

BRB No. 05-0704 BLA

ROBERT DALE OPP (deceased))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEAPODY COAL COMPANY)	DATE ISSUED: 06/29/2006
)	
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (01-BLA-0564) of Administrative Law Judge Stuart A. Levin awarding benefits on a 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). This case involves a claim filed on January 11, 2000 and is before the Board for the second time. In the initial decision, Administrative Law Judge Donald B. Jarvis, after crediting claimant with thirty-nine years of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although Judge Jarvis noted that employer stipulated that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b), he found that the evidence was insufficient to establish that

claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Jarvis denied benefits.

By Decision and Order dated May 27, 2004, the Board affirmed Judge Jarvis' findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(b) as unchallenged on appeal. *Opp v. Peabody Coal Co.*, BRB No. 03-0618 BLA (May 27, 2004) (unpublished). The Board, however, vacated Judge Jarvis' finding pursuant to 20 C.F.R. §718.202(a)(4) and remanded the case for further consideration. *Id.* The Board also instructed Judge Jarvis, that should he find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must reconsider whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

Due to Judge Jarvis's unavailability, the case was reassigned to Administrative Law Judge Stuart A. Levin (the administrative law judge). In a Decision and Order on Remand dated May 2, 2005, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the evidence together, the administrative law judge found that it was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant¹ responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer argues that the administrative law judge committed numerous errors in finding the medical opinion evidence sufficient to establish the existence of

¹Claimant died on September 3, 2002. Claimant's claim is being pursued by his surviving spouse, Ruth Ann Opp. See Decision and Order on Remand at 1.

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),² is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In analyzing whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered whether the evidence was sufficient to establish legal pneumoconiosis.³ More specifically, the administrative law judge focused upon whether the evidence was sufficient to establish that claimant's chronic obstructive pulmonary disease arose, at least in part, out of his coal mine employment.⁴

The relevant medical opinion evidence of record consists of the opinions of Drs. Anderson, James, Repsher, Tuteur, Renn and Fino. Drs. Anderson and James opined that claimant suffered from chronic obstructive pulmonary disease attributable to

²“Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

³In this case, the administrative law judge did not render an explicit finding as to whether or not the medical opinion evidence was sufficient to establish the existence of clinical pneumoconiosis. The administrative law judge, however, discredited Dr. Anderson's diagnosis of clinical pneumoconiosis because he found that it was outweighed by the other probative contrary evidence of record. Decision and Order on Remand at 7; Claimant's Exhibits 1, 2. Because no party challenges this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983).

Dr. James diagnosed (1) coal workers' pneumoconiosis and (2) chronic obstructive pulmonary disease due to smoking and coal dust exposure. Director's Exhibits 11, 12. However, Dr. James subsequently explained that a part of the reason why he diagnosed “coal workers' pneumoconiosis” was because he wanted to emphasize the relationship between claimant's coal mine employment and his respiratory disease. Employer's Exhibit 10 at 7. Dr. James conceded that his diagnoses of coal workers' pneumoconiosis and chronic obstructive pulmonary disease were “actually fairly similar.” *Id.*

⁴The administrative law judge noted that the medical reports consistently document “a lengthy smoking history of 50 to 60 pack years as well as a lengthy coal mine employment history of 39 years.” Decision and Order on Remand at 7.

cigarette smoking and coal dust exposure.⁵ Drs. Repsher, Tuteur, Renn and Fino, however, each opined that claimant did not suffer from any lung disease related to his coal dust exposure.⁶

In considering whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge stated:

After reconsideration of the medical opinion reports, and after review of the medical authorities cited by the various physicians in their depositions, I find Dr. James' conclusions are better supported by the medical authorities since his summary of those reports, that is that coal

⁵Dr. Anderson opined that claimant suffered from end stage emphysematous chronic obstructive pulmonary disease. Claimant's Exhibit 1. Dr. Anderson opined that claimant's "self supporting history of thirty-nine years as a coal miner most probably [was] a contributing factor in his chronic obstructive pulmonary disease..." *Id.* Dr. Anderson further opined that it was "reasonable to assume that [claimant's] COPD [was] caused by factors other than tobacco smoking, although [it] must be considered a contributing factor." *Id.*

Dr. James diagnosed chronic obstructive pulmonary disease attributable to coal dust exposure and cigarette smoking. Director's Exhibits 11, 12.

⁶Dr. Repsher diagnosed severe chronic obstructive pulmonary disease with bullous emphysema attributable to claimant's cigarette smoking. Director's Exhibit 33. Dr. Repsher opined that claimant's COPD was caused solely by his long and heavy cigarette smoking habit. *Id.* Dr. Repsher opined that claimant's coal dust exposure did not make any measurable contribution to his COPD. *Id.*

Dr. Tuteur opined that claimant suffered from far advanced severe cigarette smoke-induced chronic obstructive pulmonary disease. Employer's Exhibit 1. Dr. Tuteur opined that this condition was not related to, aggravated by, or caused by the inhalation of coal mine dust. *Id.*

Dr. Renn diagnosed chronic bronchitis due to cigarette smoking with an asthmatic component. Employer's Exhibit 2. Dr. Renn also diagnosed pulmonary emphysema due to cigarette smoking. *Id.* Dr. Renn indicated that neither of these diagnoses were caused, or contributed to, by his coal dust exposure. *Id.*

Dr. Fino opined that claimant suffered from significant emphysema due to cigarette smoking. Employer's Exhibit 4. Dr. Fino opined that claimant did not suffer from an occupationally acquired pulmonary condition. *Id.* Dr. Fino opined that claimant did not suffer from a coal mine dust induced disease. Employer's Exhibit 5 at 8.

mine dust exposure can cause an obstructive impairment in pulmonary function for some miners, is more consistent with the plain reading of the reports. The fact that four physicians disagreed with his characterization of the reports reflects the ability of the Employer to submit cumulative evidence and is not a persuasive basis for finding those contradictory opinions outweigh Dr. James' opinion. Accordingly, based on Dr. James' well reasoned and better supported opinion which concludes Claimant has "legal" pneumoconiosis since his obstructive pulmonary impairment is due, at least in part, to his coal mine employment and coal mine dust exposure, I find Claimant has established the presence of pneumoconiosis under the provisions of Section 718.202(a)(4).

Decision and Order on Remand at 9.

Employer initially argues that the administrative law judge erred in failing to provide an explanation for his finding that Dr. Anderson's opinion, that claimant's chronic obstructive pulmonary disease was attributable in part to his coal dust exposure, was reasoned.⁷ Employer contends that Dr. Anderson provided no explanation for his conclusions. Employer's Brief at 10 n.3. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). However, in this case, the administrative law judge erred in failing to provide any basis for finding that Dr. Anderson's opinion regarding the etiology of claimant's chronic obstructive pulmonary disease was sufficiently reasoned. *See* Decision and Order on Remand at 7. We also agree with employer that the administrative law judge erred in failing to address whether Dr. Anderson's opinion was definitive enough to support a finding that claimant's chronic obstructive pulmonary disease was attributable to his coal dust exposure since Dr. Anderson opined that claimant's coal mine employment was "most probably" a contributing factor to his chronic obstructive pulmonary disease. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Employer's Exhibit 1. Consequently, the administrative law judge, on remand, is instructed to reconsider whether Dr. Anderson's opinion regarding the etiology of claimant's chronic obstructive pulmonary disease is sufficiently reasoned so as to support a finding of legal pneumoconiosis.

⁷As employer accurately notes, the administrative law judge did not rely upon Dr. Anderson's opinion in resolving the conflicts in the medical opinion evidence at 20 C.F.R. §718.202(a)(4). *See* Decision and Order on Remand at 7-9.

Employer also argues that the administrative law judge erred in his consideration of Dr. James' opinion. Employer's argument has merit. Employer argues that the administrative law judge erred in failing to provide a basis for his finding that Dr. James' opinion regarding the etiology of claimant's chronic obstructive pulmonary disease was "well reasoned." *See* Decision and Order on Remand at 9. Employer contends that Dr. James never explained how any medical test he performed enabled him to render a determination regarding the etiology of claimant's obstructive pulmonary disease. Employer's Brief at 11. The administrative law judge noted that Dr. James based his opinion, that claimant's chronic obstructive pulmonary disease was partly attributable to his coal dust exposure, on the fact that claimant was a "sensitive" miner, *i.e.*, a miner especially susceptible to the effects of coal dust exposure. The administrative law judge, however, did not address whether Dr. James provided an adequate explanation for his identification of claimant as a "sensitive" miner.

We also agree with employer that the administrative law judge erred in failing to address the significance of Dr. James' acknowledgment that there "are no tests that can determine whether [claimant's] COPD resulted from his coal mine dust exposure or cigarette smoking or both." *See* Director's Exhibit 12. Based on the magnitude of both claimant's coal mine dust exposure and cigarette smoking history, Dr. James opined that it was "more likely than not" that both of these exposures played a contributing role in the development of his chronic obstructive pulmonary disease." Director's Exhibit 12. On remand, the administrative law judge is instructed to address whether Dr. James' opinion is equivocal and, if so, to address how it affects the weight accorded to his opinion. *See Justice, supra; Campbell, supra.*

The administrative law judge credited Dr. James' opinion because he found that it was better supported by scientific literature purporting to establish a causal connection between coal dust exposure and obstructive pulmonary impairments. *See* Decision and Order on Remand at 8-9. Although the administrative law judge noted that several physicians disagreed as to whether the medical literature supported Dr. James' opinion, the administrative law judge did not address the reasons provided by these medical experts for questioning Dr. James' reliance upon these studies. Instead, the administrative law judge conducted his own review of the medical literature⁸ and concluded that the studies supported Dr. James' conclusions. *Id.*

⁸The administrative law judge reviewed articles by (1) David Coggon and Anthony Newman Taylor; (2) Michael D. Attfield and Thomas K. Hodous; (3) C. Soutar, S. Campbell, D. Gurr, M. Lloyd, R. Love, H. Crowie and A. Seaton; and (4) J. Hurley and C. Soutar. Decision and Order on Remand at 8. Copies of these articles were attached as exhibits to Dr. Repsher's August 14, 2002 deposition testimony. *See* Employer's Exhibit 8.

We agree with employer that administrative law judge's interpretation of the studies was improper. The interpretation of medical data is a medical determination, and an administrative law judge may not substitute his opinion for that of a physician. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). By independently assessing the medical literature, the administrative law judge improperly substituted his opinion for that of the medical experts. In focusing upon a "plain reading" of the medical literature cited by Dr. James, the administrative law judge failed to address the significance of the fact that several physicians questioned the methodology of the studies and/or questioned the relevance of the studies to the facts of this case. For example, Dr. Tuteur explained that Attfield and Hodous, in conducting their study, failed to employ an adequate "control group." Employer's Exhibit 6 at 27-28. Dr. Tuteur, therefore, explained that the conclusions rendered by Attfield and Hodous are not "supported by an appropriate assessment of the data set." *Id.* at 298-29. Dr. Repsher explained that the Attfield and Hodous study was irrelevant because it involved only underground miners, Employer's Exhibit 8 at 14, while Dr. Renn questioned whether Dr. James had adequately analyzed the studies upon which he relied.⁹ Employer's Exhibit 9 at 43-44. Consequently, the administrative law judge, on remand, is instructed to reconsider Dr. James' opinion in light of all of the evidence of record, including the assessments of the medical literature upon which he relied.

⁹Dr. Renn opined that Dr. James failed to critically assess the medical literature, stating that:

I believe that Dr. James hasn't interpreted the medical literature the way that it should be interpreted. I don't think he's looked at it critically.

In fact, in one place in his deposition, the second part of his deposition that was provided by cross-examination, he even said when he looked at the literature what he looked at was the abstract.

Well, you can't assess or critically assess literature if you only look at the abstract, so I believe that he has not critically reviewed the literature. He's looked at it rather superficially.

He's accepted what have been some of the statements without actually searching more deeply into the materials and methods, the scientific results and looked at them with a critical eye in order to critically review them to the point where he could give a more valid assessment.

Employer's Exhibit 9 at 43-44.

Employer also argues that the administrative law judge erred in discrediting the opinions of Drs. Repsher, Tuteur, Renn and Fino. The administrative law judge discredited the opinions of these physicians because he found that they “based their conclusions that the obstruction present is not related to coal mine dust exposure on the absence of medical pneumoconiosis.” Decision and Order on Remand at 9. The administrative law judge found that these physicians did not “provide any reasoning or analysis as to whether or not the obstruction present could be related to coal mine dust exposure and resultant legal pneumoconiosis in the absence of radiographic pneumoconiosis or in the absence of complicated pneumoconiosis....” *Id.* Contrary to the administrative law judge’s characterization, Drs. Repsher, Tuteur, Renn and Fino did not base their opinions regarding the etiology of claimant’s lung disease solely on the fact that claimant did not suffer from clinical pneumoconiosis. As employer argues, Drs. Repsher, Tuteur, Renn and Fino provided detailed explanations for their opinions which the administrative law judge failed to adequately consider.¹⁰ He must do so on remand.

¹⁰Dr. Repsher opined that claimant did not suffer from legal pneumoconiosis because he suffered from a pure obstructive impairment. Employer’s Exhibit 8 at 10. Dr. Repsher explained that “statistically the overwhelming probability is that [claimant] does not have legal pneumoconiosis because his COPD is absolutely characteristic and typical for cigarette smoking induced COPD.” *Id.* at 11. Dr. Repsher disagreed with Dr. Anderson’s opinion that claimant’s coal mining was a significant contributing factor to his COPD. *Id.* at 26.

Dr. Tuteur explained that it is possible that chronic inhalation of coal mine dust, even in the absence of exposure to tobacco smoke, can, albeit rarely, result in air flow obstruction. Employer’s Exhibit 6 at 16. Even more rarely, Dr. Tuteur opined that it can result in the severity of air flow obstruction experienced by claimant. *Id.* Dr. Tuteur, however, explained that the most common situation in which severe air flow obstruction occurs in response to the inhalation of coal mine dust is when a miner develops complicated coal workers’ pneumoconiosis. *Id.* Dr. Tuteur further stated that:

[W]hen one compares the risks of tobacco smoke in developing obstruction and coal mine dust producing obstruction in a person exposed to both, with reasonable --- like [claimant], one can say with reasonable medical certainty the etiology of the obstruction, the emphysema, the chronic bronchitis, is cigarette smoke, not coal mine dust.

Employer’s Exhibit 6 at 18.

Dr. Tuteur also explained that the partial reversibility of claimant’s pulmonary impairment pointed to a cigarette smoke-induced chronic obstructive pulmonary disease. *Id.* at 19.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of

Dr. Renn opined that while coal dust exposure can cause obstructive defects, it did not do so in claimant. Employer's Exhibit 9 at 13. Dr. Renn opined that claimant suffered from chronic bronchitis with an asthmatic or bronchospasmodic component and pulmonary emphysema, both of which he attributed to claimant's cigarette smoking. *Id.* at 15. Dr. Renn explained that if there was a coal mine dust influence, one would expect to see a relative reduction of total lung capacity. *Id.* at 17. Dr. Renn explained that claimant's variable obstruction was consistent with chronic bronchitis with the asthmatic component of a cigarette smoker, but was not consistent with coal dust exposure. *Id.* at 43.

Dr. Fino explained that claimant's CT scan showed "significant emphysema with bullae." Employer's Exhibit 4. Dr. Fino explained that this is a "classic pattern that one would expect as a result of cigarette smoking." *Id.* Dr. Fino also found that claimant's increased lung volumes, along with a reduction in diffusing capacity, are consistent with a smoking-related disease. *Id.* Dr. Fino explained that the amount of emphysema due to coal dust inhalation increases with the amount of a miner's coal workers' pneumoconiosis and decreases with less. Employer's Exhibit 5 at 21. Dr. Fino opined that, in this case, claimant's smoking history was sufficient, in and of itself, to have caused claimant's obstruction. *Id.* at 9.

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.

Because the administrative law judge must reevaluate whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge