BRB Nos. 08-0742 BLA
and 08-0742 BLA-A

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| J.H. | ) | |
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| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| CENTRAL APPALACHIAN COAL COMPANY | ) | |
| | ) | |
| | ) | DATE ISSUED: 05/29/2009 |
| Employer-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal and Cross-Appeal of the Decision and Order and Decision and Order on Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Legal Clinic, Washington and Lee University), Lexington, Virginia, for claimant.

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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:

Claimant appeals and employer cross-appeals the Decision and Order and Decision and Order on Reconsideration (06-BLA-5224) of Administrative Law Judge Daniel L. Leland denying benefits 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 involves a claim filed on October 28, 2004. After crediting claimant with twenty-one years of coal mine employment,[1] the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge, however, found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). After finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that there was no evidence that claimant's total disability is due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.[2]

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also contends that the administrative law judge erred in failing to address whether claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Claimant also argues that the administrative law judge erred in finding that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal, contending that the administrative law judge erred in allowing claimant to submit a positive x-ray reading in rebuttal of the positive x-ray interpretation that was submitted as part of the Department of Labor (DOL)-

[1] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] Claimant moved for reconsideration, noting that the administrative law judge had issued his decision without ruling on claimant's request for an extension of time in which to submit a closing brief. The administrative law judge granted claimant's request and ordered that closing briefs be submitted by June 16, 2008. After claimant and employer each submitted closing briefs, the administrative law judge issued a Decision and Order on Reconsideration, wherein he concluded that his initial decision was correct and that claimant had not offered any persuasive reasons to change the rationale provided for the denial of benefits. The administrative law judge, therefore, denied the motion for reconsideration.

sponsored pulmonary evaluation. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response. Citing *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78 (2008), the Director asserts that a claimant may rebut a positive x-ray reading obtained in conjunction with a DOL-sponsored examination. The Director urges the Board to affirm the administrative law judge's finding that Dr. Alexander's positive rebuttal reading of the DOL x-ray, which was proffered as Claimant's Exhibit 1, is admissible under 20 C.F.R. §725.414. Claimant also responds in support of the administrative law judge's admission of Dr. Alexander's positive interpretation of the DOL-sponsored x-ray. Employer has filed a reply to the briefs filed by claimant and the Director, reiterating its previous contentions.[3]

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).

**Evidentiary Limitations**

Employer contends that the administrative law judge erred in allowing claimant to submit, as rebuttal evidence, Dr. Alexander's positive reading of the DOL x-ray dated March 8, 2005. Claimant's Exhibit 1. Employer asserts that, because the original reading by Dr. Rasmussen of the March 8, 2005 x-ray was positive for pneumoconiosis, Dr. Alexander's positive interpretation does not qualify as rebuttal evidence. We disagree. The Board has specifically held that a claimant is entitled to submit a positive rereading of a positive x-ray obtained by the DOL, because the applicable rebuttal provisions at 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii) do "not limit a party to rebutting a particular item of evidence, but permit a party to respond to a particular item of evidence in order to rebut 'the case' presented by the opposing party." *J.V.S.*, 24 BLR at 1-78.

Employer also contends that permitting a claimant to both select the physician who will read the x-ray associated with the DOL-sponsored pulmonary evaluation and submit a rebuttal reading of a favorable, positive reading of the DOL x-ray, places employers at an unfair disadvantage. Employer's contention has no merit. The regulations provide for claimant and the responsible operator to each submit an x-ray interpretation in rebuttal to the x-ray interpretation submitted by the Director pursuant to 20 C.F.R. §725.406. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Thus, the parties are

[3] Because no party challenges the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

able to submit the same amount of evidence. *J.V.S.*, 24 BLR at 1-83 n.5. Moreover, if the x-ray interpretation submitted by the Director, as part of his obligation to provide claimant with a complete pulmonary evaluation, is read as negative for pneumoconiosis, an employer would be entitled to submit a negative rebuttal reading of the x-ray to refute the case presented by claimant. *See* 20 C.F.R. §725.414(a)(3)(ii); *J.V.S.*, 24 BLR at 1-83 n.5. Consequently, we reject employer's arguments and affirm the administrative law judge's decision to admit Dr. Alexander's positive rebuttal reading into the record as Claimant's Exhibit 1.

## The Existence of Pneumoconiosis

### Clinical Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer argues that the administrative law judge's finding was "based solely on the greater number of positive readings." Employer's Reply Brief at 1-2. We disagree. In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' radiological qualifications, the dates of the x-rays, and the actual readings. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *White v. New White Coal Co.*, 23 BLR 1-1 (2004); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). We, therefore, affirm the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

However, we agree with employer that the administrative law judge erred in not considering all of the relevant evidence regarding the existence of clinical pneumoconiosis. After finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge should have weighed all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence established the existence of clinical pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In this case, the administrative law judge did not weigh the medical opinion evidence with the x-ray evidence before finding that the evidence established the existence of clinical pneumoconiosis.[4] Consequently, we remand the case

[4] In his consideration of the evidence pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that "none of the physicians has concluded that [claimant's] clinical pneumoconiosis is a substantially contributing cause of his total disability." Decision and Order at 9. However, claimant accurately notes that Dr. Rasmussen opined that claimant's clinical pneumoconiosis contributed significantly to his disabling lung disease. Director's Exhibit 10. Thus, contrary to the administrative

to the administrative law judge with instructions to weigh all of the relevant evidence of clinical pneumoconiosis together pursuant to 20 C.F.R. §718.202(a).[5]

**Legal Pneumoconiosis**

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[6] In this case, Drs. Rasmussen and Koenig diagnosed legal pneumoconiosis, opining that claimant suffers from chronic obstructive pulmonary disease (COPD)/emphysema due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 10; Claimant's Exhibits 4, 8, 9; Employer's Exhibit 13. Conversely, Drs. Zaldivar and Altmeyer opined that claimant suffers from asthma and emphysema, conditions unrelated to his coal mine dust exposure. Employer's Exhibits 2, 8, 9, 14-16.

In considering whether the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge noted that, while Drs. Rasmussen and Koenig pointed to studies demonstrating that coal mine dust exposure can cause COPD, they did not explain how they were able to reach that conclusion in this particular case. Decision and Order at 8-9. The administrative law judge, therefore, found that Drs. Rasmussen and Koenig merely opined that it was "theoretically possible that [claimant's] pulmonary impairment arose out of his coal mine dust exposure." *Id.* at 9. The administrative law judge also accorded less weight to the opinions of Drs. Rasmussen and Koenig because they failed to consider "the wide disparity in [claimant's] coal mine employment and his cigarette smoking history." *Id.* at

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law judge's characterization, there is evidence which, if credited, supports a finding of total disability due to clinical pneumoconiosis. 20 C.F.R §718.204(c).

[5] The administrative law judge accurately found that there is no biopsy evidence of record. Decision and Order at 8; *see* 20 C.F.R. §718.202(a)(2). Moreover, claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. See 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. See 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. See 20 C.F.R. §718.306.

[6] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "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).

9. On the other hand, the administrative law judge found that Drs. Altmeyer and Zaldivar "provided persuasive reasons for their findings that [claimant's] COPD was due exclusively to cigarette smoking." *Id.* at 9. The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant argues that the administrative law judge erred in his consideration of the opinions of Drs. Rasmussen and Koenig. Claimant specifically contends that, contrary to the administrative law judge's characterization, Drs. Rasmussen and Koenig explained why they attributed claimant's COPD to his coal mine dust exposure. We agree.

Dr. Rasmussen opined that claimant's twenty-one years of coal mine dust exposure and forty-two pack-year smoking history were both significant enough to have caused his COPD. Employer's Exhibit 13 at 37. Dr. Rasmussen further explained that there are no specific tests to determine which proportion of claimant's COPD was caused by coal mine dust exposure and which was caused by cigarette smoking. *Id.* at 38. However, Dr. Rasmussen explained why he attributed claimant's COPD, in significant part, to his coal mine dust exposure:

> [Claimant's Counsel]: Doctor Rasmussen, in [claimant's] case, since he's had significant exposure to both cigarette smoke and coal mine dust, what reasoned medical judgment can you form?
>
> [Dr. Rasmussen]: Well, they both cause chronic obstructive lung disease, and it seems to be very nearly impossible for all of it to have been caused by smoking or, vice versa, all by coal mine employment. Both have to be considered significant factors.
>
> And [claimant's] twenty-one years of coal mine employment is sufficient to cause disabling chronic obstructive lung disease.
>
> [Claimant's Counsel]: Okay. And in your medical opinion, would it be reasonable to attribute [claimant's] disease to just one of these causes, whether that is cigarette smoke or coal mine dust?
>
> [Dr. Rasmussen]: No. I do not believe that either one of those is a reasonable option.
>
> [Claimant's Counsel]: Okay. So just to confirm, you would say that coal mine dust exposure and cigarette smoking, both, significantly contributed to [claimant's] totally disabling pulmonary impairment?

[Dr. Rasmussen]: Yes, I would.

Employer's Exhibit 13 at 39-40.

Dr. Rasmussen explained that coal mine dust exposure and cigarette smoking "both cause the same type and degree of impairment." *Id.* at 50. Because he could not rule out cigarette smoking or coal mine dust exposure as a cause of claimant's COPD, Dr. Rasmussen explained that he had to conclude that both exposures contributed to claimant's lung disease. *Id.* at 51.

Dr. Koenig provided a similar explanation for his opinion that claimant's coal mine dust exposure significantly contributed to his COPD. Dr. Koenig opined that claimant's coal mine employment history and smoking history were both sufficient exposures to cause COPD. Claimant's Exhibit 9 at 13. Dr. Koenig explained that it is impossible to distinguish the effect of coal mine dust exposure from the effect of smoking in obstructive lung conditions such as that suffered by claimant. *Id.* at 38. The record reflects that Dr. Koenig, like Dr. Rasmussen, related his opinions to claimant's specific circumstances:

> [Claimant's Counsel]: In [claimant's] case, since he had significant exposure to both cigarette smoke and coal mine dust, what reasoned medical judgment can you form?
>
> [Dr. Koenig]: That they both contributed significantly to the COPD. That's really the only sound and logical conclusion you can come to. You could say basically both coal dust and cigarette smoke – since they're indistinguishable, you really can't tell a difference – contributed to [claimant's] COPD.
>
> Claimant's Counsel]: Okay. So in your medical opinion, it would be unreasonable to attribute just one of these causes, whether it's cigarette smoke or coal mine dust, as the ultimate cause of [claimant's] impairment?
>
> [Dr. Koenig]: Right. It's impossible. You really can't tell.
>
> [Claimant's Counsel]: So would you say that coal mine dust and cigarette smoking, both significantly contributed to [claimant's] totally disabling pulmonary impairment?
>
> [Dr. Koenig]: That's the only logical conclusion you can come to.

Claimant's Exhibit 9 at 39-40.

Thus, in this case, contrary to the administrative law judge's characterization, Drs. Rasmussen and Koenig set forth the rationale for their opinions based on their interpretation of the medical evidence of record.[7] Consequently, the administrative law judge erred in his consideration of the opinions of Drs. Rasmussen and Koenig. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

The administrative law judge also found that, because Drs. Zaldivar and Altmeyer fully took into account the "wide disparity" in the length of claimant's coal mine employment and cigarette smoking histories, their opinions were better reasoned than the opinions of Drs. Rasmussen and Dr. Koenig, who failed to consider this disparity. Decision and Order at 9. We note, however, that there is no indication that either Dr. Zaldivar or Dr. Altmeyer relied upon a "wide disparity" in the length of claimant's coal mine employment and cigarette smoking histories as a basis for determining the etiology of claimant's lung disease. As the administrative law judge recognized, the doctors in this case fundamentally disagree as to the nature of claimant's lung disease. Drs. Rasmussen and Koenig diagnosed COPD due to coal mine dust exposure and cigarette smoking and opined that claimant does not suffer from asthma. On the other hand, Drs. Zaldivar and Altmeyer opined that claimant suffers primarily from asthma, with some emphysema attributable to cigarette smoking. However, in attributing claimant's emphysema to his cigarette smoking, neither Dr. Zaldivar nor Dr. Altmeyer relied upon the disparity in claimant's coal mine employment and cigarette smoking histories. Rather, both physicians cited the type of claimant's emphysema, namely bullous, as the basis for their opinions. Employer's Exhibit 15 at 17; Employer's Exhibit 16 at 70-72. Consequently, given the fact that no physician relied upon the "wide disparity" in the length of claimant's coal mine employment and cigarette smoking histories as a basis for determining the etiology of claimant's lung diseases, the administrative law judge's use of this factor to accord greater weight to the opinions of Drs. Zaldivar and Altmeyer was not a valid basis for his credibility determination.[8] *Milburn Colliery Co. v. Hicks*, 138

[7] In remanding this case, we instruct the administrative law judge that, to establish legal pneumoconiosis, physicians are not required to apportion a miner's lung impairment between cigarette smoking and coal mine dust exposure. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107(6th Cir. 2000). A claimant need only establish that his lung disease is significantly related to, or substantially aggravated by, his coal mine dust exposure. 20 C.F.R. §718.201(b).

[8] There is no indication in the record that Drs. Zaldivar and Altmeyer believed that claimant's coal mine dust exposure was inconsequential. Dr. Zaldivar acknowledged that claimant's coal mine dust exposure was significant enough to cause chronic obstructive pulmonary disease (COPD). Employer's Exhibit 16 at 69-70. Dr. Altmeyer stated that

F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). On remand, the administrative law judge should address the specific rationales underlying the conflicting opinions of Drs. Rasmussen, Koenig, Zaldivar, and Altmeyer.[9] *Id.*

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, when reconsidering whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address 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. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On remand, should the administrative law judge find that the evidence establishes the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence establishes the existence of pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174. Should the administrative law judge find that the evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he must address whether the

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"about ten years is probably when men who are susceptible to coal dust start getting disease from it." Employer's Exhibit 15 at 16.

[9] Based on his finding that Drs. Rasmussen and Koenig failed to explain why they attributed claimant's COPD to his coal mine dust exposure, the administrative law judge found that it was "not necessary to determine whether [claimant] has asthma or COPD." Decision and Order at 9. However, in light of our holding that the administrative law judge did not adequately consider the explanations provided by Drs. Rasmussen and Koenig for their opinions, the administrative law judge's reason for not addressing whether claimant suffers from COPD and/or asthma cannot stand. On remand, the administrative law judge should address and resolve the conflicting medical opinions as to the nature and causes of claimant's respiratory impairments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).[10]

In light of our decision to vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), we also vacate his 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), and instruct him to reconsider this issue, if reached, on remand.

[10] If, on remand, the administrative law judge finds that the evidence establishes the existence of legal pneumoconiosis, the finding that the pneumoconiosis arose out of coal mine employment would be subsumed in the determination that claimant's chronic lung disease or impairment was related to dust exposure in coal mine employment, making it unnecessary for the administrative law judge to separately consider whether the legal pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *See* 20 C.F.R. §718.201(a)(2), (b); *Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration denying benefits are 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.

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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