BRB No. 10-0347 BLA

TERRY HAYTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACK DIAMOND CONSTRUCTION COMPANY	)	
	)	
	)	DATE ISSUED: 03/24/2011
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (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:

Employer appeals the Decision and Order Granting Benefits (05-BLA-5744) of Administrative Law Judge Pamela Lakes Wood 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). Claimant filed this claim for benefits on November 20, 2002. Director's Exhibit 2. The administrative law judge found that claimant worked for employer as a miner, credited claimant with 15.1 years of coal mine employment,[1] and determined that employer is the responsible operator. Considering the merits of the claim, 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), claimant established the existence of legal pneumoconiosis,[2] in the form of obstructive lung disease due, in part, to coal mine dust exposure, based on the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the evidence together, the administrative law judge found that the existence of legal pneumoconiosis was established pursuant to Section 718.202(a). Further, the administrative law judge found that claimant is totally disabled by a respiratory or pulmonary impairment that is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in determining that claimant worked as a miner, as defined in the Act, and that employer is the responsible operator. Employer also challenges the administrative law judge's findings regarding the existence of legal pneumoconiosis and the cause of claimant's total disability.[3] Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge properly determined

[1] As claimant was last employed in the coal mining industry in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 4, 7.

[2] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[3] We affirm the administrative law judge's finding that total disability was established pursuant to 20 C.F.R. §718.204(b)(2), as it is not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

that claimant was a miner and that employer is the responsible operator.[4] Employer has filed a reply brief, reiterating its allegations of error.

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).

Claimant's Status as a Miner

Employer challenges the administrative law judge's finding that claimant worked for employer as miner. Specifically, employer asserts that the administrative law judge deprived employer of due process when she applied 20 C.F.R. §725.202 to assess whether claimant's construction work constituted the work of a miner.

The definition of "miner" includes "any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a). Construction workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted by evidence demonstrating that a worker was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility, or that the worker did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

The administrative law judge found that claimant worked in or around a coal mine, performing construction and maintenance work for a "significant portion" (8.5 years) of the ten years that he worked for employer.[5] Decision and Order at 18. The administrative law judge, therefore, presumed that claimant was exposed to coal mine dust during that time period. *Id*. The administrative law judge further found that

[4] As the Director, Office of Workers' Compensation Programs, accurately notes, the recent amendments to the Black Lung Benefits Act that became effective on March 23, 2010, do not affect this case, as the claim at issue was filed before January 1, 2005.

[5] Based on claimant's testimony at the hearing, the administrative law judge found that claimant's job duties included constructing coal mine facilities, building roads on the mine site, maintaining and repairing a belt line, driving trucks, drilling, and laying pipe. Decision and Order at 4-5.

employer's evidence that it used dust reduction measures, when viewed in light of claimant's testimony about his working conditions on the mine site, did not establish that claimant was not regularly exposed to coal mine dust. Decision and Order at 19. The administrative law judge, therefore, found that claimant was a miner.

Employer asserts that, because the revised version of Section 725.202 applied by the administrative law judge was intended to "overrule" circuit court decisions that limited coverage of construction activities to work involving dust exposure from the extraction or preparation of coal, the administrative law judge retroactively applied "a new standard that is a denial of due process." Employer's Brief at 39. We disagree. This claim was filed after the revised regulations took effect on January 19, 2001. Therefore, it is governed by those regulations, *see* 20 C.F.R. §725.2, and there is no retroactive application of a new standard. Moreover, the revisions to Section 725.202(b) did not alter the standard of the United States Court of Appeals for the Fourth Circuit, which permitted coverage of coal mine construction work without any showing that the work was related to the extraction or preparation of coal. *See Glem Co. v. McKinney*, 33 F.3d 340, 342, 18 BLR 2-368, 2-371-72 (4th Cir. 1994); 65 Fed. Reg. 69930, 79961 (Dec. 20, 2000). As employer makes no other arguments regarding the administrative law judge's finding that claimant was a miner, we affirm that finding.

Responsible Operator

Employer next challenges its designation as the responsible operator, contending that it did not employ claimant for the requisite number of working days. The regulations impose liability for the payment of benefits on the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year. 20 C.F.R. §§725.494(c), 725.495(a)(1). A "year" is defined as "one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'"[6] 20 C.F.R. §725.101(a)(32). Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii). Here, it is undisputed that claimant was employed with employer from June 1991 through January 2002. Thus, the burden shifted to employer to establish that claimant did not work 125 working days. *See* 20 C.F.R. §725.101(a)(32)(ii).

[6] A working day is "any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave." 20 C.F.R. §725.101(a)(32).

The administrative law judge found that employer did not establish that claimant worked for it as a miner for less than 125 days in a calendar year. The administrative law judge considered employer's argument, based on the testimony of claimant's supervisor, that claimant spent only about five percent of his time performing maintenance on a belt line, the dustiest job claimant had. The administrative law judge, however, stressed that claimant's other jobs for employer constituted coal mine employment as well, noting that he spent thirty-five to forty percent of his time doing general labor work. Decision and Order at 21.

Employer contends that the administrative law judge erred because she did not address whether the evidence established that claimant worked for 125 days in any calendar year, and states that the evidence is "unclear" as to whether claimant reached the 125 working days necessary. Employer's Brief at 39. Employer's contention lacks merit. The administrative law judge inquired whether claimant worked for 125 days in a calendar year. Decision and Order at 21. Further, as it was employer's burden to demonstrate that claimant did not work for 125 working days, any ambiguity in the evidence does not assist employer. *See* 20 C.F.R. §725.101(a)(32)(ii); *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-73 (1996)(*en banc*)(noting, under an analogous provision, that the party opposing entitlement must "establish that the miner's employment was not regular by proving that the miner was not employed in or around a coal mine for . . . at least 125 working days during the year"). Therefore, we reject employer's contention, and affirm the administrative law judge's finding that employer is the responsible operator.[7]

Merits of Entitlement

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[7] Employer argues further that the administrative law judge erred in finding that, even focusing solely on the five percent of claimant's time that he spent working on the belt line, five percent of either ten years or 8.5 years exceeds 125 working days. Employer's Brief at 39. Because the administrative law judge provided a valid, alternative basis for finding that employer is the responsible operator, we need not address this argument, as any error in the administrative law judge's statement is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Employer contends that the administrative law judge erred in her analysis of the medical opinion evidence when she found legal pneumoconiosis established under 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Mullins, Rasmussen, Bellotte, and Zaldivar, along with claimant's medical treatment records.[8] All four physicians examined and tested claimant, and reviewed his medical treatment records. Drs. Mullins and Rasmussen opined that claimant has chronic obstructive pulmonary disease (COPD) and emphysema due to both smoking and coal mine dust exposure. Director's Exhibit 16; Claimant's Exhibit 4, 7, 14. In contrast, Drs. Bellotte and Zaldivar opined that claimant has COPD with emphysema due solely to smoking, and asthma that is unrelated to his coal mine dust exposure. Employer's Exhibits 9, 10, 19; Hearing Transcript at 101-78.

Considering the medical opinions and the physicians' qualifications, the administrative law judge discounted Dr. Mullins' opinion because the doctor understated claimant's smoking history, overstated the length of his coal mine employment, and did not adequately explain her opinion. The administrative law judge further found that Dr. Rasmussen's opinion, attributing claimant's COPD to both coal mine dust exposure and smoking, was well-reasoned and more consistent with claimant's occupational and smoking histories, and the admissible evidence of record, than were the contrary opinions of Drs. Bellotte and Zaldivar. The administrative law judge, therefore, found legal pneumoconiosis established, based on Dr. Rasmussen's opinion.

Employer alleges multiple errors in the administrative law judge's analysis of the medical opinions. Employer contends, *inter alia*, that the administrative law judge erred in failing to remand this case to the district director for further evidentiary development, once she determined that Dr. Mullins' opinion was not well-documented or reasoned. Employer further asserts that the administrative law judge erred in her analysis of the physicians' respective qualifications, failed to properly weigh the medical opinion of a treating physician, and failed to provide adequate rationales for crediting and discrediting the medical opinions. Some of employer's contentions have merit.

Employer asserts that, because the administrative law judge discounted the opinion of the Department of Labor examining physician, Dr. Mullins, that claimant's COPD is due to both smoking and coal mine dust exposure, the administrative law judge was required to remand the case to the district director for a complete pulmonary evaluation to be provided to claimant. Employer's Brief at 23-24. The Director responds

[8] Additionally, the administrative law judge reviewed the deposition of Dr. Menzel, claimant's treating physician. The administrative law judge noted, accurately, Dr. Menzel's testimony that she is not qualified to determine the etiology of claimant's obstructive lung disease. Employer's Exhibit 20.

that employer lacks standing to raise this argument. Director's Brief at 7. We agree with the Director. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b). As the pulmonary evaluation that the Director must provide is for the benefit of the miner, employer lacks standing to argue that Dr. Mullins' opinion was deficient and therefore did not provide claimant with a complete pulmonary evaluation. *See Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-197 (2002)(*en banc*); 20 C.F.R. §802.201(a).

Additionally, we reject employer's argument that the administrative law judge erred in finding Dr. Rasmussen to be well-qualified to render an opinion on claimant's pulmonary condition, when Dr. Rasmussen is not Board-certified in Pulmonary Diseases, as are Drs. Bellotte and Zaldivar. Employer's Brief at 21. The administrative law judge considered that Dr. Rasmussen is Board-certified in Internal Medicine only, but reasonably determined that his lack of certification in Pulmonary Disease was "not dispositive," Decision and Order at 26, in view of Dr. Rasmussen's experience in the field of pulmonary medicine. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-236 (4th Cir. 1998); *Kiser v. L & J Equip. Co.*, 24 BLR 1-246, 1-251 n.6 (2006).

Further, we find no merit in employer's argument that the administrative law judge failed to properly analyze Dr. Bellotte's opinion as that of a treating physician under 20 C.F.R. §718.104. Employer's Brief at 19-20. The administrative law judge considered that Dr. Bellotte interpreted a pulmonary function study that was administered at United Hospital Center (UHC) on April 19, 1994, and later, provided a pulmonary consultation during claimant's hospitalization at UHC, on July 9, 2003. Decision and Order at 13-14, 26; Claimant's Exhibit 1 at 33; Employer's Exhibit 14. As this was the extent of any treatment by Dr. Bellotte that was documented in the record, the administrative law judge found that Dr. Bellotte had treated claimant only "incidentally," and that the treatment did not appear to be the basis for Dr. Bellotte's opinion in this case. Decision and Order at 26. The administrative law judge's analysis is consistent with 20 C.F.R. §718.104(d)(1)-(4), and is supported by substantial evidence. We therefore reject employer's argument that the administrative law judge erred in declining to accord Dr. Bellotte's opinion greater weight, based on his treatment of claimant.

There is merit, however, in employer's contention that the administrative law judge did not adequately explain her reasons for crediting Dr. Rasmussen's opinion. The administrative law judge found that Dr. Rasmussen's opinion was well-documented and reasoned, and more consistent with the facts as found by the administrative law judge. As employer alleges, however, the administrative law judge did not address the fact that Dr. Rasmussen relied on a twenty-four-year history of coal mine employment, while the administrative law judge credited claimant with fifteen years. This issue is relevant,

since the administrative law judge discounted Dr. Mullins' opinion because she found that Dr. Mullins relied on an "overstated" coal mine employment history of twenty-three years. Decision and Order at 27; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-236; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

The administrative law judge further found that Dr. Rasmussen's "mixed dust theory" better accounted for the kind of dust exposure that claimant likely experienced during his work for employer, and before, when he worked outside the mines. Decision and Order at 30. Employer alleges that Dr. Rasmussen did not posit a mixed dust theory to diagnose legal pneumoconiosis. It is unclear from a review of Dr. Rasmussen's medical report and deposition what aspect of Dr. Rasmussen's opinion the administrative law judge was referring to. Further, as employer argues, the administrative law judge did not explain the relevance of claimant's dust exposure in non-coal mine employment, which she apparently included in her analysis of the credibility of Dr. Rasmussen's opinion.[9] Additionally, while the administrative law judge noted accurately that Dr. Rasmussen explained that the specific pattern of claimant's pulmonary impairment was consistent with a coal mine dust-related condition, she did not address the testimony of Drs. Bellotte and Zaldivar, disagreeing with this aspect of Dr. Rasmussen's opinion, or provide a basis for crediting it over their testimony. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-236; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4), and remand this case for her to reconsider Dr. Rasmussen's opinion.[10]

[9] In including claimant's employment outside the mines as a source of his mixed dust exposure, the administrative law judge apparently was referring to claimant's previous work in foundries and as a street sweeper, where he was exposed to silica and asbestos. Decision and Order at 4.

[10] However, we reject employer's allegation that Dr. Rasmussen's opinion attributing claimant's chronic obstructive pulmonary disease (COPD) to both smoking and coal mine dust exposure is unreasoned as a matter of law, because Dr. Rasmussen stated that he could not distinguish between the effects of coal mine dust exposure and smoking in causing claimant's COPD. To establish legal pneumoconiosis, claimant need only prove that his COPD is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). There is no requirement that coal mine dust exposure be the sole cause of claimant's respiratory or pulmonary problems. We likewise reject employer's assertion that the administrative law judge erred in failing to consider whether Dr. Rasmussen's x-ray diagnosis of clinical pneumoconiosis undermined his diagnosis of legal pneumoconiosis, since the administrative law judge found that the x-ray evidence did not establish clinical pneumoconiosis. There is no indication that Dr. Rasmussen relied on a positive x-ray

Further, the administrative law judge did not adequately explain her bases for discrediting the opinions of Drs. Bellotte and Zaldivar, that claimant suffers from lung diseases unrelated to his coal mine employment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-236; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. The administrative law judge noted that Drs. Bellotte and Zaldivar reviewed certain x-ray readings, and that Dr. Bellotte reviewed a pulmonary function study, which were not admitted into evidence. She therefore stated that, to the extent the doctors relied on that evidence to conclude that claimant does not have legal pneumoconiosis, she did not credit their opinions. As employer argues, however, the administrative law judge did not identify the extent to which she found that the doctors relied on that excess evidence to conclude that claimant's COPD is unrelated to coal mine dust exposure, or discuss whether the doctors had a basis in the admissible evidence for their conclusions regarding the etiology of claimant's impairment. *See* 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); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). Further, the administrative law judge found that Drs. Bellotte and Rasmussen did not adequately address Dr. Rasmussen's "mixed dust theory" that incorporated claimant's occupational dust exposure outside of the mines. As discussed above, the administrative law judge did not adequately explain her analysis of the mixed dust issue, and must do so on remand. Additionally, the administrative law judge did not consider all of Dr. Bellotte's deposition, in particular, his explanation of his opinion that claimant's condition was unrelated to coal mine dust exposure. Employer's Exhibit 18.

Accordingly, we vacate the administrative law judge's finding of legal pneumoconiosis, and remand this case for further consideration. On remand, the administrative law judge must resolve the conflicting opinions, taking into account the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In assessing the documentation of the medical opinions, the administrative law judge, on remand, should indicate the weight, if any, she accords to the consultation reports and treatment records of claimant's treating physicians, including those of Drs. Abrahams and Rajjoub, relating to whether claimant suffers from asthma. Claimant's Exhibit 1; Employer's Exhibits 1, 13. Additionally, in considering the medical opinions, on remand, the administrative law judge must make a specific finding

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reading for clinical pneumoconiosis to diagnose claimant with COPD and emphysema due, in part, to coal mine dust exposure. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-173 (4th Cir. 2000).

as to the length of claimant's smoking history, and then reconsider the medical opinions in light of this determination, as it could affect the relative credibility of the physicians' opinions regarding the cause of claimant's COPD.[11] *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Employer next challenges the administrative law judge's finding that claimant is totally disabled due to legal pneumoconiosis, pursuant to Section 718.204(c). Because we have vacated the administrative law judge's finding of legal pneumoconiosis, we also vacate her finding of total disability due to pneumoconiosis pursuant to Section 718.204(c), and instruct the administrative law judge to reconsider this issue, if reached, on remand.

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[11] A review of the record reflects differing smoking histories for claimant. Employer's Brief at 32-33 (summarizing smoking histories). Claimant testified that he smoked approximately one and one-half packs of cigarettes per day, off and on, from age eighteen or nineteen until 2003. Hearing Transcript at 33. Dr. Mullins recorded a smoking history of one and one-half packs per day for twenty-five years. Director's Exhibit 16. Apparently relying on claimant's testimony, the administrative law judge found that Dr. Mullins understated claimant's smoking history, "which extended at a rate of about one and one half packs daily for about 34 years. . . ." Decision and Order at 27 n.23. The administrative law judge, however, did not address other smoking histories in the record. In a report dated July 8, 2003, Dr. Bellotte reported that claimant smoked one to two packs per day for twenty-five to thirty years, Employer's Exhibit 17, and in a September 4, 2003 report, Dr. Bellotte recorded a smoking history of one to two packs per day for thirty-three years. Employer's Exhibit 9. In a 2008 report, Dr. Bellotte noted a smoking history of one and one-half pack per day for thirty years, which he stated was a forty-five pack-year history. Employer's Exhibit 18. In a 2004 report, Dr. Zaldivar referred to claimant's "lifelong smoking habit." Employer's Exhibit 10. In a 1987 report, Dr. Ansinelli reported a forty-five pack year history of smoking, Employer's Exhibit 11; in a 1991 report, Dr. Navada reported that claimant smoked two packs per day, but did not specify the duration, Employer's Exhibit 12; and in a 2006 report, Dr. Abrahams stated that claimant smoked one to two packs per day for most of his life, and had quit two and a half years earlier. Employer's Exhibit 13. In a 2003 report, Dr. Rasmussen noted that claimant smoked one to one and one-half packs per day from 1966 until 2003, Claimant's Exhibit 4; in a May 15, 2008 report, Dr. Rasmussen recorded claimant's smoking history as one and one-half packs per day for twenty-eight to thirty years, for a fifty pack year history, Claimant's Exhibit 7; and in a September 10, 2008 report, Dr. Rasmussen noted that claimant smoked for thirty to forty years. Claimant's Exhibit 14. Dr. Rajjoub, in a 2004 report, relied upon a smoking history of one to one and one-half packs per day for twenty-five years, and noted that claimant stopped smoking two years earlier. Claimant's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, vacated in part, and this 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