

BRB No. 10-0515 BLA

MARCUS OSBORNE )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 WHITAKER COAL CORPORATION ) DATE ISSUED: 06/15/2011  
 )  
 and )  
 )  
 SUN COAL 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 on Remand of Ralph A. Romano,  
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2004-BLA-06797) of Administrative Law Judge Ralph A. Romano awarding benefits on a subsequent claim filed on April 14, 2003, 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).<sup>1</sup> This case is before the Board for the second time. In his initial Decision and Order, the administrative law judge credited claimant with twenty-two years of coal mine employment, based on the parties' stipulation, and determined that the subsequent claim was timely filed pursuant to 20 C.F.R. §725.308.<sup>2</sup> In light of employer's concession that the biopsy evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(2) and 718.203(b), the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Addressing the merits of entitlement, the administrative law judge found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Upon considering employer's appeal, the Board vacated the administrative law judge's finding that the subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. *M.O. [Osborne] v. Whitaker Coal Corp.*, BRB No. 07-0706 BLA, slip op. at 5 (May 29, 2008)(unpub.). The Board also held that there was merit in employer's contention that the administrative law judge did not provide an adequate rationale for his weighing of the medical opinions of Drs. Myers, Simpao, Crouch, Dahhan and

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<sup>1</sup> The amendments to the Act became effective on March 23, 2010 and apply to claims filed after January 1, 2005. Based upon the filing date of this subsequent claim, the amendments are not applicable in this case.

<sup>2</sup> Claimant filed his initial claim for benefits on December 6, 1995. Director's Exhibit 1. Administrative Law Judge Alfred Lindeman issued a Decision and Order denying benefits, based on his finding that claimant failed to establish the existence of pneumoconiosis. *Id.* The Board affirmed Judge Lindeman's denial of benefits. *Osborne v. Whitaker Coal Corp.*, BRB No. 97-1760 BLA (Sept. 11, 1998)(unpub.); Director's Exhibit 1. Claimant subsequently filed a request for modification on October 8, 1998. Director's Exhibit 1. Administrative Law Judge Thomas F. Phalen denied claimant's request for modification, finding that claimant failed to establish either a change in conditions or a mistake in a determination of fact. *Id.* The Board affirmed Judge Phalen's denial of modification and benefits. *Osborne v. Whitaker Coal Corp.*, BRB No. 00-1077 BLA (July 1, 2000)(unpub.); Director's Exhibit 1.

Rosenberg pursuant to 20 C.F.R. §718.204(c). *Id.* at 6-7. The Board remanded the case to the administrative law judge with instructions to reconsider whether employer established rebuttal of the presumption of timeliness and, if reached, to reconsider the medical opinions relevant to 20 C.F.R. §718.204(c). *Id.* at 5, 7.

On remand, the administrative law judge initially found that the subsequent claim was timely filed pursuant to 20 C.F.R. §725.308(a), in accordance with the United States Court of Appeals for the Sixth Circuit's decision in *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009), issued subsequent to the Board's decision. The administrative law judge further determined that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical evidence was sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant has responded, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a response brief unless requested to do so.<sup>3</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 rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</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).

Employer argues that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish disability causation at 20 C.F.R. §718.204(c). On remand, the administrative law judge addressed the opinions of Drs.

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<sup>3</sup> In the present appeal, employer concedes that the ruling of the United States Court of Appeals for the Sixth Circuit in *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009), precludes a finding that claimant's present claim was untimely filed. Employer's Brief at 8 n.2. We affirm, therefore, the administrative law judge's determination that claimant's subsequent claim was timely filed under 20 C.F.R. §725.308. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

Myers, Simpao, Crouch, Dahhan and Rosenberg.<sup>5</sup> Decision and Order on Remand at 6-7. The administrative law judge found that the opinions of Drs. Myers and Simpao, that claimant's respiratory disability is due to coal dust exposure, were well-reasoned and well-documented and sufficient to meet claimant's burden of establishing disability causation. *Id.* at 6. In so finding, the administrative law judge noted that both doctors based their opinions on chest x-rays, pulmonary function studies, blood gas studies and physical examinations. *Id.* In contrast, the administrative law judge determined that the opinions of Drs. Crouch, Dahhan and Rosenberg were entitled to little probative weight, as Dr. Crouch "seem[ed] to quickly dismiss the notion that simple coal workers' pneumoconiosis can cause a disabling impairment;" Dr. Dahhan found "claimant is not disabled at all" and rendered an inconsistent opinion regarding the source of any impairment; and Dr. Rosenberg's opinion, that pneumoconiosis was not present radiographically, was "contrary to the x-rays in evidence, some of which shows [sic] an ILO category 1/2." *Id.* at 7.

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<sup>5</sup> Dr. Myers examined claimant on November 29, 2000, and diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease and "Class III obstructive/restrictive defects in ventilation," due to coal dust exposure. Director's Exhibit 14; Claimant's Exhibit 1. Dr. Simpao examined claimant on June 9, 2003, diagnosed coal workers' pneumoconiosis, and indicated that claimant's multiple years of coal dust exposure were medically significant in causing his severe pulmonary impairment. Director's Exhibits 10, 16. Dr. Dahhan examined claimant on March 9, 2004, and reviewed various medical reports. Director's Exhibit 19. Dr. Dahhan indicated that, although there was no basis for diagnosing coal workers' pneumoconiosis, claimant had a moderately severe ventilatory impairment, caused by cigarette smoking and coronary artery disease. *Id.* In his deposition, Dr. Dahhan acknowledged the presence of simple coal workers' pneumoconiosis, based upon the pathology evidence obtained during claimant's right lung transplant, but opined that it did not contribute to claimant's disability. Employer's Exhibit 5. Dr. Crouch reviewed tissue slides obtained during claimant's transplant and opined that claimant had mixed-pattern emphysema and mild simple pneumoconiosis. Employer's Exhibits 6, 7. Dr. Crouch stated that the coal dust related changes were insufficient to cause a clinically significant degree of impairment and that claimant's disability was due to severe emphysema and fibrosis related to smoking. *Id.* Dr. Rosenberg examined claimant on February 3, 2005, and determined that claimant had emphysema in his left lung, while his transplanted right lung was functioning normally. Employer's Exhibits 1, 4. Dr. Rosenberg reported that, prior to the transplant, claimant's right lung showed severe airflow obstruction. Employer's Exhibit 4. Dr. Rosenberg further indicated that claimant's pulmonary impairment was due to his lung transplant, which was necessitated by the development of emphysema caused by cigarette smoking, based on the area of lung affected by the emphysema. *Id.*

Employer argues that the administrative law judge failed to explain why he found the opinions of Drs. Myers and Simpao to be better reasoned than the contrary opinions of Drs. Crouch, Dahhan and Rosenberg. Employer asserts that, contrary to the administrative law judge's finding, Drs. Myers and Simpao provided no reasoning for their disability causation determinations, while Drs. Crouch, Dahhan and Rosenberg specifically explained why they believed that claimant's respiratory condition is due to smoking, rather than coal dust exposure.

Employer's allegations of error have merit. In its prior Decision and Order, the Board held that, because the administrative law judge did not make a finding as to whether the opinions of Drs. Myers and Simpao are reasoned and documented, he did not provide an adequate rationale for crediting these opinions. *Osborne*, BRB No. 07-0706 BLA, slip op. at 7. The Board also vacated the administrative law judge's finding that the contrary opinions of Drs. Crouch, Dahhan and Rosenberg were entitled to little probative weight, as the administrative law judge did not discuss the specific bases each of the physicians gave for finding that pneumoconiosis was not a contributing cause of claimant's total disability. *Id.* The Board remanded the case to the administrative law judge with instructions to more fully discuss his findings, taking into account the relative qualifications of the physicians, the persuasiveness and detail of the physicians' explanations, the underlying documentation, and the significance of any flaws in the opinions, such as a reliance on inaccurate smoking histories. *Id.* at 7-8.

The administrative law judge's summary finding, that the opinions of Drs. Myers and Simpao are reasoned and documented and entitled to controlling weight, does not comport with the Board's remand instructions, nor does it satisfy the Administrative Procedure Act (APA).<sup>6</sup> See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although the administrative law judge identified, in general terms, the objective evidence that Drs. Myers and Simpao relied on, in identifying coal dust exposure as a contributing cause of claimant's total disability, he did not explain how this evidence supported their conclusions. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge did not make a finding as to the length of claimant's smoking history and did not address

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

the discrepancy in the physicians' understandings of the extent of claimant's use of cigarettes.<sup>7</sup>

Accordingly, we must vacate the administrative law judge's findings that the opinions of Drs. Myers and Simpao are entitled to greater weight than those of Drs. Crouch, Dahhan and Rosenberg and, therefore, are sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). On remand, when reconsidering the medical opinion evidence, the administrative law judge should explicitly address the comparative credentials of the respective physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). In determining the relative weight to which the opinions of Drs. Myers, Simpao, Crouch, Dahhan and Rosenberg are entitled, the administrative law judge is required to apply the same level of scrutiny to each opinion. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Because the physicians' knowledge of claimant's smoking history is relevant to the probative value of their opinions as to whether coal dust exposure is a substantially contributing cause of claimant's total disability under 20 C.F.R. §718.204(c), the administrative law judge must also render a finding as to claimant's smoking history. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). He must then assess the probative value of the physicians' opinions in light of his determination. *Id.* The administrative law judge must set forth his findings on remand in detail, including the underlying rationale, as required by the APA.

Lastly, claimant's counsel has filed a petition for attorney fees, requesting compensation in the amount of \$506.25 for legal services rendered to claimant from May 15, 2007 to June 2, 2008, when the case was previously before the Board on appeal. The requested fee represents 2.25 hours of legal services billed at the rate of \$225.00 per hour. Based upon our decision to vacate the administrative law judge's award of benefits, there has not been a successful prosecution of the claim at this time. 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); *Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993)(*en banc*)(Brown, J., concurring); *Markovich v. Bethlehem Mines Corp.*, 11

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<sup>7</sup> Dr. Myers recorded a smoking history of less than one-half of a pack per day for ten years. Claimant's Exhibit 1. Dr. Simpao indicated that claimant smoked for twelve years. Director's Exhibit 10. Dr. Dahhan recorded a smoking history of one pack per day for twenty-five years. Director's Exhibit 19. Dr. Rosenberg noted that claimant reported a smoking history of twelve to fifteen years. Employer's Exhibit 1. Dr. Crouch did not reference a smoking history. Employer's Exhibits 6, 7.

BLR 1-105 (1987). Consequently, we deny counsel's fee petition, which may be refiled if the claim is successfully prosecuted on remand. 20 C.F.R. §802.203(c).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, and vacated in part, and the case is remanded for further proceedings 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