

BRB No. 08-0597 BLA

W.G. (deceased)¹)
)
 Claimant-Respondent)
)
 v.)
)
 ISLAND CREEK 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 Awarding Benefits on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (04-BLA-5435) of Administrative Law Judge Janice K. Bullard (the administrative law judge) rendered 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 case is before the Board for the second time.

¹ By letter dated November 18, 2008, the miner's counsel informed the Board that the miner died on October 28, 2008, and that the miner's widow is pursuing his claim on his behalf.

Claimant filed this initial claim for benefits on January 22, 2002. Director's Exhibit 2. The administrative law judge credited claimant with 26.62 years of coal mine employment,² and found that claimant 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 in the administrative law judge's evaluation of the x-rays, CT scans, and medical opinions, and affirmed the award of benefits.³ [*W.G.*] v. *Island Creek Coal Co.*, No. 05-0559 BLA, slip op. at 4 (Feb. 15, 2006)(unpub.).

Upon review of employer's appeal, the United States Court of Appeals for the Fourth Circuit vacated the award of benefits. *Island Creek Coal Co. v. [W.G.]*, No. 06-1435 (4th Cir. Aug. 17, 2007)(unpub.). The Fourth Circuit rejected employer's allegation of error regarding the x-ray evidence, but held that the administrative law judge erred in evaluating the CT scans and medical opinions. [*W.G.*], No. 06-1435, slip op. at 5. Specifically, the court held that, contrary to the administrative law judge's finding that the record did not document how negative CT scan readings compared with the positive x-rays, the record contained evidence that the CT scans are "at least equivalent" to the chest x-rays, and thus "directly contradict" the positive x-ray readings. [*W.G.*], No. 06-1435, slip op. at 6. Further, the court held that the administrative law judge did not adequately explain why she credited the opinion of Dr. Rasmussen over those of Drs. Zaldivar and Crisalli, who are more highly qualified in pulmonary medicine. *Id.* The court additionally held that the administrative law judge substituted her judgment for that of a medical expert and selectively analyzed the evidence, when she found that Dr. Zaldivar excluded pneumoconiosis based on a negative x-ray, and opined that coal mine dust exposure cannot cause an obstructive impairment. [*W.G.*], No. 06-1435, slip op. at

² The law of the United States Court of Appeals for the Fourth Circuit is applicable as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ The Board affirmed, as unchallenged on appeal, the finding that claimant was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). [*W.G.*] v. *Island Creek Coal Co.*, No. 05-0559 BLA, slip op. at 2 n.1 (Feb. 15, 2006)(unpub.). With respect to the medical opinions, the Board held that the administrative law judge erred in mechanically according greater weight to the opinion of claimant's treating physician, Dr. Jarvis. However, the Board concluded that the error was harmless, because the administrative law judge permissibly credited Dr. Rasmussen's opinion that claimant had totally disabling pneumoconiosis. [*W.G.*], slip op. at 6-7.

7-8. Moreover, Dr. Crisalli's report and deposition testimony "ruled out coal dust exposure as the cause for [claimant's] respiratory impairment because the objective evidence overwhelmingly supported a diagnosis of bullous emphysema, which [Dr. Crisalli] testified he had never seen in miners who had not smoked." [W.G.], No. 06-1435, slip op. at 8. Therefore, the court held that the administrative law judge erred in discrediting Dr. Crisalli's opinion because he did not explain why he eliminated coal dust exposure as a cause of claimant's impairment. *Id.* Finally, in light of the administrative law judge's error in evaluating the CT scans and medical opinions, the court concluded that her error in weighing the opinion of Dr. Jarvis, the miner's treating physician, was not harmless. *Id.* Accordingly, the court remanded the case for further consideration of the existence of pneumoconiosis.

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. The administrative law judge further determined that the medical opinion evidence established that claimant was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding the existence of pneumoconiosis and total disability due to pneumoconiosis established. Claimant responds in support of the award of benefits. Employer has filed a reply brief reiterating its contentions.⁴ The Director, Office of Workers' Compensation Programs, has declined to file a response in this appeal.

On remand, the administrative law judge did not follow the instructions of the Fourth Circuit, and therefore, employer's arguments have merit.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 living miner's claim, claimant must establish the existence of pneumoconiosis, that the

⁴ Employer has not challenged the administrative law judge's finding that the negative CT scan readings were not sufficiently reliable or probative to be dispositive of whether the miner had pneumoconiosis, and thus did not outweigh the x-rays and medical opinions diagnosing pneumoconiosis. Decision and Order on Remand at 5, 11. The finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four medical opinions. Drs. Zaldivar⁵ and Crisalli⁶ opined that claimant did not suffer from clinical or legal pneumoconiosis,⁷ while Drs. Jarvis⁸ and Rasmussen⁹ opined that he

⁵ Dr. Zaldivar opined that none of claimant's pulmonary impairment was related to, or aggravated by, his occupational exposure to coal mine dust, and that claimant's respiratory impairment was due entirely to emphysema caused by cigarette smoking, and asthma. Director's Exhibit 26; Employer's Exhibits 18, 21. Dr. Zaldivar also explained that:

The fact that the chest x-ray does not show any reaction to coal dust that is visible as pneumoconiosis means that there is insufficient dust inhaled into his lungs for the dust to have caused any damage. . . . In the case of [claimant] there is absolutely no evidence that any dust was inhaled in the lungs to have caused any degree of damage. On the other hand, smoking will result in no radiographic changes other than hyperinflation of emphysema.

Director's Exhibit 26 at 3.

⁶ Dr. Crisalli diagnosed emphysema and bronchitis, and opined that both were caused entirely by smoking. Dr. Crisalli also explained that the type of emphysema that claimant had is not seen in coal workers' pneumoconiosis. Employer's Exhibit 4 at 5.

⁷ "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).

⁸ Dr. Jarvis, claimant's treating physician, opined that claimant had clinical pneumoconiosis based on x-ray evidence, and that claimant's pulmonary disease was "significantly related to dust exposure in coal mine employment." Claimant's Exhibit 2 at 1. Dr. Jarvis stated that claimant was exposed to a significant amount of coal dust during his employment, and that claimant's pulmonary function and blood gas studies indicated a moderate impairment. Dr. Jarvis further opined that claimant's twenty to thirty pack-year smoking history "undoubtedly aggravated" claimant's respiratory condition. *Id.*

⁹ Dr. Rasmussen diagnosed clinical coal workers' pneumoconiosis by x-ray, and emphysema and bronchitis due to both smoking and coal dust exposure. Director's

had both clinical and legal pneumoconiosis. Finding the opinions of Drs. Jarvis and Rasmussen to be better reasoned and documented than the opinions of Drs. Zaldivar and Crisalli, the administrative law judge determined that the medical opinion evidence supported a finding of pneumoconiosis. Decision and Order on Remand at 11.

Employer asserts that the administrative law judge erred in discounting Dr. Zaldivar's opinion. Employer's Brief at 7, 10. We agree. The administrative law judge found that Dr. Zaldivar's opinion was not well-reasoned or documented because, although Dr. Zaldivar explained how he ruled out coal mine dust exposure as a cause of claimant's emphysema, he relied heavily on a negative x-ray to exclude pneumoconiosis and failed to provide any explanation for excluding coal dust as a cause or aggravating factor of claimant's asthma. Decision and Order on Remand at 6-7. As employer asserts, the Fourth Circuit previously rejected the administrative law judge's finding that Dr. Zaldivar's opinion was inconsistent with the regulatory provision that a claim shall not be denied solely on a negative x-ray. [*W.G.*], No. 06-1435, slip op. at 7. The court explained that "Dr. Zaldivar did not opine that pneumoconiosis can never be diagnosed without a positive x-ray reading, but stated that in this case [claimant's] x-ray did not exhibit any signs that he had inhaled sufficient dust to cause any damage to his lungs to explain the pulmonary symptoms he exhibited." *Id.* On remand, however, the administrative law judge again concluded that it was "reasonable to infer that Dr. Zaldivar gave considerable weight to the lack of [x]-ray evidence of pneumoconiosis." Decision and Order on Remand at 6. As this line of reasoning was rejected by the Fourth Circuit, this was not a valid reason to discount Dr. Zaldivar's opinion that claimant did not have legal pneumoconiosis.

Further, although the administrative law judge determined that Dr. Zaldivar did not explain how he excluded coal mine dust exposure as a cause of claimant's asthma, the administrative law judge failed to explain this finding in light of the fact that the record contains no evidence relating claimant's asthma to coal mine dust exposure, and the administrative law judge did not find that claimant established that his asthma arose out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); Employer's Brief at 10. Therefore, the administrative law judge did not provide a valid reason for discrediting Dr. Zaldivar's opinion.

Exhibit 12 at 4, 6-7; Claimant's Exhibit 1 at 3. Dr. Rasmussen explained that epidemiologic studies have shown that coal mine dust exposure causes bronchitis and emphysema, and that both smoking and coal dust may cause chronic lung disease in the absence of radiographic changes of pneumoconiosis. Claimant's Exhibit 1 at 3-4.

We additionally find merit in employer's contention that the administrative law judge did not state a valid reason for discounting Dr. Crisalli's opinion. Employer's Brief at 11. The administrative law judge found that Dr. Crisalli's opinion was not well-reasoned or documented because, although his finding that claimant's emphysema was due entirely to smoking was "credible," Dr. Crisalli did not discuss the etiology of claimant's bronchitis, or explain why he discounted claimant's exposure to coal mine dust as a cause of claimant's impairment. Decision and Order on Remand at 8. Contrary to the administrative law judge's finding, Dr. Crisalli explicitly opined that "[claimant] has significant pulmonary disease, but this is related entirely to his cigarette smoking history, which has caused emphysema and chronic bronchitis." Employer's Exhibit 4 at 5. As noted above, the Fourth Circuit held that Dr. Crisalli's explanation "ruled out coal dust exposure as the cause for [claimant's] respiratory impairment," and that it was therefore error to discount Dr. Crisalli's opinion on the basis that he did not explain why he eliminated coal dust exposure as a cause of the impairment. [W.G.], No. 06-1435, slip op. at 8. Consequently, the administrative law judge on remand did not provide a valid reason for discrediting Dr. Crisalli's opinion.

With respect to the contrary medical opinions of record, we also find merit in employer's assertion that the administrative law judge failed to state valid reasons for her credibility determinations. The administrative law judge determined that Dr. Jarvis's opinion was well-reasoned and documented and entitled to "substantial weight" in light of his status as claimant's treating physician, because Dr. Jarvis relied on ten years of treating claimant, a physical examination, x-rays, a pulmonary function study, and blood gas studies. Decision and Order on Remand at 9. However, as employer asserts, the administrative law judge did not explain her credibility determination in light of the fact that Dr. Jarvis did not discuss any specific pulmonary function or blood gas studies, or explain how the objective studies supported his conclusion. See *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); Employer's Brief at 16; Claimant's Exhibit 2. Further, the administrative law judge did not explain how the tests that Dr. Jarvis ordered gave him "superior knowledge about and understanding of [c]laimant's respiratory condition," Decision and Order on Remand at 9, than was possessed by the other physicians of record. See 20 C.F.R. §718.104(d)(1)-(4).

The above errors affected the administrative law judge's evaluation of Dr. Rasmussen's opinion. The administrative law judge explained that Dr. Rasmussen's opinion was reasoned and well-documented,¹⁰ and in crediting his opinion over the contrary opinions of record, the administrative law judge found that the opinions of Drs.

¹⁰ Employer does not challenge this finding on appeal. It is therefore affirmed. See *Skrack*, 6 BLR at 1-711.

Zaldivar and Crisalli were less persuasive because the doctors did not adequately address the effect of coal mine dust exposure on claimant's pulmonary impairment. However, as discussed above, the administrative law judge's evaluation of the opinions of Drs. Zaldivar and Crisalli on that issue was erroneous. Additionally, in crediting Dr. Rasmussen's opinion, that claimant's emphysema arose out of coal mine employment, the administrative law judge did not resolve the conflict in the medical opinion evidence as to the etiology of claimant's emphysema.¹¹ See *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993).

In light of the foregoing, we must vacate the administrative law judge's findings at Section 718.202(a)(4), and remand the case for further consideration. On remand, the administrative law judge must resolve the conflict in the medical opinion evidence with respect to the existence of both clinical pneumoconiosis and legal pneumoconiosis, specifically, the etiology of claimant's emphysema and bronchitis. See 20 C.F.R. §718.201(a)(2); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999); *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127. In so doing, the administrative law judge must explain her credibility determinations in light of the comparative credentials 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 20 C.F.R. §718.104(d)(5); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Further, the administrative law judge must bear in mind that it is not employer's burden to establish an absence of pneumoconiosis; rather, it is claimant's burden to establish the existence of the disease. See *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12.

¹¹ Although the administrative law judge determined that Drs. Zaldivar and Crisalli failed to adequately address the effect of claimant's many years of coal dust exposure, she failed to reconcile this finding with her findings that Dr. Crisalli's opinion, that claimant's emphysema was caused entirely by smoking, was "credible," and that Dr. Zaldivar "explained how he concluded that [c]laimant's emphysema was due solely to [his] smoking history." Decision and Order on Remand at 7, 10.

On remand, after reconsidering the medical opinions, the administrative law judge must weigh all relevant evidence together pursuant to 20 C.F.R. §718.202(a), and determine whether the evidence as a whole establishes the existence of clinical or legal pneumoconiosis, or both. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174.

In light of our determination to vacate the administrative law judge's finding as to the existence of pneumoconiosis, we additionally vacate her finding that pneumoconiosis was a substantially contributing cause of claimant's total disability under 20 C.F.R. §718.204(c). If reached, on remand, the administrative law judge must again consider the relevant evidence on this issue and explain her credibility determinations pursuant to 20 C.F.R. §718.204(c).

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge