that while Dr. Farney identified Dr. Feuerstein's report as the source for his reference to a thirty pack year smoking history, Dr. Poitras did not identify any evidence in his third report to document his finding of up to a thirty pack year smoking history for claimant. Employer, therefore, contends that it was error for the administrative law judge to accord less weight to Dr. Farney's opinion for identifying and considering Dr. Feuerstein's report of claimant's smoking history, but to decline to attribute less weight to Dr. Poitras' opinion for considering the same data without identifying the source of it. Furthermore, employer argues that while the revised regulations do not permit a physician to discuss evidence that is not admissible, *see* 20 C.F.R. §§ 725.414(a)(1), 725.457(d), those provisions are not applicable to this claim filed prior to January 21, 2001. The prior regulations, which are applicable to this claim, do not contain such restrictions. 65 Fed. Reg. 80001 (Dec. 20, 2000) (citing *Peabody Coal Co. v. Durbin*, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999)).

[7] In its brief, employer outlines the medical evidence of record that Dr. Farney referred to and discussed during his hearing testimony, on direct and cross examination. Employer's Brief at 12.

[8] In fact, in his hearing testimony, Dr. Farney reviewed a December 14, 2001 pulmonary function study that Dr. Poitras did not review because claimant submitted this study just prior to the hearing. Hearing Transcript at 89-94.

Decision and Order on Remand, the administrative law judge stated that he "continue[d] to find that Dr. Poitras' opinion is well-reasoned and well-documented." Decision and Order on Remand at 4. Prior to rendering this finding, the administrative law judge stated, "even were I to discredit [Dr. Poitras'] third report. . ., I would still rely on his first two reports that included proper smoking histories." *Id.* The record contains three reports by Dr. Poitras dated October 3, 2000, January 29, 2001, and April 19, 2002. Director's Exhibits 8, 9; Claimant's Exhibit 1. As employer argues, it is clear from the content of Dr. Poitras' October 3, 2000 report that it was based on his examination of claimant and the tests he performed as part of that examination. Dr. Poitras' January 29, 2001 report, which is in the form of a letter and answers questions posed by the Department of Labor (DOL), is based on this physician's October 3, 2000 examination of claimant and medical records forwarded to him by DOL, but he did not specifically identify in that letter the records he relied on. Director's Exhibit 8. Additionally, as employer notes, in his third report, Dr. Poitras stated that he "reviewed the files" on claimant, but did not identify which of "the files" he reviewed. The administrative law judge's Decision and Order on Remand suggests that Dr. Poitras reviewed claimant's file merely because this physician listed claimant's claim number on his third report dated April 19, 2002. Decision and Order on Remand at 4. However, as employer points out, it was irrational for the administrative law judge to find that Dr. Poitras' opinion is well reasoned and documented because Dr. Poitras listed claimant's claim number on his third report, while finding that Dr. Farney failed to identify what evidence he relied upon when, in fact, Dr. Farney listed claimant's Social Security number in his report dated April 10, 2001.[9] *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Accordingly, we instruct the administrative law judge, on remand, to reconsider the documentation and reasoning underlying the opinions of Drs. Farney and Poitras.

Additionally, employer contends that the administrative law judge erred to the extent that he accorded more weight to Dr. Poitras' opinion over Dr. Farney's opinion on the basis that Dr. Poitras relied on a correct smoking history. In Dr. Poitras' 2000 and 2001 reports, he noted that claimant had a smoking history of nine pack years. Director's Exhibits 8, 9. In his first Decision and Order, the administrative law judge found that claimant had a smoking history of nine pack years. Decision and Order at 5, 15. In considering Dr. Poitras' reports on remand, the administrative law judge noted that this physician recorded a nine pack year smoking history in his 2000 and 2001 reports. Decision and Order on Remand at 3-4. The administrative law judge further stated that in

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[9]The number Dr. Poitras listed as claimant's claim number on his third report and the Social Security number listed for claimant on Dr. Farney's report are the same number. Claimant's Exhibit 1; Director's Exhibit 24.

Dr. Poitras' 2002 report, Dr. Poitras examined the record and noted that the smoking histories listed for claimant ranged from nine to thirty pack years. *Id.* at 4. The administrative law judge noted that "[t]he range [Dr. Poitras] recorded included the nine pack-year history that was consistent with [this administrative law judge's] findings." *Id.* Therefore, the administrative law judge concluded that Dr. Poitras' "overall opinion should not be granted less weight because he relied upon correct smoking histories in his first two reports, and in his third report, he was providing a review of the recorded smoking histories of record." *Id.* The administrative law judge added, "even if I were to discredit [Dr. Poitras'] third report based upon an incorrect smoking history as the Employer urges, I would still rely on his first two reports that included proper smoking histories." *Id.* Contrary to employer's assertion, it was not irrational for the administrative law judge, on remand, to conclude that Dr. Poitras' overall opinion should not be accorded less weight because he considered the range of the recorded smoking histories of record in his third report. *See Tackett*, 12 BLR at 1-14; *Calfee*, 8 BLR at 1-10. In considering a smoking history range of nine to thirty pack years in his third report, Dr. Poitras did not amend his earlier assumptions about claimant's smoking history. Rather, Dr. Poitras reviewed the other medical evidence regarding claimant's smoking history and found that his opinion, that claimant's coal dust exposure played a significant role in causing his lung disease, was still valid, even considering a smoking history of thirty pack years.[10] Claimant's Exhibit 1.

Employer next contends that the administrative law judge's finding of a nine pack year smoking history for claimant is unexplained and unsupported by the evidence in the record. The record contains the following evidence regarding claimant's smoking history. Dr. Poitras noted a smoking history of one-half of a pack per day for eighteen years, equaling nine pack years. Director's Exhibits 8, 9. Dr. Farney reported that claimant's smoking history, as contained in his medical records, varied from nine to thirty pack years. Director's Exhibit 24. However, Dr. Farney noted that claimant told him that he smoked about five to six cigarettes a day for about eighteen years, but quit in 1976 because of a bet. *Id.* Dr. Lincoln recorded that claimant averaged one pack per day from 1950 to 1975 for a twenty-five pack year history. Director's Exhibit 29. Dr. Ross noted that claimant smoked about one-half of a pack per day from 1954 to 1976, equaling

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[10]When the Board previously considered the administrative law judge's weighing of Dr. Poitras' opinion, the Board stated that the administrative law judge erred in finding that Dr. Poitras relied on a nine pack year smoking history when, in fact, Dr. Poitras considered a range of nine to thirty pack years in his April 2002 opinion. However, the Board did not intend to suggest that the fact that Dr. Poitras considered a range in his third report renders his opinion incredible.

eleven pack years, but quit in 1976 to win a bet.[11] Claimant's Exhibit 2. At the hearing, claimant testified that he smoked about one-half of a pack per day before quitting in 1975, noting that he could not smoke for eight hours a day because he was working and it was not permitted. Hearing Transcript at 35-36. Claimant also testified that he started chewing tobacco after he quit smoking. *Id.* at 43. Claimant's wife testified that claimant quit smoking in 1975 or 1976, that he was not a "chain smoker," that he did not smoke when he was busy, that he was a very active person, and that he has been chewing tobacco ever since he quit smoking. *Id.* at 63.

In his first Decision and Order, the administrative law judge stated that claimant's smoking history, as recorded in the record, was between twenty-five pack years and four and one-half to five and one-half pack years. Decision and Order at 4. The administrative law judge noted that claimant testified that he smoked one-half of a pack per day from 1958 to 1976. *Id.* The administrative law judge found claimant's testimony to be corroborated by his wife's testimony and a majority of the smoking histories in the record in which claimant stated that he quit smoking in 1975 or 1976 because of a bet. *Id.* at 4-5. The administrative law judge further noted that "Claimant explained his light smoking as a result of being underground eight hours a day where smoking is not permitted." *Id.* at 5. Additionally, the administrative law judge stated that claimant's chewing tobacco history is supported by his wife's testimony. *Id.* After determining that claimant's testimony was "persuasive," the administrative law judge found that the record established a smoking history of nine pack years. *Id.* at 5, 15. The administrative law judge, within his discretion, found the testimony of claimant and his wife, regarding claimant's smoking history, to be credible. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Based on the testimony at the hearing and his review of the smoking histories noted in the physicians' reports, the administrative law judge's finding of a nine pack year smoking history was not unreasonable and, therefore, we affirm it. *See Tackett*, 12 BLR at 1-14; *Calfee*, 8 BLR at 1-10. Accordingly, we instruct the administrative law judge, on remand, to reconsider the effect, if any, his finding of a nine pack year smoking history has on his weighing of the opinions of Drs. Poitras and Farney.

Lastly, employer contends that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis based on Dr. Poitras' opinion.

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[11]In his first Decision and Order, the administrative law judge considered the opinions of Drs. Lincoln and Ross. Decision and Order at 15. The administrative law judge assigned less weight to Dr. Lincoln's opinion because he found it to be "equivocal and insufficiently well-reasoned." *Id.* The administrative law judge assigned less weight to Dr. Ross' opinion because he found it to be equivocal and vague. *Id.*

Pursuant to Section 718.204(c), the administrative law judge stated that "[t]he only well-reasoned and well-documented medical reports of record, as explained above, are from Dr. Poitras." Decision and Order on Remand at 5. Noting that Dr. Poitras found that claimant's respiratory impairment was due, in part, to his coal dust exposure, the administrative law judge concluded that claimant established total disability due to pneumoconiosis. *Id.* Because we instruct the administrative law judge, on remand, to reevaluate his weighing of the opinions of Drs. Farney and Poitras regarding the existence of pneumoconiosis, we also vacate the administrative law judge's Section 718.204(c) finding, because it is based on his consideration of these physicians' opinions at Section 718.202(a)(4). If the issue of disability causation is again reached on remand, the administrative law judge must consider all the relevant evidence regarding whether claimant's total respiratory disability is due to pneumoconiosis, 20 C.F.R. §718.204(c); *see also Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989), and fully explain the rationale for his conclusions, *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge