

BRB No. 12-0569 BLA

EVERETT SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NUMBER 8 LTD OF VIRGINIA	)	
	)	
and	)	
	)	DATE ISSUED: 07/17/2013
LIBERTY MUTUAL 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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05089) of Administrative Law Judge Lystra A. Harris, rendered on a subsequent claim filed on December 7, 2009, pursuant to the provisions of the Black Lung Benefits Act, as

amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act).<sup>1</sup> The administrative law judge determined that claimant worked nine to ten years in coal mine employment and adjudicated this subsequent claim under the regulations at 20 C.F.R. Part 718. Because the administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), she found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Employer maintains that the administrative law judge erroneously weighed the conflicting medical opinions as to the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer asserts that the administrative law judge improperly shifted the burden to employer to prove that claimant's chronic obstructive pulmonary disease (COPD) was not caused by coal dust exposure and that she erred in crediting the opinions of Drs. Al-Khasawneh and DeFore over the opinions of Drs. Rosenberg and Fino. Moreover, employer argues that the administrative law judge did not consider all the relevant evidence when considering the claim on the merits. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30

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<sup>1</sup> Claimant filed a claim for benefits on November 2, 2000, which was denied by Administrative Law Judge Daniel J. Roketenetz on July 1, 2004. Director's Exhibit 1. Judge Roketenetz found that while claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), he failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Claimant took no action with regard to that denial until he filed his current subsequent claim. Director's Exhibit 3.

<sup>2</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2).

<sup>3</sup> Because the record indicates that claimant's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

If a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that “one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.”<sup>4</sup> 20 C.F.R. §725.309(d)(2). Claimant’s prior claim was denied because he failed to establish the existence of pneumoconiosis. Director’s Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). In weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), relevant to the existence of legal pneumoconiosis,<sup>5</sup> she assigned controlling weight to the opinions of Drs. Al-Khasawneh and DeFore, that coal dust exposure significantly contributed to claimant’s disabling obstructive respiratory impairment, over the contrary opinions of Drs. Fino and Rosenberg, which she determined were not sufficiently reasoned. *See* Decision and Order at 12-13; Director’s Exhibits 10, 12; Claimant’s Exhibits 1, 2; Employer’s Exhibits 6, 7, 8, 44. Employer argues that the administrative law judge improperly shifted the burden of proof in this case, insofar as she “engaged in a less rigorous analysis of the

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Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 1-616.

<sup>4</sup> In order to establish entitlement to benefits in a living miner’s claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

<sup>5</sup> “‘Legal pneumoconiosis’ includes 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).

opinions of Drs. Al-Khasawneh and DeFore than she applied to the opinions of Drs. Rosenberg and Fino.” Employer’s Petition for Review and Brief at 3. Employer maintains that the administrative law judge did not properly consider whether Drs. Al-Khasawneh and DeFore provided reasoned opinions regarding the cause of claimant’s COPD.

We reject employer’s assertion that the administrative law judge improperly shifted the burden of proof. Our review of the Decision and Order reflects that she specifically considered whether claimant established the requisite elements of entitlement by a preponderance of the evidence. Furthermore, we reject employer’s argument that the opinions of Drs. Al-Khasawneh and DeFore are insufficient to establish the existence of legal pneumoconiosis because they stated that “it was impossible to assess the contribution that coal dust had made to claimant’s impairment” in comparison to smoking. Employer’s Brief in Support of Petition for Review at 5. Even though a physician cannot establish the precise percentage of lung obstruction attributable to cigarette smoke and coal dust exposure, such exact findings are not required for claimant to establish that he has a chronic respiratory condition arising out of coal mine employment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

However, we agree with employer that the administrative law judge erred in failing to consider whether Drs. Al-Khasawneh and DeFore based their opinions on an accurate understanding of the length of claimant’s coal mine employment. The administrative law judge found that claimant established nine to ten years of coal mine employment. Dr. Al-Khasawneh examined claimant on behalf of the Department of Labor and reported that claimant worked from 1986 until 1998 “hauling coal.” Director’s Exhibit 10. Dr. DeFore indicated that claimant worked for twenty-five years in coal mine employment. *See* Director’s Exhibit 10; Claimant’s Exhibit 2. Where a significant discrepancy exists between the administrative law judge’s finding as to claimant’s length of coal mine employment and the assumption by the physicians regarding claimant’s length of coal mine employment, the administrative law judge must note the discrepancy and explain how it affects the credibility of the physicians’ opinions. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Moreover, in light of the varying smoking histories reported by the physicians, the administrative law judge erred in failing to render a specific finding as to the length and extent of claimant’s smoking history prior to evaluating the credibility of the medical opinions. *See Worhach*, 17 BLR at 1-110; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). Thus, because the administrative law judge’s credibility findings with

respect to claimant's experts fail to satisfy the Administrative Procedure Act (APA),<sup>6</sup> we vacate her determinations that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation pursuant to 20 C.F.R. §718.204(c).<sup>7</sup> See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Since we vacate the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of legal pneumoconiosis, we further vacate her finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

In the interest of judicial economy, we will also address employer's arguments with respect to the weight accorded its medical experts. With respect to Dr. Fino, the administrative law judge determined that his opinion was not well reasoned. Decision and Order at 12. Dr. Fino attributed claimant's respiratory disease to asthma, in part, because he found no radiographic evidence of emphysema.<sup>8</sup> However, as noted by the administrative law judge, Dr. Fino's opinion is contradicted "by all but one of the x-ray interpretations of record" finding emphysema. Decision and Order at 12; see Director's Exhibits 10, 11, 12; Claimant's Exhibits 4, 5; Employer's Exhibit 1. As the fact-finder, the administrative law judge acted within her discretion in discounting Dr. Fino's opinion for failing to adequately explain his rationale for excluding coal dust as a factor for claimant's respiratory disease. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

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<sup>6</sup> The Administrative Procedure Act, 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 every adjudicatory decision be accompanied by a statement of findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record.

<sup>7</sup> Dr. DeFore opined that coal dust exposure and smoking "likely contribute" to claimant's disabling respiratory impairment. Claimant's Exhibit 2. On remand, the administrative law judge is instructed to address employer's assertion that the use of the word "likely" renders Dr. DeFore's opinion equivocal. Employer's Petition for Review and Brief at 5.

<sup>8</sup> Dr. Fino stated, "asthma in this case best explains the abnormality [on pulmonary function testing] since I certainly would expect significant emphysema present if this was a lung disease due to either coal mine dust or smoking. I find the diffusing capacity value extremely persuasive -- along with the bronchodilator response -- to diagnose asthma." Director's Exhibit 12.

We agree with employer, however, that the administrative law judge's credibility determinations with regard to Dr. Rosenberg do not satisfy the APA. The administrative law judge observed that, in attributing claimant's COPD solely to smoking, Dr. Rosenberg relied "heavily on pulmonary function study evidence and the effects of bronchodilators on [c]laimant's lung function." Decision and Order at 12. Specifically, Dr. Rosenberg explained that claimant "had a marked bronchodilator response of around 50%, which [is] inconsistent with obstruction related to past coal mine dust exposure." Employer's Exhibit 7. The administrative law judge, however, found that Dr. Rosenberg "failed to explain why years of coal mine dust exposure would not have contributed to the residual impairment found post-bronchodilator administration." Decision and Order at 12-13. Employer maintains that, contrary to the administrative law judge's finding, Dr. Rosenberg specifically addressed the cause of claimant's residual impairment during his deposition, when he explained that claimant's asthmatic condition resulted in airway remodeling due to scarring and fibrosis within the airways, which prevents the FEV1 from normalizing. See Employer's Petition for Review and Brief at 6-7, Employer's Exhibit 8 at 16. Because the administrative law judge did not address Dr. Rosenberg's explanation, we instruct her to explain the significance, if any, of Dr. Rosenberg's deposition testimony regarding the effects of airway remodeling, in determining the weight to accord his opinion.

Additionally, although the administrative law judge noted Dr. Rosenberg's explanation that claimant's emphysema on x-ray was more likely related to smoking because it was diffuse, she stated only that "I do not find this last point persuasive." Decision and Order at 13. We agree with employer that the administrative law judge's cursory statement fails to satisfy the APA and we instruct her on remand to fully explain the bases for all of her credibility determinations with respect to Dr. Rosenberg. See *Wojtowicz*, 12 BLR at 1-165.

In summary, the administrative law judge must determine whether the physicians have an accurate understanding of the length of claimant's coal mine employment and the duration of his smoking habit, in assessing the credibility of their opinions, and more fully explain the bases for all of her credibility findings in accordance with the APA. See *Wojtowicz*, 12 BLR at 1-165. The administrative law judge must determine if claimant has satisfied his burden to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). If the administrative law judge finds that claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, she must weigh all of the record evidence, including the evidence from claimant's prior claim, to determine whether claimant has established all of the requisite elements for entitlement to benefits. See *White*, 23 BLR at 1-3; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the administrative law judge's Decision and Order Awarding 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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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge