

BRB No. 08-0581 BLA

J.S.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DONNA KAYE COAL COMPANY)	DATE ISSUED: 05/27/2009
)	
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 on Remand Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand Award of Benefits (04-BLA-6267) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent 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).¹ This is the second

¹ Claimant's first claim was filed on August 21, 1990. On June 26, 1992, Administrative Law Judge Donald B. Jarvis denied benefits because claimant failed to establish the existence of pneumoconiosis and total disability. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*J.S.*] *v. Donna Kay Coal Co.*, BRB

time that this case has been before the Board. Initially, the administrative law judge credited claimant with “at least twenty years” of coal mine employment² and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that there was a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge found that, although the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), when he weighed together the x-ray, biopsy, CT scan, and medical opinion evidence submitted pursuant to 20 C.F.R. §718.202(a)(1)-(4), the weight of all the medical evidence did not establish the existence of pneumoconiosis. The administrative law judge further found that all of the relevant medical evidence established that claimant is totally disabled, but did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant’s appeal, the Board held that the administrative law judge erred in weighing together the x-ray, biopsy, CT scan, and medical opinion evidence to find that the existence of pneumoconiosis was not established. [*J.S.*] v. *Donna Kaye Coal Co.*, BRB No. 06-0654 BLA (May 31, 2007)(Boggs, J., concurring and dissenting)(unpub.). Noting that 20 C.F.R. §718.202(a) provides alternative methods of establishing the existence of pneumoconiosis, the Board affirmed the administrative law judge’s unchallenged finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).³ Therefore, the Board reversed the administrative law judge’s finding that the evidence did not establish the existence of

No. 92-2267 BLA (Apr. 26, 1994)(unpub.); Director’s Exhibit 1. Claimant filed his current claim on December 31, 2002. Director’s Exhibit 3.

² The record indicates that claimant’s coal mine employment was in Kentucky. Director’s Exhibits 4, 6, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ The Board noted that, although the United States Courts of Appeals for the Fourth and Third Circuits have held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a), *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the Board has declined to apply the holdings of *Compton* and *Williams* to cases outside the jurisdiction of the Fourth and Third Circuits. [*J.S.*] v. *Donna Kaye Coal Co.*, BRB No. 06-0654 BLA, slip op. at 3 (May 31, 2007)(Boggs, J., concurring and dissenting)(unpub.).

pneumoconiosis pursuant to 20 C.F.R. §718.202(a).⁴ Additionally, the Board vacated the administrative law judge's finding that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), as that finding was affected by the administrative law judge's weighing together of all the evidence at 20 C.F.R. §718.202(a). Thus, the Board remanded the case for the administrative law judge to reconsider whether claimant is totally disabled due to pneumoconiosis.⁵ On November 30, 2007, the Board denied employer's motion for reconsideration. [*J.S.*] v. *Donna Kaye Coal Co.*, BRB No. 06-0654 BLA (Nov. 30, 2007)(Order on Recon. *En Banc*)(unpub.).

On remand, the administrative law judge found that, because claimant had at least twenty years of coal mine employment, he was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and further found that employer did not rebut the presumption. The administrative law judge also found that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer requests that the Board reconsider its reversal of the administrative law judge's prior finding that the existence of pneumoconiosis was not established. Employer further asserts that the administrative law judge erred in finding that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). Further, employer challenges the administrative law judge's finding that claimant's disability is due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's findings. The Director, Office of Workers' Compensation Programs, submitted a letter stating that he will not file a brief in this appeal; however, he urges the Board to reject employer's request to revisit the issue of the existence of pneumoconiosis. Employer has filed a reply brief, reiterating its allegations.

⁴ On the pneumoconiosis issue, Judge Boggs dissented, stating that, although 20 C.F.R. §718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis, the administrative law judge should be able to consider all of the relevant evidence, including the negative biopsy evidence, pursuant to the statutory requirement that all relevant evidence be considered. [*J.S.*], slip op. at 5-6. Because it was unclear that the administrative law judge had actually found the existence of pneumoconiosis established by the x-ray evidence, Judge Boggs would have vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a) and remanded the case for him to further consider the evidence. [*J.S.*], slip op. at 6.

⁵ The Board affirmed the administrative law judge's findings that the new evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and that total disability was established on the merits, as these findings were not challenged on appeal. [*J.S.*], slip op. at 2 n.2.

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).

To establish entitlement to benefits under Part 718 in a living 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

As a preliminary matter, we decline to address employer's assertion that the Board reconsider its reversal of the administrative law judge's prior finding that the existence of pneumoconiosis was not established. This issue was resolved in the Board's 2007 Decision and Order and its 2007 Order on Reconsideration *En Banc*, and therefore this ruling constitutes the law of the case with regard to this issue. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Employer has not shown a basis for an exception to this doctrine, *see Williams*, 22 BRBS at 237, and its contentions in this regard are without merit.

Pursuant to Section 718.203(b), employer asserts that the administrative law judge's finding that claimant's pneumoconiosis arose out of his coal mine employment was based on an unlawful finding as to claimant's work history. Specifically, employer notes that in the initial claim, Administrative Law Judge Donald B. Jarvis credited claimant with 7.39 years of coal mine employment, while the current administrative law judge credited him with "at least twenty years" of coal mine employment. Employer argues that the administrative law judge "was not permitted to revisit Judge Jarvis's finding in the context of this duplicate claim." Employer's Brief at 20.

We reject employer's contention that the administrative law judge was barred from making a different length of coal mine employment finding in this subsequent claim. The regulation governing subsequent claims states:

If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see §725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. §725.309(d)(4). It is undisputed that the length of claimant's coal mine employment was contested before Judge Jarvis, and there was no stipulation regarding that issue. In the current claim, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement. Therefore, it was proper for him to make a length of coal mine employment finding. *See* 20 C.F.R. §725.309(d)(4). The record reflects that the length of claimant's coal mine employment was raised as a hearing issue. Director's Exhibit 42. Additionally, the administrative law judge explained that he found it appropriate to reconsider the length of coal mine employment issue because, in the prior claim, Judge Jarvis did not have the benefit of the Social Security Administration (SSA) earnings records that were submitted in this claim. 2006 Decision and Order at 5-6. Employer alleges no specific error in the administrative law judge's finding that the SSA earnings records, and claimant's W-2 forms, pay stubs, and testimony established "at least twenty years" of coal mine employment. *Id.* The finding is therefore affirmed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Thus, the administrative law judge properly relied on "at least twenty years" of coal mine employment to find that claimant was entitled to the Section 718.203(b) presumption that his pneumoconiosis arose out of coal mine employment. We affirm the administrative law judge's otherwise unchallenged finding that employer did not rebut that presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer also challenges the administrative law judge's finding that the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer asserts that the administrative law judge's decision to rely on Dr. Baker's opinion was improper, and it argues that the administrative law judge erred in discrediting the contrary opinions of Drs. Dahhan and Rosenberg.

A miner is considered totally disabled due to pneumoconiosis if pneumoconiosis:

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); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 610-11, 22 BLR 2-288, 2-303 (6th Cir. 2001); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17

(2003). Because the only form of pneumoconiosis that has been established in this case is clinical pneumoconiosis⁶ pursuant to Section 718.202(a)(1), the issue before the administrative law judge was whether claimant's clinical pneumoconiosis is a substantially contributing cause of his total disability pursuant to Section 718.204(c).

On remand, the administrative law judge reviewed the medical opinions of Drs. Alam, Baker, Rosenberg, and Dahhan,⁷ and noted their qualifications. The administrative

⁶ Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁷ Dr. Alam, claimant's treating physician, diagnosed coal workers' pneumoconiosis and a moderate impairment, and stated:

[P]atient has worsening respiratory problems, including cough, bronchitis and dyspnea, has [sic] been contributed [sic] to coal dust exposure and associated tobacco abuse, but we cannot ignore the history that patient has of underground mining.

Claimant's Exhibit 4. Dr. Baker examined claimant in March, 2003, and diagnosed coal workers' pneumoconiosis due to coal dust exposure, and chronic obstructive pulmonary disease, hypoxemia, and chronic bronchitis, each due to coal dust exposure and cigarette smoking. He diagnosed a moderate impairment, and opined that each of the diagnosed conditions contributed "fully" to claimant's impairment. Director's Exhibit 10. When later asked to assume that claimant had seven and one-half years of coal mine employment, rather than the thirty-six years he had considered, Dr. Baker diagnosed an occupational lung disease caused by claimant's coal mine employment, explaining:

If however, the patient has only 7 ½ years of coal dust exposure, it would be less likely his changes are due to coal dust. . . . If he did, indeed, have 36 years, but just doesn't have the record to show it, I think he would have evidence of Coal Workers' Pneumoconiosis on his x-ray.

Director's Exhibit 10. Dr. Baker diagnosed a moderate impairment that would prevent claimant from performing his usual coal mine employment, and opined that this impairment was due to "cigarette smoking and questionable coal dust exposure." *Id.* In his deposition, Dr. Baker diagnosed pneumoconiosis and opined that claimant's disability was due to both cigarette smoking and coal dust exposure. Claimant's Exhibit 5. Dr. Dahhan examined claimant and reviewed his medical records. He found insufficient objective findings to diagnose coal workers' pneumoconiosis. He opined that claimant's

law judge found that Dr. Alam's treatment records were consistent with treatment for pneumoconiosis. The administrative law judge attributed less weight to the opinions of Drs. Dahhan and Rosenberg regarding the cause of claimant's disability, because their opinions were "premised on a false assumption that pneumoconiosis was not established." Decision and Order at 4. He further found that their opinions were based on questionable premises concerning the medical literature regarding the effect of coal mine dust on obstructive lung disease. The administrative law judge concluded that Dr. Baker's opinion was the better reasoned opinion, in that Dr. Baker "acknowledge[d] a combination of causes and noted the effect of aggravation" Decision and Order on Remand at 4.

Employer argues that the administrative law judge erred because Dr. Baker did not attribute claimant's total disability to clinical pneumoconiosis. We disagree. The record reflects that Dr. Baker opined that clinical pneumoconiosis contributes fully to claimant's total disability. Director's Exhibit 10. We therefore reject employer's argument. Additionally, we reject employer's contention that the administrative law judge erred by failing to consider Dr. Baker's statement that claimant's disability was due to cigarette smoking and "questionable coal dust exposure." Director's Exhibit 10. The record reflects that the portion of Dr. Baker's opinion quoted by employer was the physician's response to a letter from the claims examiner asking Dr. Baker to provide a supplemental opinion assuming only seven and one-half years of coal mine employment. Director's Exhibit 10. Since the administrative law judge credited claimant with "at least twenty years" of coal mine employment, he did not err in not considering the portion of Dr. Baker's opinion that was based on a hypothetical length of coal mine employment of only seven and one-half years.

However, there is merit in employer's argument that the administrative law judge erred by not addressing the discrepancy between the smoking history relied upon by Dr. Baker and the smoking history suggested by the record, which, employer states, may have been as high as eighty pack-years. In his first Decision and Order, the administrative law judge noted claimant's testimony that he "smoked cigarettes for forty years at the rate of one to one and a half packages per day. (Tr. 18) He quit smoking two or more years ago. (Tr. 18)." 2006 Decision and Order at 3. The administrative law judge did not make a finding regarding claimant's smoking history in either the 2006

disabling respiratory impairment is the result of his eighty pack-year history of cigarette smoking, and he stated that claimant's disability was unrelated to his coal dust exposure. Employer's Exhibits 1, 3. Dr. Rosenberg examined claimant and reviewed claimant's medical records. He stated that claimant did "not have CWP or associated impairment," and he concluded that claimant's disabling obstructive lung disease is due to smoking. Employer's Exhibits 4, 6.

Decision and Order or his 2008 Decision and Order on Remand. In his 2005 report, Dr. Alam recorded a smoking history of one and one-half packs per day for forty-five years, and he noted that claimant stopped smoking two years earlier. Claimant's Exhibit 4. In a 2003 report, when claimant was sixty-two years old, Dr. Baker reported a smoking history of one pack per day from age twenty until seven or eight months before claimant's examination. Director's Exhibit 10. In his subsequent deposition, Dr. Baker reiterated that smoking history, and agreed that it was "significant." Claimant's Exhibit 5 at 3-4. In a 2003 report, Dr. Dahhan considered a smoking history of two packs per day from age eighteen to sixty-two, and he noted that claimant had stopped smoking ten months earlier. Employer's Exhibit 1. In his deposition, Dr. Dahhan summarized this as an eighty pack-year smoking history. Employer's Exhibit 3 at 7. Dr. Rosenberg examined claimant in 2004, when claimant was sixty-four years old, and noted a smoking history of one and one-half packs per day from age sixteen or seventeen until two years before his examination. Employer's Exhibit 4.

In evaluating the credibility of the evidence regarding the cause of claimant's respiratory disability pursuant to Section 718.204(c), the administrative law judge erred by failing to specifically resolve the discrepancies in claimant's smoking history and by not considering whether these discrepancies affected the credibility of Dr. Baker's opinion regarding disability causation. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Therefore, we must vacate the administrative law judge's findings pursuant to Section 718.204(c). On remand, the administrative law judge must determine the extent of claimant's smoking history, consider whether it coincides with the smoking history reported by Dr. Baker, and determine whether this issue affects the credibility of Dr. Baker's opinion that clinical pneumoconiosis contributes to claimant's total disability.

Contrary to employer's contention, the administrative law judge, on remand, has the discretion to accord less weight to the opinions of Drs. Dahhan and Rosenberg, to the extent that they did not diagnose clinical coal workers' pneumoconiosis, contrary to the determination that the existence of clinical pneumoconiosis was established. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). However, in view of the need to reassess claimant's smoking history, the administrative law judge, on remand, should reconsider the credibility of the opinions of Drs. Dahhan and Rosenberg that claimant's total disability is due entirely to obstructive lung disease resulting from smoking. Finally, we agree with employer that the administrative law judge did not explain the basis for the change in his credibility findings regarding Dr. Baker's opinion. Employer notes that in considering the existence of legal pneumoconiosis in his 2006 Decision and Order, the administrative law judge found that Dr. Baker's opinion regarding etiology was not well-reasoned, and in considering disability causation in his 2008 Decision and

Order, he found that the same portion of Dr. Baker's opinion was well-reasoned with respect to the cause of claimant's total disability. If, on remand, the administrative law judge finds that Dr. Baker's opinion is reasoned, he should explain completely his finding and address any changes in his credibility determinations. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Accordingly, the administrative law judge's Decision and Order on Remand Award of Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting in part, and concurring in part:

For the reasons stated in my previous dissent, I would have the administrative law judge analyze all of the relevant evidence regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as this evidence affects the disability causation analysis and the crediting of the physicians' opinions at 20 C.F.R. §718.204(c).

I concur with the majority's determination that since claimant established a change in an applicable condition of entitlement, it was proper for the administrative law judge to consider the length of claimant's coal mine employment, which was identified as a contested issue. 20 C.F.R. §725.309(d)(4); Director's Exhibit 42. I also concur with the majority that this case must be remanded for the administrative law judge to reconsider the credibility of the medical opinion evidence as to whether claimant's total disability is

due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), in light of the administrative law judge's determination of the extent of claimant's smoking history.

JUDITH S. BOGGS
Administrative Appeals Judge