

BRB No. 06-0608 BLA

RICHARD M. McELVANEY)
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 Claimant-Respondent)
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 v.)
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 JOE KUPERAVAGE COAL COMPANY) DATE ISSUED: 03/22/2007
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 and)
)
 ROCKWOOD CASUALTY 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 Upon Remand by the Benefits Review Board of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Gregory J. Fischer and Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits Upon Remand by the Benefits Review Board (2004-BLA-05930) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) 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 claim is on appeal before the Board for a second time. Pursuant to employer's previous appeal, the Board vacated the administrative law judge's award of

benefits. *McElvaney v. Joe Kuperavage Coal Co.*, BRB No. 05-0240 BLA (Nov. 30, 2005)(unpub.). Specifically, the Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as the administrative law judge failed to provide affirmable bases for rejecting the opinions of Drs. Fino and Galgon. *McElvaney*, slip op. at 3-5.¹ In addition, the Board vacated the administrative law judge's determination that claimant established that his totally disabling respiratory impairment was due to pneumoconiosis (disability causation) pursuant to 20 C.F.R. §718.204(c) because the administrative law judge improperly substituted his opinion for that of Dr. Talati.² *McElvaney*, slip op. at 5-6. The Board, therefore, remanded the case for further consideration of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and the Board directed the administrative law judge to weigh all the evidence relevant to the existence of

¹ The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the x-ray evidence established pneumoconiosis at 20 C.F.R. §718.202(a)(1) and that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). However, because the administrative law judge erroneously found pneumoconiosis established at 20 C.F.R. §718.202(a)(4), and the administrative law judge is required to consider all of the relevant evidence together in determining whether pneumoconiosis is established under 20 C.F.R. §718.202(a)(1)-(4) in cases arising within the jurisdiction of the United States Court of Appeals for the Third Circuit, *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the Board vacated the administrative law judge's finding of pneumoconiosis and remanded the case for further consideration of the issue. *McElvaney v. Joe Kuperavage Coal Co.*, BRB No. 05-0240 BLA (Nov. 30, 2005)(unpub.). The Board also remanded the case for further consideration of the medical opinion evidence at Section 718.202(a)(4) as that finding affected the administrative law judge's finding regarding disability causation at Section 718.204(c).

The Board affirmed, as unchallenged, the administrative law judge's finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3), and the finding that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *McElvaney*, slip op. at 3 n.1.

² In considering the administrative law judge's analysis of the medical evidence pursuant to 20 C.F.R. §718.204(c), the Board, however, affirmed the administrative law judge's decision to accord "some probative value" to the opinion of Dr. Russell diagnosing disability due to anthracosilicosis, Claimant's Exhibit 10, and further affirmed the administrative law judge's reliance on the opinion of Dr. Kraynak, Claimant's Exhibit 6, as support for a finding of disability causation. *McElvaney*, slip op. at 7.

pneumoconiosis pursuant to 20 C.F.R. §718.202(a), if reached. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The Board further directed the administrative law judge to again consider the issue of disability causation, if reached.

On remand, the administrative law judge again found the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) based on the medical opinion evidence. Decision and Order on Remand at 3-5. Weighing all of the relevant evidence together, the administrative law judge also found that the evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a). Decision and Order on Remand at 6. In addition, the administrative law judge found that claimant established that his totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(c). Decision and Order on Remand at 7-8. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding disability causation established pursuant to Section 718.204(c) and again erred in failing to properly consider the disability causation opinions of Drs. Galgon and Fino.³ Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in this appeal.

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 law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that claimant established disability causation pursuant to Section 718.204(c), as the administrative law judge impermissibly rejected the medical reports of Drs. Galgon and Fino, Employer's Exhibits 1, 2, which opined that claimant did not suffer from a totally disabling respiratory impairment due to pneumoconiosis. Employer argues that the administrative law judge failed to fully address and consider the medical bases for Dr. Galgon's

³ We affirm, as unchallenged in this appeal, the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as well as his finding that the medical opinion evidence and the x-ray evidence, considered together, establish the existence of the disease pursuant to Section 718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Further the administrative law judge noted, as he did in his prior decision, that the parties stipulated that claimant has a totally disabling respiratory impairment, and a coal mine employment history of twenty-two years. Decision and Order on Remand at 2, 7.

conclusion, specifically that the blood gas study evidence demonstrates that claimant did not suffer from interstitial lung disease, including coal workers' pneumoconiosis. Employer argues, therefore, that the administrative law judge's finding that the physician did not offer a credible opinion on the issue of disability causation was erroneous.

In addition, employer argues that, because Dr. Fino clearly explained the bases for his conclusion that claimant's totally disabling respiratory impairment was not due to pneumoconiosis, the administrative law judge erred in failing to address the reasons underlying the physician's conclusions. Employer also argues that the administrative law judge erred in rejecting Dr. Fino's opinion since Dr. Fino stated that pneumoconiosis would not have contributed to claimant's totally disabling respiratory impairment, even assuming that claimant had pneumoconiosis.

In order to establish disability causation pursuant to Section 718.204(c), a claimant must establish that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment. 20 C.F.R. §718.204(c)(1); *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). In finding that claimant established disability causation pursuant to Section 718.204(c), the administrative law judge, in a permissible exercise of his discretion, accorded superior weight to the opinions of Drs. Talati,⁴ Kraynak and Russell, all of whom opined that claimant's totally disabling respiratory impairment was due to claimant's coal workers' pneumoconiosis and/or anthracosilicosis, Director's Exhibits 10, 12; Claimant's Exhibits 4, 6, as the opinions were the best reasoned and documented of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).⁵ Further, contrary to

⁴ When this case was previously before the Board, it vacated the administrative law judge's analysis of Dr. Talati's medical opinion because the administrative law judge impermissibly substituted his opinion for that of the medical expert. *McElvaney*, slip op. at 6; *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). On remand, the administrative law judge again considered Dr. Talati's opinion and found that the physician provided a comprehensive examination of claimant, a thorough explanation of that examination, and a well-reasoned and well-documented opinion based on his evidentiary review. Decision and Order on Remand at 6. As employer has not challenged this analysis, but has instead challenged only the administrative law judge's review of the disability causation opinions of Drs. Fino and Galgon, the administrative law judge's analysis of Dr. Talati's opinion is affirmed. *See Skrack*, 6 BLR at 1-711.

⁵ In addition to crediting the opinion of Dr. Talati on disability causation, the administrative law judge noted that he had previously given "some probative weight" to the disability causation opinion of Dr. Russell, as he was claimant's treating physician.

employer's assertion, the administrative law judge rationally accorded less weight to the opinions of Drs. Fino and Galgon, on the issue of disability causation at Section 718.204(c), as these opinions were based on a faulty underlying premise that the miner did not have pneumoconiosis.⁶ See *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004) (Roth, J., dissenting); see also *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Moreover, contrary to employer's argument, the mere fact that Dr. Fino assumed the existence of pneumoconiosis, after having specifically determined that claimant did not suffer from the disease, does not render the physician's opinion, on the issue of disability causation, any more credible. See *Soubik*, 366 F.3d at 234, 23 BLR at 2-99 (a superficial hypothetical assumption of pneumoconiosis made by a physician, is insufficient to reconcile his contrary opinion with the administrative law judge's finding of the disease). We, thus, hold that the administrative law judge has complied with the Board's remand instructions and we, therefore, reject employer's allegation of error and affirm the administrative law judge's finding of disability causation pursuant to Section 718.204(c). 20 C.F.R. §718.204(c)(1); see *Bonessa*, 884 F.2d at 734, 13 BLR at 2-37. As employer has rendered no further challenges to the administrative law judge's consideration of the evidence on remand, we must affirm the award of benefits.

The administrative law judge also noted that he had credited Dr. Kraynak's disability causation opinion because he found that Dr. Kraynak provided supportive reasons for finding that coal workers' pneumoconiosis was the primary cause of claimant's total disability. These findings were affirmed by the Board. *McElvaney*, at 28; Administrative Law Judge's Decision and Order dated Nov. 30, 2005.

⁶ In addressing the opinion of Dr. Galgon on the issue of pneumoconiosis, at Section 718.202(a)(4), the administrative law judge gave it diminished weight because the doctor did not rule out the presence of pneumoconiosis and the doctor placed substantial reliance on his "zero" x-ray-interpretation, but was unaware of the x-rays taken after his examination of claimant, which resulted in positive interpretations. Thus, the administrative law judge properly found Dr. Galgon's testimony to be faulty as the doctor noted that pneumoconiosis does not typically cause obstructive lung disease, as reflected by claimant's pulmonary function and blood gas studies, without an x-ray category of at least three. Decision and Order at 5.

Accordingly the administrative law judge's Decision and Order Awarding Benefits Upon Remand by the Benefits Review Board is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge