

BRB No. 08-0615 BLA

C.W. )  
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 Claimant-Respondent )  
 )  
 v. )  
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 WESTMORELAND COAL COMPANY ) DATE ISSUED: 06/30/2009  
 )  
 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 - Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and Erik B. Lawson (Washington and Lee University School of Law Legal Clinic), Lexington, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2003-BLA-6684) of Administrative Law Judge Richard A. Morgan on a subsequent 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).<sup>1</sup> This case is before the Board for

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<sup>1</sup> Claimant filed his first claim on July 22, 1985. Director's Exhibit 1. A Department of Labor claims examiner denied this claim on January 2, 1986, because the evidence did not establish any of the elements of entitlement. *Id.* Claimant requested a

the second time. In his 2006 Decision and Order, the administrative law judge credited claimant with thirty-six years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge accepted employer's stipulation that claimant is totally disabled by a respiratory or pulmonary impairment and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge determined that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge further found that the evidence was sufficient to establish the presence of complicated pneumoconiosis, thereby entitling claimant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Employer appealed, and the Board affirmed, as unchallenged, the administrative law judge's determination as to the length of claimant's coal mine employment, and his findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and the existence of simple coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as well as his determination that there was no biopsy or autopsy evidence of record to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). [*C.W.*] v. *Westmoreland Coal Co.*, BRB No. 06-0397 BLA, slip op. at 2 n.2 (Mar. 28, 2007) (unpub.) (McGranery, J., dissenting). The Board rejected employer's assertion that because the evidentiary limitations at 20 C.F.R. §725.414 are invalid, the administrative law judge erred in applying those limitations in excluding the reports of several physicians. *Id.* at 3. The Board, however, held that the administrative law judge erred in shifting the burden to employer to disprove that claimant has complicated pneumoconiosis, and in applying an analysis contrary to the holdings of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000), and *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993). *Id.* at 4-6. Consequently, the Board vacated the administrative law judge's finding that claimant has complicated pneumoconiosis and remanded the case for the

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hearing, which was scheduled before Administrative Law Judge John H. Bedford on September 21, 1988. *Id.* Claimant, however, did not appear for the hearing, and on November 23, 1988, Judge Bedford issued an order dismissing the 1985 claim on the ground that claimant did not show good cause for his failure to attend the hearing. *Id.* No further action was taken by claimant with respect to that claim. Claimant filed this subsequent claim on April 19, 2002, which was ultimately assigned to Administrative Law Judge Richard A. Morgan (the administrative law judge). Director's Exhibit 3.

administrative law judge to consider whether the relevant evidence under 20 C.F.R. §718.304(a), (c), establishes the presence of complicated pneumoconiosis. *Id.* at 9. The administrative law judge was instructed to weigh all of the evidence together before determining whether it is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Id.*

On remand, in accordance with the Board's instructions, the administrative law judge reevaluated the x-rays, CT scan interpretations, treatment records, the findings by the West Virginia Occupational Pneumoconiosis Board, and the medical opinions of Drs. Daniel, Mullins, Crisalli, Castle, Haddadin, Alexander and Wiot, and found that claimant failed to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and (c). Decision and Order on Remand at 8; Director's Exhibits 1-10, 8; Claimant's Exhibits 9, 11, 13, 15, 18; Employer's Exhibits 2, 3, 5, 9, 10 11. The administrative law judge, however, again found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). Decision and Order on Remand at 10. He further determined that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's finding that claimant established the existence of clinical and legal pneumoconiosis pursuant to C.F.R. §718.202(a)(1), (4). Employer also contends that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order on Remand – Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 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).

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<sup>2</sup> We affirm the administrative law judge's findings that the evidence was insufficient to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c), as those findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 5-8.

<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 4.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 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).

Initially, we note that since the Board affirmed the administrative law judge's finding that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a), it was not necessary for the administrative law judge to repeat his credibility findings with respect to that issue on remand. Although employer challenges the administrative law judge's findings that claimant has both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), we decline to revisit our prior holding. Because the Board's previous disposition of the issue of the existence of simple pneumoconiosis constitutes the law of the case, and we are not persuaded that the law of the case is inapplicable or that an exception to it has been demonstrated, we decline to address employer's arguments with respect to 20 C.F.R. §718.202(a)(1), (4). See *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Thus, we consider, in this appeal, only employer's arguments with respect to 20 C.F.R. §718.204(c).

Employer asserts that the administrative law judge "failed to provide adequate discussion concerning his finding of disability causation, similar to his lack of discussion considering his finding of legal pneumoconiosis." Employer's Brief at 17. Therefore, employer contends that the administrative law judge's finding that claimant established total disability due to pneumoconiosis fails to satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), 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). Employer's Brief at 17. Employer's assertion of error has merit.

In considering whether claimant established that he was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c), the administrative law judge summarily stated:

Moreover, as stated above [with respect to 20 C.F.R. §718.202(a)(4)], the better reasoned opinions of Drs. Haddadin and Mullins establish that claimant not only suffers from pneumoconiosis, but that claimant's disabling lung impairment is due to a combination of claimant's coal mine dust exposure (i.e., legal pneumoconiosis) and his significant smoking history. Accordingly, I find that claimant has established total disability due to pneumoconiosis . . . .

Decision and Order on Remand at 10.

We agree with employer that the administrative law judge's cursory statement with respect to the issue of disability causation is insufficient, under the circumstances of this case, to satisfy the requirements of the APA. Although the administrative law judge determined that claimant has legal pneumoconiosis, the administrative law judge must explain how the objective evidence in the record supports his reliance on the opinions of Drs. Haddadin and Mullins, rather than those of Drs. Crisalli and Castle, as to the issue of disability causation.<sup>4</sup> Furthermore, we are unable to affirm the administrative law judge's analysis at 20 C.F.R. §718.204(c), since he has not specifically addressed the extent to which, if any, Dr. Haddadin's review of inadmissible evidence tainted his opinion with regard to whether claimant's respiratory disability is due, in any part, to coal dust exposure. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006) (*en banc*) (McGranery & Hall, JJ.,

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<sup>4</sup> Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge noted that Drs. Mullins and Haddadin opined that claimant has clinical pneumoconiosis, that he is totally disabled, and that clinical pneumoconiosis and coal dust exposure played a significant contributing role in claimant's total disability. Decision and Order on Remand at 9; Director's Exhibit 17; Claimant's Exhibit 10. The administrative law judge found that Drs. Crisalli and Castle opined that claimant does not have clinical pneumoconiosis or legal pneumoconiosis, and that coal dust exposure did not play a significant role in claimant's total respiratory disability. Decision and Order on Remand at 9; Employer's Exhibits 2, 5. The administrative law judge credited the opinions of Drs. Haddadin and Mullins as being more consistent with the credible objective medical evidence, "including the positive x-ray evidence for pneumoconiosis, the recent qualifying pulmonary function studies and arterial blood gas tests which reflect a significant worsening of [c]laimant's pulmonary impairment since the mid-1980's, [c]laimant's 36-year history of coal mine employment; and the progressive and latent nature of pneumoconiosis . . . ." and found that claimant established both clinical pneumoconiosis and legal pneumoconiosis. Decision and Order on Remand at 10. Because we affirmed, as unchallenged in the last appeal, the administrative law judge's finding that claimant established the existence of pneumoconiosis, and since the administrative law judge merely applied his credibility findings at 20 C.F.R. §718.202(a)(4) to his analysis at 20 C.F.R. §718.204(c), it is necessary for the administrative law judge to specifically explain the basis for his finding that claimant is totally disabled due to pneumoconiosis. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery & Hall, J.J., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). Therefore, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c), and remand this case for the administrative law judge to further explain the basis for the weight accorded to the conflicting medical opinions as to the etiology of claimant's totally disabling respiratory impairment. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

On remand, the administrative law judge must weigh the conflicting medical opinions as to whether claimant is totally disabled due to either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). See *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109; 19 BLR 2-70 (4th Cir. 1995). The administrative law judge must consider "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In his determination as to whether claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge must set forth the rationale underlying his findings in accordance with the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, the Decision and Order on Remand – Awarding Benefits of the administrative law judge is affirmed in part, and vacated in part, and the case is remanded 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