BRB No. 09-0650 BLA

CHARLES E. RICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/30/2010
	)	
BLEDSOE COAL CORPORATION	)	
	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand Award of Benefits (03-BLA-5748) of Administrative Law Judge Edward Terhune Miller rendered 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).[1] This case is before the Board for the second time.

In his initial decision, the administrative law judge credited claimant with twenty-four years of coal mine employment, as stipulated.[2] The administrative law judge found that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that it arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Rice v. Bledsoe Coal Corp.*, BRB No. 05-0230 BLA (Jan. 30, 2006)(unpub.)(McGranery, J., dissenting). Pursuant to Section 718.202(a)(1), the Board instructed the administrative law judge to consider whether Dr. Broudy's positive ILO classification of a January 6, 2004 x-ray was called into question by his comment that the opacities on the x-ray could be due to tuberculosis. *Rice*, slip op. at 5. Pursuant to Section 718.202(a)(4), the Board instructed the administrative law judge to reconsider the medical opinion evidence, along with the CT scan evidence, to determine whether the evidence established the existence of either clinical or legal pneumoconiosis.[3] *Rice*, slip op. at 5-6. With respect to total disability under Section 718.204(b)(2)(ii), (iv), the Board instructed the administrative law judge to consider Dr. Repsher's testimony that claimant's blood gas study is abnormal not because of a respiratory or pulmonary condition, but rather, because of the

[1] The Director, Office of Workers' Compensation Programs, and employer correctly state that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim filed before January 1, 2005.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

[3] The Board rejected, however, employer's argument that the administrative law judge erred in finding that Dr. Broudy's 2001 and 2004 physical examination reports constituted two separate medical reports that filled both slots available to employer under the evidentiary limitations of 20 C.F.R. §725.414(a)(3)(i). Consequently, the Board held that the administrative law judge did not err in excluding a third medical report, by Dr. Rosenberg, that was submitted by employer.

effect of abdominal obesity, and to then reconsider the medical opinions of Drs. Baker and Broudy in light of his finding regarding the blood gas studies. *Rice*, slip op. at 6-7. Finally, the Board instructed the administrative law judge to reconsider whether total disability due to pneumoconiosis was established pursuant to Section 718.204(c), if reached.[4] *Rice*, slip op. at 7.

On remand, the administrative law judge reconsidered the x-ray and medical opinion evidence, and found that claimant established the existence of both clinical and legal pneumoconiosis pursuant to Section 718.202(a)(1), (4).[5] The administrative law judge also found that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). The administrative law judge reconsidered the blood gas study and medical opinion evidence pursuant to Section 718.204(b)(2)(ii), (iv), and found that claimant established a totally disabling respiratory impairment. The administrative law judge also found that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). Further, employer challenges the administrative law judge's findings that claimant established that he has a totally disabling respiratory impairment pursuant to Section 718.204(b)(2), and that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Claimant did not file a response brief, and the Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Claimant's counsel has filed an attorney's fee petition for work performed before the Board in the prior appeal. Employer objects to the fee request.

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[4] Judge McGranery indicated that she would have affirmed, as supported by substantial evidence, the administrative law judge's Decision and Order awarding benefits. *Rice v. Bledsoe Coal Corp.*, BRB No. 05-0230 BLA slip op. at 8-14 (Jan. 30, 2006)(unpub.)(McGranery, J., dissenting).

[5] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "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).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge considered four readings of three x-rays. Dr. Broudy, a B reader, interpreted the August 6, 2001 x-ray as negative for pneumoconiosis. Employer's Exhibit 7. Dr. Baker, who lacks radiological qualifications,[6] interpreted the September 4, 2001 x-ray as positive for pneumoconiosis, while Dr. Wiot, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibits 13, 29. Dr. Broudy classified the January 6, 2004 x-ray as "Category 1/1" for pneumoconiosis, but commented that it was possible that the opacities seen on the x-ray were due to tuberculosis.[7] Employer's Exhibit 5.

The administrative law judge found that Dr. Broudy's comment "acknowledging the possibility that tuberculosis could have caused" the x-ray abnormalities did not undercut Dr. Broudy's "consistent and clear findings of CWP" that he made by stating four times in his report that the January 6, 2004 x-ray showed pneumoconiosis. Decision and Order on Remand at 9. The administrative law judge therefore found that the January 6, 2004 x-ray was positive for pneumoconiosis. Noting further that pneumoconiosis may be latent and progressive, the administrative law judge accorded greater weight to the January 6, 2004 positive x-ray than to the two negative x-rays from 2001. The administrative law judge therefore found that the x-ray evidence "supports a finding of clinical pneumoconiosis" by a "preponderance of the evidence." *Id.*

[6] The administrative law judge accurately noted that Dr. Baker was not qualified as a B reader when he interpreted the September 4, 2001 x-ray. Decision and Order on Remand at 3 n.5; 6; Director's Exhibit 13.

[7] The record reflects that claimant was treated for pulmonary tuberculosis beginning in February 2001. Director's Exhibit 8 at 2, 4; Director's Exhibit 15 at 8, 10; Director's Exhibit 28; Employer's Exhibit 5 at 2-3.

Employer argues that the administrative law judge erred because the weight of the x-ray evidence is negative, as the 2001 x-rays are negative for pneumoconiosis, and the 2004 x-ray is "[a]t best" equivocal, given Dr. Broudy's comment that tuberculosis possibly caused the x-ray opacities. Employer's Brief at 12. We disagree.

Contrary to employer's contention, the administrative law judge permissibly found that Dr. Broudy clearly diagnosed pneumoconiosis, although he acknowledged the possibility that tuberculosis might have caused the opacities on the January 6, 2004 x-ray. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Moreover, the administrative law judge permissibly accorded greater weight to the 2004 positive x-ray than to the 2001 negative x-rays, consistent with the principle that pneumoconiosis may be latent and progressive. *See* 20 C.F.R. §718.201(c); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993). In arguing that the weight of the x-ray evidence is negative for pneumoconiosis, employer essentially asks the Board to reweigh the evidence, which the Board is not authorized to do. *Anderson*, 12 BLR at 1-113. Therefore, we affirm the administrative law judge's finding that claimant established clinical pneumoconiosis pursuant to Section 718.202(a)(1).

Ordinarily, affirmance of the administrative law judge's finding that pneumoconiosis was established pursuant to Section 718.202(a)(1) would obviate the need to review his finding that the medical opinions established the existence of pneumoconiosis at Section 718.202(a)(4). *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, the administrative law judge's analysis of the medical opinions at Section 718.202(a)(4) for the existence of pneumoconiosis affected his consideration of the disability causation issue pursuant to Section 718.204(c). Therefore, we will address employer's arguments challenging the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Baker and Broudy, as well as the CT scan evidence. Dr. Baker diagnosed claimant with clinical pneumoconiosis, based on his positive reading of the September 4, 2001 x-ray, and a history of coal dust exposure; and legal pneumoconiosis, in the form of chronic bronchitis and hypoxemia, both due to coal dust exposure. Director's Exhibit 8 at 4. Initially, when he examined claimant in 2001, Dr. Broudy opined that claimant's August 6, 2001 chest x-ray and CT scan were negative for clinical pneumoconiosis. Director's Exhibit 28 at 8, 19. After examining claimant a second time in 2004, Dr. Broudy diagnosed clinical pneumoconiosis, based on the January 6, 2004 chest x-ray. Employer's Exhibit 5 at 2, 3. With respect to legal pneumoconiosis, Dr. Broudy opined that claimant's hypoxemia is unrelated to coal mine dust inhalation, and he indicated that claimant has no significant pulmonary disease or respiratory impairment that arose out of his coal mine employment. Director's Exhibit 28 at 9-11. Dr. Wiot

interpreted the August 6, 2001 CT scan as negative for pneumoconiosis. Employer's Exhibit 8 at 22-25.

The administrative law judge found that the medical opinion evidence established the existence of both clinical and legal pneumoconiosis. With respect to clinical pneumoconiosis, he found that his rationale for according greater weight to Dr. Broudy's positive reading of the more recent January 6, 2004 x-ray than to the 2001 negative x-rays under Section 718.202(a)(1), "appl[ied] with equal force" to weighing the August 6, 2001 negative CT scan. Decision and Order on Remand at 9-10. Therefore, the administrative law judge credited Dr. Broudy's 2004 x-ray-based diagnosis of clinical pneumoconiosis over the 2001 negative CT scan evidence. *Id.* Regarding legal pneumoconiosis, the administrative law judge found that Dr. Baker "attributed Claimant's 'chronic bronchitis, decreased PO2, [and] hypoxemia" to coal dust exposure, and "accurately described Claimant's working and smoking history. . . ." Decision and Order on Remand at 9. Finding Dr. Baker's opinion "well-reasoned and supported," the administrative law judge found legal pneumoconiosis established. *Id*.

Employer argues that the administrative law judge erred in finding that clinical pneumoconiosis was established pursuant to Section 718.202(a)(4), because he did not consider that Dr. Baker's 2001 diagnosis of clinical pneumoconiosis was based on his positive reading of the August 6, 2001 x-ray, which was reread as negative by a better qualified reader. Employer's Brief at 13. This argument is misplaced. As discussed above, the administrative law judge relied on Dr. Broudy's 2004 opinion, not Dr. Baker's 2001 opinion, to find that claimant has clinical pneumoconiosis.

There is merit, however, in employer's argument that, with respect to legal pneumoconiosis, the administrative law judge did not consider and weigh Dr. Broudy's opinion that claimant does not have legal pneumoconiosis, before he credited Dr. Baker's opinion that claimant has chronic bronchitis and hypoxemia due to coal dust exposure. Therefore, we must vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, and remand this case to the administrative law judge for further consideration. *See* 30 U.S.C. §923(b); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. On remand, the administrative law judge must reconsider the opinions of Drs. Baker and Broudy, taking into account the respective analyses and the quality of the physicians' comparative reasoning, along with the physicians' qualifications, and explain the weight he accords their conclusions in determining whether they establish legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Turning to total disability pursuant to Section 718.204(b)(2)(ii), the administrative law judge considered the three blood gas studies of record, all of which were taken at

rest. The blood gas studies performed in 2001 by Drs. Baker and Broudy were qualifying.[8] Director's Exhibits 9, 28. The blood gas study performed in 2004 by Dr. Broudy was non-qualifying. Employer's Exhibit 5. All three blood gas studies were interpreted as showing moderate hypoxemia. Director's Exhibits 9, 28; Employer's Exhibit 5. In a written report designated by employer as rebuttal to the Department of Labor (DOL)-sponsored blood gas study (the September 4, 2001 blood gas study administered by Dr. Baker), Dr. Repsher stated that the blood gas study results were invalid due to either a sampling or lab error. Director's Exhibit 31 at 36. Subsequently, in a deposition that was also designated by employer as rebuttal to the DOL blood gas study, Dr. Repsher recanted his opinion that there had been sampling or lab error,[9] but indicated that the blood gas study revealed only the effects of obesity, not a respiratory impairment. Director's Exhibit 31 at 14-16.

The administrative law judge found that "Dr. Repsher provides very little explanation, reasoning or supporting evidence" for his deposition testimony that claimant's blood gas study results are abnormal because claimant is overweight. Decision and Order on Remand at 10. The administrative law judge further found that Dr. Repsher's "wavering characterization of Claimant as obese or merely 'overweight' casts some doubt on the veracity of the opinion." Decision and Order on Remand at 11. Weighing the blood gas studies, the administrative law judge found that they established total disability.[10] *Id.*

Employer argues that substantial evidence does not support the administrative law judge's reasons for discrediting Dr. Repsher's deposition testimony. Employer's Brief at 16. Even if we agreed with employer, however, upon further reflection, we conclude that

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[8] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] Noting that Dr. Repsher recanted his written statement that the blood gas study was technically invalid, the administrative law judge further found that there was no other evidence in the record of invalidity due to lab error. Decision and Order on Remand at 13. Employer does not challenge this aspect of the administrative law judge's decision.

[10] The administrative law judge found that "Dr. Broudy's non-qualifying blood gas study does not defeat a finding of total disability because the values were only slightly higher than the results of the prior two examinations," and there was nothing in the record to explain the slight increase in the values of the most recent study. Decision and Order on Remand at 11.

our previous instruction to the administrative law judge, to consider Dr. Repsher's testimony, was inconsistent with our holding that employer reached its full complement of two affirmative-case medical reports when it submitted Dr. Broudy's 2001 and 2004 physical examination reports. Consequently, as we will set forth below, Dr. Repsher's testimony was inadmissible.

As noted, employer designated Dr. Repsher's written report and deposition testimony as "rebuttal of [the] Department-sponsored blood gas study only" under 20 C.F.R. §725.414(a)(3)(ii). Director's Exhibit 31. The regulation governing witness testimony provides that "[n]o person shall be permitted to testify as a witness at the hearing, or pursuant to deposition . . . unless that person meets the requirements of §725.414(c)." 20 C.F.R. §725.457(c). Section 725.414(c) provides that "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." 20 C.F.R. §725.414(c). Although Dr. Repsher did not prepare a medical report[11] that was admitted under Section 725.414, his deposition testimony could still be admitted "in lieu of" a medical report if employer "submitted fewer than two medical reports as part of [its] affirmative case . . . ." *Id.* In that situation, Dr. Repsher's testimony would "be considered a medical report for purposes of the limitations provided by this section." *Id.*; *see also* 20 C.F.R. §725.457(c)(2)("Such physician's opinion shall be considered a medical report subject to the limitations of §725.414.").

As we held previously, however, the administrative law judge properly determined that employer already submitted its two affirmative-case medical reports, namely, Dr. Broudy's physical examination reports from 2001 and 2004. *Rice*, slip op. at 3-4. Further, because a physician's deposition testimony is considered a medical report for purposes of the evidentiary limitations, 20 C.F.R. §725.457(c)(2), Dr. Repsher's testimony does not constitute part of his written assessment of the DOL blood gas study. Thus, Dr. Repsher's testimony was inadmissible, unless employer withdrew one of Dr. Broudy's reports, or argued to the administrative law judge that good cause existed for exceeding its evidentiary limits. *See* 20 C.F.R. §725.456(b)(1). Employer did neither. Since the evidentiary limitations are mandatory, *Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004), upon further review, we conclude both that the administrative

[11] A "medical report" is "a physician's written assessment of the miner's respiratory or pulmonary condition." 20 C.F.R. §725.414(a). By contrast, "[a] physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section." *Id.* Thus, the portion of Dr. Repsher's written report designated for admission by employer, in which Dr. Repsher assessed a blood gas study for its validity, was not a medical report.

law judge was correct, in his initial decision, when he did not consider Dr. Repsher's testimony, and, that our instruction to consider Dr. Repsher's testimony is not controlling. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). Accordingly, the administrative law judge's analysis, on remand, of Dr. Repsher's testimony has no effect on this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Therefore, we do not address that issue further.

Turning to employer's remaining argument relevant to Section 718.204(b)(2)(ii), employer contends that substantial evidence does not support the administrative law judge's finding of total disability because the "most recent blood gas [study] is not qualifying," and "all blood gas study evidence of record must be weighed." Employer's Brief at 15. The record reflects that the administrative law judge considered all three blood gas studies of record, and correctly found that two were qualifying. He further found that the third and most recent blood gas study, though nonqualifying, yielded values "only slightly higher" than those obtained in the two earlier studies, and he noted that there was no evidence in the record "explain[ing] the slight increase . . . ." Decision and Order on Remand at 11. The administrative law judge therefore found that it would be "arbitrary and unwarranted" to credit the nonqualifying study simply because it was more recent. *Id*. The administrative law judge's analysis was proper. *See Woodward*, 991 F.2d at 319-20, 17 BLR at 2-84-85. Substantial evidence supports his finding that the blood gas study evidence "weighs in favor of" a finding of total disability. We therefore reject employer's contention, and affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(ii).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker and Broudy that claimant is not totally disabled. The administrative law judge found Dr. Baker's opinion entitled to "little probative weight" because he did not explain how claimant retained the ability to perform his usual coal mine employment despite his qualifying blood gas studies. Decision and Order on Remand at 12. The administrative law judge declined to credit Dr. Broudy's opinion because, although Dr. Broudy acknowledged that claimant's blood gas study was qualifying, Dr. Broudy did not address or explain "how [c]laimant would be capable of performing his usual coal mine employment as a roof bolter, a labor intensive position, in light of these results." *Id*. Substantial evidence supports these permissible findings. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). While employer argues that the administrative law judge's finding is not rational or supported by substantial evidence, Employer's Brief at 14, it does not set forth any arguments directed at the administrative law judge's credibility determinations respecting the opinions of Drs. Baker and Broudy. We therefore affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv).

In addition to discounting the medical opinion evidence, the administrative law judge found that the nonqualifying pulmonary function studies under Section 718.204(b)(2)(i) were not contrary to, and did not weigh against, the qualifying blood gas study evidence under Section 718.204(b)(2)(ii), because "pulmonary function tests and blood gas studies measure different types of impairments." Decision and Order on Remand at 11, *citing Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993). Employer does not challenge the administrative law judge's finding. We therefore affirm the finding that the preponderance of the evidence established total disability under Section 718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer next contends that the administrative law judge substituted his judgment for that of the medical experts when he found that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). Employer's Brief at 18. Because we have vacated the administrative law judge's finding that the existence of legal pneumoconiosis was established, we also vacate the finding that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c), and we instruct the administrative law judge, on remand, to reconsider that issue, if reached.

Finally, we decline to address, at this time, the fee petition filed by claimant's counsel. Because we have vacated the administrative law judge's award of benefits, there has not been a successful prosecution of the claim before the Board. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993).

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 to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I agree with Judge Smith in all respects, except as to the admissibility of Dr. Repsher's deposition testimony. The admissibility of Dr. Repsher's deposition testimony

as "rebuttal of [the] Department-sponsored blood gas study only" under 20 C.F.R. §725.414(a)(3)(ii) was not an issue raised before us, and deserves proper briefing and consideration. Thus, I would give the parties the opportunity to address this issue prior to our determination.

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

I agree with Judge Smith that Dr. Repsher's deposition testimony is inadmissible. I respectfully dissent, however, from my colleagues' decision to vacate, yet again, the administrative law judge's decision awarding benefits. Insofar as the majority decision directs the administrative law judge to reconsider the opinions of Drs. Baker and Broudy on the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), it is unnecessary; in his discussion of disability causation at 20 C.F.R. §718.204(c), the administrative law judge set forth valid reasons for crediting Dr. Baker's opinion and for discrediting Dr. Broudy's opinion. The majority also errs in vacating the administrative law judge's finding of disability causation established at 20 C.F.R. §718.204(c) because this instruction was premised upon the majority's needless determination to vacate the administrative law judge's finding of the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4). Accordingly, the majority's remand order is both wrong and a waste of judicial time. I would affirm the administrative law judge's decision awarding benefits.

The majority errs in holding that the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) must be vacated because he did not address Dr. Broudy's opinion diagnosing no respiratory impairment, before he credited Dr. Baker's opinion diagnosing chronic bronchitis due to coal mine employment. It is true that the administrative law judge did not analyze Dr. Broudy's opinion in that section of his decision addressing the existence of legal pneumoconiosis, but that error is harmless because he discussed thoroughly the opinions of both doctors (Decision and Order on Remand at 6-7) and in the disability causation section of his decision he set forth his reasons for crediting Dr. Baker's opinion over that of Dr. Broudy. The starting point for the administrative law judge's analysis was claimant's moderate hypoxemia which both doctors had diagnosed and which established total disability at Section

718.204(b)(2)(ii). Decision and Order at 13. The issue for the administrative law judge was whether Dr. Baker or Dr. Broudy better accounted for claimant's hypoxemia. *Id*.

Dr. Baker had noted a history of chronic bronchitis and tuberculosis, twenty-four years of coal mine employment and no smoking. Decision and Order on Remand at 6; Director's Exhibit 8. He diagnosed hypoxemia due to coal workers' pneumoconiosis and chronic bronchitis, both caused by coal dust exposure. *Id*. Dr. Broudy prepared medical opinions in 2001 and 2004. He did not report a history of chronic bronchitis, but his other histories were essentially the same as Dr. Baker's. Director's Exhibit 8; Employer's Exhibit 5. He found no evidence of chronic obstructive airways disease or a disabling respiratory impairment. Decision and Order on Remand at 7; Employer's Exhibit 5 at 3. Although Dr. Broudy diagnosed simple pneumoconiosis by x-ray in 2004, he stated that: "It is also possible that the tuberculosis treated a few years caused the opacities on chest x-ray." *Id*. In 2002, two years before he had diagnosed claimant's clinical pneumoconiosis, Dr. Broudy observed that moderate hypoxemia can be caused by coal workers' pneumoconiosis, but he opined that was not the cause of claimant's hypoxemia. Decision and Order on Remand at 7; Director's Exhibit 28 at 9. He said: "[I]t could be due to tuberculosis." *Id*. The doctor explained that after tuberculosis is treated, "[u]sually [blood gas study results] improve, but not necessarily to normal." Decision and Order on Remand at 7; Director's Exhibit 28 at 10. The doctor stated that claimant's tuberculosis was "probably just tuberculosis infection rather than active tuberculosis." Director's Exhibit 28 at 3. He added that one who has had a tuberculosis infection "may not have developed any illness or impairment." Decision and Order on Remand at 7; Director's Exhibit 28 at 10. The administrative law judge carefully analyzed the opinions of Drs. Baker and Broudy, stating:

> The low arterial blood gas values showed that Claimant was totally disabled. Dr. Baker reasonably attributed Claimant's hypoxemia to coal dust exposure. [Director's Exhibit] 8 at 4. His opinion is well reasoned, in this regard, because Claimant worked underground in a coal mine for twenty-four years, performed intensive labor predominantly as a roof bolter, never smoked, and the record does not have persuasive evidence of another possible cause for Claimant's hypoxemia. Dr. Broudy confirmed that pneumoconiosis can cause low blood gas levels, although he did not conclude that Claimant's low blood gas levels in the instant case were caused by pneumoconiosis. Dr. Broudy's conclusion that Claimant's hypoxemia "could be due to tuberculosis" is speculative, not well-reasoned, and unpersuasive. Dr. Broudy stated that blood gas levels usually return to normal levels after the tuberculosis is treated, and that Claimant's tuberculosis may not have been active. Dr. Broudy did not reconcile his contradictory statements regarding tuberculosis, in light of Claimant's qualifying values.

Decision and Order on Remand at 13. The administrative law judge explained that he had credited Dr. Baker's opinion because he had "reasonably attributed Claimant's hypoxemia to [his twenty-four years of] coal dust exposure." *Id*. The administrative law judge thereby implicitly criticized Dr. Broudy's opinion for excluding, without explanation, claimant's long coal mine employment as a cause of his hypoxemia. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121-22 (6th Cir. 2000). The administrative law judge discussed Dr. Broudy's opinion with specificity. The administrative law judge properly determined that the opinion, phrased in terms of "could be due to," was "speculative." *Id*. In *Island Creek Coal Co. v. Hammonds*, 81 F.3d 160, 1996 WL 135019 (6th Cir. 1996), the United States Court of Appeals for the Sixth Circuit rejected as "mere speculation . . ." a medical opinion that the miner's disabling bronchitis was "related probably entirely to his smoking habits." *Id.* The *Hammonds* court cited with approval the decision of the United States Court of Appeals for the Tenth Circuit in *Garcia v. Director, OWCP*, 869 F.2d 1413, 1417, 12 BLR 2-231, 2-238 (10th Cir. 1989), holding that Dr. Repsher's opinion, that the miner's blood gas study results were "probably" attributable to obesity, was a "qualified determination" which could not establish "that something other than pneumoconiosis was the primary cause of [the miner's] disability." *Id.* The administrative law judge also properly pointed out that Dr. Broudy's diagnosis did not appear to fit claimant, whose testing showed moderate hypoxemia in 2001 and in 2004. Dr. Broudy diagnosed "probably . . . tuberculosis infection" which, he stated, may not develop any impairment, and he stated that after treatment, blood gas studies usually improve. The doctor's statements left unexplained claimant's continuing moderate hypoxemia. Accordingly, the administrative law judge properly found the opinion "not well-reasoned, and unpersuasive." Decision and Order on Remand at 13. Because the administrative law judge fully explained his determination that claimant has a totally disabling respiratory impairment due to twenty-four years of intensive coal mine employment, the administrative law judge's failure to incorporate that discussion in the legal pneumoconiosis section of his opinion is harmless error, *i.e.*, error which does not affect the disposition of the case. *Belcher v. Director, OWCP*, 895 F.2d 244, 246, 13 BLR 2-273, 2-275 (6th Cir. 1989); *accord Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). It is noteworthy that the majority does not confirm any of employer's allegations of error in the administrative law judge's crediting of Dr. Baker's opinion or his discrediting of Dr. Broudy's. Hence, because the only reason the majority has provided for vacating the administrative law judge's determination of disability causation is that it vacated his determination of legal pneumoconiosis and, as demonstrated above, the majority's order was unnecessary and erroneous, its order to vacate his disability causation finding is likewise unnecessary and erroneous. *See Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 303, 9 BLR 2-221, 2-223 (6th Cir. 1987).

In conclusion, the majority has provided invalid reasons for requiring the administrative law judge to reconsider the opinions of Drs. Baker and Broudy and for

vacating the administrative law judge's decision awarding benefits. I would affirm the administrative law judge's decision.

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REGINA C. McGRANERY
Administrative Appeals Judge