

BRB No. 08-0490 BLA

C.A.G.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED: 03/30/2009
)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-BLA-06291) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) awarding benefits on claim filed on August 20, 2004, 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). The administrative law judge accepted the parties' stipulations that claimant had thirty-three years of coal mine employment and that he had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge found that, although the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R.

§718.202(a)(1)-(3), the existence of legal pneumoconiosis¹ was established pursuant to 20 C.F.R. §718.202(a)(4), and that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Further, the administrative law judge found that the evidence established 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 challenges the administrative law judge's finding that the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Further, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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 rational, supported by substantial evidence, and in accordance with applicable law.² 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

Employer first contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), by crediting the opinion of Dr. Baker over the contrary opinion of Dr. Repsher. Employer also contends that the administrative law judge erred in finding that the opinion of Dr. Fino did not address legal pneumoconiosis.

¹ 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).

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 6, 14 at 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Dr. Baker opined that claimant had both clinical pneumoconiosis and legal pneumoconiosis. Director's Exhibits 14, 17; Claimant's Exhibits 1-3. By contrast, Dr. Repsher opined that claimant did not have either clinical or legal pneumoconiosis. Director's Exhibit 18. Dr. Fino opined that claimant did not have clinical pneumoconiosis. He further noted that his review of claimant's medical records showed that respiratory impairment findings were consistent with an asthma-like condition and that a CT scan showed the presence of bullous emphysema. Employer's Exhibit 1. In finding that the medical opinions established the existence of legal pneumoconiosis at Section 718.202(a)(4),³ the administrative law judge credited the opinion of Dr. Baker, diagnosing legal pneumoconiosis, as reasoned, over the contrary opinion of Dr. Repsher, because it was flawed.

Employer argues that the administrative law judge erred in crediting Dr. Baker's opinion diagnosing legal pneumoconiosis, as reasoned. Specifically, employer contends that the administrative law judge failed to sufficiently explain how he found Dr. Baker's opinion to be reasoned.

In considering the opinion of Dr. Baker, a Board-certified pulmonologist, the administrative law judge noted that Dr. Baker found that claimant's lengthy coal mine dust exposure history was "more than enough time to develop pneumoconiosis in a susceptible person." Decision and Order at 8; Claimant's Exhibit 2 (Dr. Baker's Deposition at 5). The administrative law judge also noted that Dr. Baker opined that while people who have never been exposed to coal dust can develop asthma, emphysema, and bronchitis, "all three of those conditions can be aggravated by the inhalation of coal dust." Decision and Order at 9; Claimant's Exhibit 2 (Dr. Baker's Deposition at 30). Further, the administrative law judge noted that Dr. Baker opined that claimant's smoking history was not long enough to be the sole cause of claimant's respiratory impairment. Additionally, the administrative law judge noted that Dr. Baker's opinion was supported by medical literature that was in keeping with the amended regulations, *see* 65 Fed. Reg. 79940 (Dec. 20, 2000), confirming a connection between coal mine dust exposure and obstructive lung disease. The administrative law judge concluded, therefore, that Dr. Baker's opinion established legal pneumoconiosis at Section 718.202(a)(4).

The Administrative Procedure Act (APA), 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, we agree with employer that the

³ The administrative law judge stated, "[a]fter a review of the x-ray and the 'other' evidence submitted, I accept that the [c]laimant has not established clinical pneumoconiosis." Decision and Order at 8.

administrative law judge did not adequately explain why he found Dr. Baker's opinion well-reasoned. *Wojtowicz*, 12 BLR at 1-165. As employer asserts, the administrative law judge did not refer to any testing done by Dr. Baker. Further, as employer asserts, in noting: 1) that Dr. Baker's opinion was supported by medical literature discussing the connection between obstructive lung disease and coal mine dust exposure; 2) that Dr. Baker opined that claimant had enough coal mine dust exposure to cause legal pneumoconiosis, and 3) that Dr. Baker opined that asthma, emphysema, and bronchitis could be aggravated by coal dust exposure, the administrative law judge failed to consider and discuss whether Dr. Baker's opinion supported a finding that this specific claimant's chronic obstructive pulmonary disease was related to coal mine dust exposure. *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). Thus, we agree with employer that the administrative law judge erred in failing to provide a sufficient analysis of Dr. Baker's opinion on the issue of legal pneumoconiosis.

Employer also argues that the administrative law judge erred in discrediting the opinion of Dr. Repsher, a Board-certified pulmonologist, that claimant did not have legal pneumoconiosis, because the studies that Dr. Repsher cited were not in keeping with the amended regulations, which note that coal mine dust exposure can cause obstructive lung disease. Dr. Repsher opined that claimant did not have a respiratory disease or condition related to coal mine dust exposure, but that he had severe chronic obstructive pulmonary disease related to cigarette smoking and/or asthma, and probably complicated by early cor pulmonale. Director's Exhibit 18. However, finding that none of the medical literature that Dr. Repsher referred to in his report addressed the connection between obstructive lung disease and coal mine dust exposure, as discussed in the amended regulations, the administrative law judge found that Dr. Repsher's opinion was not reasoned. Further, the administrative law judge noted that the medical literature relied on by Dr. Baker, contradicted Dr. Repsher's opinion.

As employer asserts, while Dr. Repsher noted general statistical findings in medical literature regarding the etiology of chronic obstructive pulmonary disease, Dr. Repsher's opinion, that claimant did not have a chronic lung disease related to coal mine dust exposure, was based on the respiratory condition of the specific miner in this case. *See Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 18 BLR 2-105 (7th Cir. 1994). Dr. Repsher opined that "in this individual coal miner, to an overwhelming probability, any detectable COPD would be the result of cigarette smoking and/or asthma, but not the result of the inhalation of coal mine dust." Director's Exhibit 18. Dr. Repsher also noted that "[t]his does not mean that exposure to coal mine dust cannot cause clinically significant airways obstruction (COPD), but does indicate that it would be very unlikely in this specific individual miner." Director's Exhibit 18. Thus, to the extent that the administrative law judge found that Dr. Repsher's opinion was flawed because Dr. Repsher relied on general statistical findings, he impermissibly discredited Dr. Repsher's opinion. *See generally Hall v. Consolidation Coal Co.*, 6 BLR 1-1306, 1-1309 (1984)(An administrative law judge may not reject a physician's report simply

because it does not comply with the administrative law judge's own medical conclusion.); *see also Knizner*, 8 BLR at 1-7.

Employer additionally argues that the administrative law judge erred in discrediting the opinion of Dr. Fino, a Board-certified pulmonologist, on the grounds that Dr. Fino did not examine claimant and did not address the existence of legal pneumoconiosis. Dr. Fino noted, on review of claimant's medical records, that his respiratory findings were consistent with an asthma-like condition and that a CT scan showed the presence of bullous emphysema. Dr. Fino did not, however, render an opinion regarding the etiology of these conditions. Employer's Exhibit 1. Consequently, the administrative law judge properly found that Dr. Fino's report could not establish the presence or absence of legal pneumoconiosis at Section 718.202(a)(4). Thus, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Fino's opinion on the issue of legal pneumoconiosis at Section 718.202(a)(4). In light of our remand of the case for reconsideration of the other medical opinions in this case, however, the administrative law judge may consider whether Dr. Fino's opinion is supportive of Dr. Repsher's opinion.⁴

In view of the foregoing errors made by the administrative law judge in analyzing the opinions of Drs. Baker and Repsher, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4),⁵ and remand the case for further consideration of the evidence on the issue of legal pneumoconiosis.⁶

⁴ In considering the medical opinion evidence at Section 718.202(a)(4), the administrative law judge gave less weight to Dr. Fino's opinion because "Drs. Repsher, Baker and Simpao examined the [c]laimant, and Dr. Fino did not." Decision and Order at 9. As employer assert, however, an administrative law judge cannot reject a medical report solely because the physician was a non-examining physician. *Collins v. J&L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999). The administrative law judge could, as the finder-of-fact, however, accord greater weight to the opinions of physicians, who examined claimant, over those who did not, if he finds their opinions more complete. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

⁵ Employer asserts that the administrative law judge mischaracterized the record by finding that claimant did not have a history of asthma. Dr. Baker stated that "[claimant] had no history [of asthma], no one had ever diagnosed it." Claimant's Exhibit 2 at 27. Similarly, Dr. Simpao noted that claimant did not have a history of asthma. Director's Exhibit 14. While Dr. Fino noted physical findings "consistent with an asthma-like condition," he did not indicate that claimant has a history of asthma. Employer's Exhibit 1. In addition, Dr. Repsher did not indicate that claimant has a history of asthma. Director's Exhibit 18. Moreover, employer does not point to any evidence that claimant has a history of asthma. We, therefore, reject employer's assertion

Employer next contends that the administrative law judge erred in finding claimant entitled to the presumption at 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, based on his length of coal mine employment. Specifically, employer asserts that the presumption is not available in cases dealing with the issue of legal, rather than clinical pneumoconiosis. We agree.

The administrative law judge found “that the 33 year exposure in coal mine employment in part caused [claimant’s] pneumoconiosis.” Decision and Order at 11. The administrative law judge also stated that he “credit[ed] Drs. Simpao’s and Baker’s testimony on causation.” *Id.* As employer asserts, the presumption at Section 718.203(b), that pneumoconiosis arose out of coal mine employment when the miner has ten or more years of coal mine employment, is not available in cases dealing with legal pneumoconiosis. *See generally Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006)(because a claimant suffering from chronic obstructive pulmonary disease must prove his chronic obstructive pulmonary disease arose out of coal mine employment to prove he suffers from legal pneumoconiosis, the rebuttable presumption at Section 718.203(b) does not extend to cases of chronic obstructive pulmonary disease). Thus, if the administrative law judge finds legal pneumoconiosis established on remand, the finding that it arose out of coal mine employment is subsumed in that determination, and the administrative law judge would not need to separately consider whether pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.⁷

that the administrative law judge mischaracterized the record by finding that claimant did not have a history of asthma.

⁶ Employer has not challenged the administrative law judge’s analysis of Dr. Simpao’s opinion, that claimant had legal pneumoconiosis. Employer states that the administrative law judge permissibly discredited it based on Dr. Simpao’s lack of expertise. Employer’s Brief at 9 n.1. We agree with employer that the administrative law judge noted that Dr. Simpao, unlike Drs. Baker, Repsher, and Fino, was not a Board-certified pulmonologist. Decision and Order at 9. We disagree with employer, however, that the administrative law judge did not consider or credit Dr. Simpao’s opinion for this reason, as the administrative law judge refers to Dr. Simpao’s opinion numerous times. Accordingly, on remand, the administrative law judge should consider Dr. Simpao’s opinion regarding the existence of legal pneumoconiosis, along with the other medical opinions, in light of the physicians’ credentials, the testing they performed, and the detail and completeness of their analysis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

⁷ Because the administrative law judge found that claimant has failed to establish clinical pneumoconiosis, the presumption at 20 C.F.R. §718.203(b) is unavailable in this case.

Finally, employer contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Because the administrative law judge's analysis regarding the existence of legal pneumoconiosis affects his analysis regarding disability causation, we vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c),⁸ and remand the case for further consideration of the evidence thereunder, if reached.

⁸ Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge