BRB No. 10-0592 BLA

ETHEL GROVES[1] (o/b/o WILLIAM GROVES, deceased)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 06/23/2011
ISLAND CREEK COAL COMPANY	)	
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 Awarding Benefits on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

[1] Claimant, the miner's widow, is pursuing his claim on his behalf.

Employer appeals the Decision and Order Awarding Benefits on Remand (04-BLA-5435) of Administrative Law Judge Janice K. Bullard 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). This case involves a claim filed on January 22, 2002, and is before the Board for the third time. Director's Exhibit 2.

In the initial decision, the administrative law judge credited the miner with 26.62 years of coal mine employment,[2] and found that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits. Pursuant to employer's appeal, the Board rejected employer's allegations of error, and affirmed the award of benefits. *Groves v. Island Creek Coal Co.*, BRB No. 05-0559 BLA (Feb. 15, 2006)(unpub.).

Upon review of employer's appeal, the United States Court of Appeals for the Fourth Circuit held that, although the administrative law judge properly found that a preponderance of the x-ray evidence established the existence of pneumoconiosis under Section 718.202(a)(1), she failed to adequately consider negative readings of two CT scans that contradicted the x-ray evidence, and she did not provide valid reasons for crediting and discrediting the various medical opinions on whether the miner had pneumoconiosis under Section 718.202(a)(4). *Island Creek Coal Co. v. Groves*, No. 06-1435 (4th Cir. Aug. 17, 2007). Accordingly, the court vacated the administrative law judge's finding of pneumoconiosis under Section 718.202(a), and remanded the case for the administrative law judge to reconsider that issue.

On remand, the administrative law judge found that, although the CT scan evidence was negative for pneumoconiosis, the weight of the x-ray and medical opinion evidence established the existence of the disease under Section 718.202(a)(1),(4). The administrative law judge further determined that the medical opinion evidence established that the miner was totally disabled due to pneumoconiosis under Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the award of benefits because the administrative law judge did not follow the Fourth Circuit's instructions with respect

[2] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibits 4, 7; Claimant's Exhibit 8; Hearing Transcript at 42. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

to the medical opinions on the existence of pneumoconiosis.[3] *W.G.* [*Groves*] *v. Island Creek Coal Co.*, BRB No. 08-0597 BLA, slip op. at 5-7 (Mar. 30, 2009)(unpub.). Specifically, the Board held that the administrative law judge provided reasons that were rejected by the Fourth Circuit, when she again found that Dr. Zaldivar improperly relied on negative x-rays to rule out coal mine dust exposure as a cause of the miner's emphysema, and when she again found that Dr. Crisalli did not explain why he eliminated coal mine dust exposure as a cause of the miner's emphysema and bronchitis. Further, the Board held that the administrative law judge did not adequately explain her reasons for relying on Dr. Jarvis's status as the miner's treating physician, to credit his opinion diagnosing the miner with both clinical and legal pneumoconiosis.[4] Additionally, the Board held that the administrative law judge's decision to credit Dr. Rasmussen's opinion diagnosing both clinical and legal pneumoconiosis was affected by her improper discrediting of the opinions of Drs. Zaldivar and Crisalli.[5] Accordingly, the Board vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4), and remanded the case for the administrative law judge to reconsider the medical opinions, and determine whether claimant carried her burden to establish the existence of pneumoconiosis.[6]

On remand, the administrative law judge found that the x-ray and medical opinion evidence established the existence of both clinical and legal pneumoconiosis pursuant to Section 718.202(a). The administrative law judge further found that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

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[3] The Board affirmed, as unchallenged, the administrative law judge's finding that the negative CT scan readings did not outweigh the x-rays and medical opinions diagnosing pneumoconiosis. *W.G.* [*Groves*] *v. Island Creek Coal Co.*, BRB No. 08-0597 BLA slip op. at 3 n.4 (Mar. 30, 2009)(unpub.).

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

[5] The Board affirmed, as unchallenged, the administrative law judge's determination that Dr. Rasmussen's opinion was documented and reasoned. *Groves*, slip op. at 6 n.10.

[6] The Board further instructed the administrative law judge to weigh all relevant evidence together pursuant to 20 C.F.R. §718.202(a), and determine whether the evidence as a whole established the existence of pneumoconiosis, and, if so, to reconsider whether pneumoconiosis was a substantially contributing cause of the miner's total disability under 20 C.F.R. §718.204(c). *Groves*, slip op. at 8.

In this appeal, employer contends that the administrative law judge erred in her analysis of the medical opinion evidence when she found the existence of pneumoconiosis established under Section 718.202(a)(4), and when she found that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief, but notes that the recent amendments to the Act do not apply, based on this claim's filing date.[7]

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

On remand, the administrative law judge reconsidered the medical opinions of Drs. Crisalli, Zaldivar, Jarvis, and Rasmussen on the issue of the existence of pneumoconiosis under Section 718.202(a)(4). Dr. Crisalli opined that the miner did not have clinical or legal pneumoconiosis, but suffered from chronic bronchitis and bullous emphysema due solely to smoking. Employer's Exhibits 4 at 5; 20 at 25. Dr. Zaldivar opined that the miner did not have clinical or legal pneumoconiosis, but suffered from emphysema due solely to smoking, with a component of asthma. Director's Exhibit 26 at 2-3; Employer's Exhibits 18 at 6; 21 at 26-27, 37. Dr. Jarvis opined that the miner had clinical and legal pneumoconiosis, which were aggravated by his smoking. Claimant's Exhibit 2. Dr. Rasmussen diagnosed the miner with clinical pneumoconiosis and chronic obstructive pulmonary disease (COPD) with emphysema, related to both coal mine dust exposure and smoking. Director's Exhibit 12 at 4; Claimant's Exhibit 1 at 4.

[7] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The Director, Office of Workers' Compensation Programs, correctly states that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim filed on January 22, 2002. Director's Letter at 1 n.1.

The administrative law judge discounted Dr. Crisalli's opinion, because she found his opinion, that coal mine dust exposure does not cause bullous emphysema, to be inconsistent with the medical science relied upon by the Department of Labor (DOL) when it revised the regulatory definition of pneumoconiosis. Further, the administrative law judge discounted Dr. Zaldivar's opinion, because she found that he assumed that the miner's smoking history was longer and more intense than was documented by the record. In contrast, the administrative law judge found that, although Dr. Jarvis failed to explain how specific test results supported his conclusions, his opinion merited weight because he treated the miner for pulmonary problems for over ten years, affording him the opportunity to review the miner's test results and observe his condition. Further, the administrative law judge found that Dr. Rasmussen's opinion on the etiology of the miner's emphysema was "the strongest," since she had discounted Dr. Crisalli's and Dr. Zaldivar's contrary opinions.

Employer contends that the administrative law judge erred in discounting Dr. Crisalli's opinion. We disagree. The administrative law judge permissibly found Dr. Crisalli's opinion was contrary to the medical science relied upon by DOL in promulgating 20 C.F.R. §718.201, and the position of DOL that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and that coal mine dust exposure is associated with clinically significant airways obstruction.[8] 65 Fed. Reg. 79,920, 79,940, 79,943 (Dec. 20, 2000). Contrary to employer's contention, an administrative law judge has the discretion to examine whether a physician's reasoning is consistent with the conclusions contained in medical literature and scientific studies relied upon by DOL in drafting the definition of legal pneumoconiosis. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Helen Mining Co. v. Director, OWCP* [*Obush*], F.3d , 2011 WL 1366355 (3d Cir. 2011).

There is merit, however, in employer's contention that the administrative law judge erred in discrediting Dr. Zaldivar's opinion as based on an inaccurate smoking history. The administrative law judge focused on portions of Dr. Zaldivar's August 4, 2004 report, and of his deposition testimony, in which Dr. Zaldivar addressed and criticized Dr. Rasmussen's reliance on a medical study of Dutch coal miners. In Dr. Zaldivar's opinion, that study did not adequately control for smoking by taking into account the unreliability of self-reported smoking histories, or by factoring in the variability of when, during the day, a miner was able to smoke. Employer's Exhibits 18 at 5; 21 at 42-43. From these comments, the administrative law judge inferred that Dr. Zaldivar based his opinion in this case on a "secret but unsupported longer history of

[8] Dr. Crisalli opined that bullous emphysema such as that suffered by the miner is not caused by coal mine dust exposure and that severe emphysema is not seen in coal workers' pneumoconiosis. Employer's Exhibits 4 at 5; 20 at 27, 33, 40, 54-56, 60.

smoking," and assumed that the miner's smoking was more damaging than would be expected, since it had to be "clustered in the pre- and post-shift hours because it is not possible to smoke in an underground mine." Decision and Order on Remand at 4. The record reflects that Dr. Zaldivar consistently identified the miner's smoking history as three-fourths of a pack of cigarettes per day for thirty-three years from 1959-1992, in his initial report and at his deposition. Director's Exhibit 26; Employer's Exhibit 21 at 9. Dr. Zaldivar's recorded smoking history coincides with that reported by the miner at the hearing, Hearing Transcript at 40-41, and with the history recorded by Dr. Rasmussen. Director's Exhibit 12 at 2. There is no indication in the record that Dr. Zaldivar relied on a more extensive smoking history in reaching his opinion that the miner's emphysema was due solely to smoking. Further, the record reflects that Dr. Zaldivar understood that the miner worked at the surface as a heavy equipment operator. Director's Exhibit 26. Thus, there is no indication that Dr. Zaldivar relied on a belief that the miner had a "clustered" pattern of smoking that may be seen with underground miners, to support his opinion in this case. Therefore, substantial evidence does not support the administrative law judge's reasons for discounting Dr. Zaldivar's opinion.[9] *See* 33 U.S.C. §921(b)(3).

Employer further contends that the administrative law judge did not adequately explain why she found that Dr. Jarvis's opinion merited weight, or why Dr. Rasmussen's opinion was the strongest. We agree. Although an administrative law judge need not discredit an opinion that lacks a thorough explanation, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000), given the administrative law judge's finding that Dr. Jarvis did not explain how any specific testing supported his opinion, she did not explain why she found that his opinion merited weight, apart from his status as the miner's treating physician. *See* 20 C.F.R. §718.104(d)(5); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Additionally, the administrative law judge's finding that Dr. Rasmussen's opinion was "the strongest" on the issue of whether the miner's emphysema was related to coal mine dust exposure, was based on her discrediting of Dr. Zaldivar's opinion, which we have vacated.

In light of the foregoing, we must vacate the administrative law judge's finding at Section 718.202(a)(4), and remand the case for further consideration of the medical opinion evidence on the existence of pneumoconiosis. On remand, the administrative law judge must explain her credibility determinations in light of the comparative credentials

[9] The administrative law judge additionally discounted Dr. Zaldivar's opinion because the doctor did not specify the etiology of the miner's asthma. In the previous appeal, the Board held that this reasoning was not sufficient to discount Dr. Zaldivar's opinion, as the record contains no evidence relating the miner's asthma to coal mine dust exposure. *Groves*, slip op. at 5; *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

On remand, after reconsidering the medical opinions, the administrative law judge must weigh all relevant evidence together pursuant to Section 718.202(a), and determine whether the evidence as a whole establishes the existence of clinical or legal pneumoconiosis, or both. *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

In light of our determination to vacate the administrative law judge's finding of pneumoconiosis pursuant to Section 718.202(a), we additionally vacate her finding that pneumoconiosis was a substantially contributing cause of the miner's total disability under Section 718.204(c). If reached, on remand, the administrative law judge must again consider the relevant evidence on this issue pursuant to Section 718.204(c). On remand, contrary to employer's contention, if the administrative law judge finds the existence of pneumoconiosis established, she has the discretion to discount the disability causation opinions of those physicians who did not diagnose the miner with pneumoconiosis. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 267, 269, 22 BLR 2-372, 2-379-80, 2-384 (4th Cir. 2002).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand 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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BETTY JEAN HALL
Administrative Appeals Judge