

BRB No. 05-0762 BLA

MICHAEL A. TULLIO)	
)	
Claimant-Respondent)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY, LLC)	
)	DATE ISSUED: 11/29/2006
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER on
Party-in-Interest)	RECONSIDERATION

Appeal of the Decision and Order on Remand – Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William J. Evans and John P. Ball (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

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

PER CURIAM:

Employer requests reconsideration, with suggestion for reconsideration *en banc*, of the Board's Decision and Order remanding this case to the administrative law judge for the second time. In its July 3, 2006 decision considering employer's second appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Tullio v. U.S. Steel Mining Company, Inc.*, BRB No. 05-0762 BLA (July 3, 2006)(unpub.). Specifically, the Board vacated the administrative law judge's finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) because the administrative law judge erred in weighing the medical opinions of Drs. Farney and

Poitras. *Id.* Additionally, the Board vacated the administrative law judge's finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) because it was based on his consideration of the opinions of Drs. Farney and Poitras at Section 718.202(a)(4). *Id.* The Board affirmed the administrative law judge's finding of a nine pack year smoking history. *Id.*

On reconsideration, employer asserts that the Board erred in affirming the administrative law judge's finding of a nine pack year smoking history. Employer additionally contends that the Board "may have misunderstood" its assertion regarding the administrative law judge's weighing of the opinions of Drs. Poitras and Farney in light of their assumptions about claimant's smoking history. Employer's Brief on Reconsideration at 18. Claimant has filed a response brief, urging the Board to deny employer's Motion for Reconsideration. The Director, Office of Workers' Compensation Programs, has not responded to employer's Motion for Reconsideration.

We first address employer's contention that the Board "may have misunderstood" its assertion that the administrative law judge "may not accord greater weight to Dr. Poitras' opinion, or less weight to Dr. Farney's opinion on the basis of their respective assumptions about Claimant's smoking history." Employer's Brief on Reconsideration at 18. In addressing this issue in our original Decision and Order, we stated:

In considering Dr. Poitras' reports on remand, the administrative law judge noted that this physician recorded a nine pack year smoking history in his 2000 and 2001 reports. The administrative law judge further stated that in Dr. Poitras' 2002 report, Dr. Poitras examined the record and noted that the smoking histories listed for claimant ranged from nine to thirty pack years. The administrative law judge noted that "[t]he range [Dr. Poitras] recorded included the nine pack-year history that was consistent with [this administrative law judge's] findings." Therefore, the administrative law judge concluded that Dr. Poitras' "overall opinion should not be granted less weight because he relied upon correct smoking histories in his first two reports, and in his third report, he was providing a review of the recorded smoking histories of record." The administrative law judge added, "even if I were to discredit [Dr. Poitras'] third report based upon an incorrect smoking history as the Employer urges,^[1] I would still rely on his first two reports that included proper smoking histories." Contrary to

¹Employer maintains in its Motion for Reconsideration "that Employer never urged that [Dr. Poitras'] Third Report should be discredited based upon the assumed smoking history." Employer's Brief on Reconsideration at 20 n.14.

employer's assertion, it was not irrational for the administrative law judge, on remand, to conclude that Dr. Poitras' overall opinion should not be accorded less weight because he considered the range of the recorded smoking histories of record in his third report. In considering a smoking history range of nine to thirty pack years in his third report, Dr. Poitras did not amend his earlier assumptions about claimant's smoking history. Rather, Dr. Poitras reviewed the other medical evidence regarding claimant's smoking history and found that his opinion, that claimant's coal dust exposure played a significant role in causing his lung disease, was still valid, even considering a smoking history of thirty pack years.

Tullio, slip op. at 7 (footnote omitted) (citations omitted).

Employer asserts that the Board's statement that "[c]ontrary to employer's assertion, it was not irrational for the administrative law judge, on remand, to conclude that Dr. Poitras' overall opinion should not be accorded less weight because he considered the range of the recorded smoking histories of record in his third report" is an incorrect statement of the issue raised by employer. Employer states that it contends "that it would be irrational to accord Dr. Poitras' overall opinion *more weight* than Dr. Farney's (or to accord Dr. Farney's opinion less weight than Dr. Poitras') on the basis that Dr. Poitras assumed a 'correct' smoking history and Dr. Farney did not." *Id.* at 19. In so asserting, employer relies on an argument contained in the 2005 brief employer submitted in support of its second petition for review. In employer's 2005 brief, it stated that because both Drs. Poitras and Farney ultimately relied on the same smoking history, a range of between nine and thirty pack years,² "[t]o the extent that the administrative law judge credited Dr. Poitras over Dr. Farney on the basis of Dr. Poitras' assumptions about smoking history, the Decision on Remand should be reversed." Employer's Brief in Support of Its Second Petition for Review at 20. On reconsideration, employer acknowledges that the issue of whether the administrative law judge accorded greater weight to Dr. Poitras' opinion based on this physician's assumptions about claimant's smoking history "does not appear to be ripe" for the Board's decision because the administrative law judge has not yet accorded greater weight to Dr. Poitras' opinion on this basis. Employer's Brief on Reconsideration at 20. Employer, however, contends that statements made by the administrative law judge in his Decision and Order on Remand suggest a predisposition for the administrative law judge to decide this case by

²Employer stated that notwithstanding that Dr. Poitras relied on a nine pack year smoking history in his first and second reports, in his third report he "recast his opinion to reflect a range of between nine and thirty pack years." Employer's Brief in Support of Its Second Petition for Review at 20.

attributing greater weight to Dr. Poitras' opinion based on the "correct" smoking history stated in his first two reports.

In light of employer's assertions, we clarify our previous statements regarding Dr. Poitras' consideration of a nine pack year smoking history in his 2000 and 2001 reports and his consideration of a smoking history range of nine to thirty pack years in his 2002 report. By stating in our July 3, 2006 decision that "it was not irrational for the administrative law judge, on remand, to conclude that Dr. Poitras' overall opinion should not be accorded less weight because he considered the range of the recorded smoking histories of record in his third report," we did not intend to direct the administrative law judge to accord more weight to Dr. Poitras' first and second reports over Dr. Farney's report. Because both Dr. Poitras and Dr. Farney relied on a smoking history range of nine to thirty pack years in their final opinions, these two physicians' opinions cannot be distinguished from one another on the basis of the smoking history relied upon.

Employer additionally asserts that the Board erred in affirming the administrative law judge's finding of a nine pack year smoking history. Employer contends that the administrative law judge did not consider and weigh all of the reports of record containing evidence relevant to claimant's smoking history. Specifically, employer asserts that the administrative law judge cited only two of the seven³ reported smoking histories contained in the record. In our 2006 Decision and Order, we stated "that the administrative law judge noted that claimant's smoking history, as recorded in the record, was between twenty-five pack years and four and one-half to five and one-half pack years." *Tullio*, slip op. at 8. While the administrative law judge did not list all of the smoking histories contained in the record, he correctly stated that the evidence regarding claimant's smoking history indicated a range of between five to six cigarettes a day over eighteen years to twenty-five pack years.⁴ 2002 Decision and Order at 4. Contrary to employer's assumption, the administrative law judge's decision not to list all of the smoking histories contained in the physicians' reports, but rather to note the range of smoking histories recorded for claimant, does not necessarily mean that the administrative law judge did not consider all of the smoking histories listed for claimant

³Employer asserts that "[t]he record contains seven reported smoking histories by five different physicians." Employer's Brief on Reconsideration at 6. In so stating, employer includes Dr. Feuerstein's report. However, while Dr. Farney identified Dr. Feuerstein's report as the source for his reference to a thirty pack year smoking history, Dr. Feuerstein's report is not contained in the record.

⁴As employer correctly points out, the administrative law judge mistakenly attributed to Dr. Poitras the smoking history of five or six cigarettes a day recorded by Dr. Farney.

in the record. However, because we vacate the administrative law judge's finding regarding claimant's smoking history, *see* discussion, *infra*, we instruct the administrative law judge to clarify on remand his consideration of all of the relevant evidence of record in rendering his determination regarding claimant's smoking history.

Employer additionally asserts that the administrative law judge's finding of a nine pack year smoking history for claimant is unexplained and is unsupported by evidence in the record. Employer asserts that the testimony of claimant and his wife and the majority of the smoking histories in the record do not support a finding of nine pack years. In particular, employer argues that the testimony of claimant and his wife does not clearly identify a starting or ending date for claimant's smoking. Employer, therefore, contends that the administrative law judge's finding of nine pack years is irrational and arbitrary.

In rendering his smoking history finding in his 2002 Decision and Order, the administrative law judge noted that claimant testified that he smoked one-half of a pack per day from 1958 to 1976. The administrative law judge found claimant's testimony to be corroborated by his wife's testimony and a majority of the smoking histories in the record in which claimant stated that he quit smoking in 1975 or 1976 because of a bet. The administrative law judge further noted that "Claimant explained his light smoking as a result of being underground eight hours a day where smoking is not permitted." Decision and Order at 5. Additionally, the administrative law judge stated that claimant's chewing tobacco history is supported by his wife's testimony. After determining that claimant's testimony was "persuasive," the administrative law judge found that the record established a smoking history of nine pack years. *Id.* at 5, 15. In the Board's 2006 decision, we held that "[t]he administrative law judge, within his discretion, found the testimony of claimant and his wife, regarding claimant's smoking history, to be credible." *Tullio*, slip op. at 9. We affirmed, as not unreasonable, the administrative law judge's finding of a nine pack year smoking history based on his review of the testimony at the hearing and the smoking histories noted in the physicians' reports.

Employer argues that the administrative law judge's statement, that claimant testified that he smoked between 1958-1976, "is clearly wrong." Employer's Brief on Reconsideration at 11. At the May 15, 2002 hearing, claimant answered, "[t]hat's right," when asked by his attorney whether it was reported on Dr. Lincoln's report that he smoked one pack per day from 1950 through 1975. Hearing Transcript at 35. Claimant also replied, "[y]eah," when asked by his attorney whether Dr. Poitras recorded a smoking history of one pack per day from 1958 to 1976. *Id.* Claimant further testified that he quit smoking in 1975 and that he smoked a half pack of cigarettes per day because he "was underground the other eight hours" where smoking was not permitted, and that he "wasn't a heavy smoker like they say I was." *Id.* Because employer is correct that claimant did not specifically testify that he smoked between 1958-1976, we vacate the administrative law judge's finding regarding the length of claimant's smoking history and

remand this case for the administrative law judge to reconsider this issue. On remand, we instruct the administrative law judge to reconsider the relevant evidence of record and the testimony of claimant and his wife and to further explain his reasoning for finding the duration of claimant's smoking history to be from 1958 to 1976. See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

In the Board's 2006 decision, after affirming the administrative law judge's smoking history finding, we "instruct[ed] the administrative law judge, on remand, to reconsider the effect, if any, his finding of a nine pack year smoking history has on his weighing of the opinions of Drs. Poitras and Farney." *Tullio*, slip op. at 9. Because the opinions of Drs. Poitras and Farney cannot be distinguished from one another on the basis of the smoking history that these physicians relied upon, see discussion, *supra*, we modify the Board's 2006 Decision and Order to explicitly strike this instruction.

Inasmuch as we grant the relief requested by employer, we deny its request for *en banc* review of its Motion for Reconsideration.

Accordingly, employer's Motion for Reconsideration is granted and the Board's Decision and Order of July 3, 2006 is modified. The administrative law judge's Decision and Order on Remand – Award of Benefits is vacated and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge