

BRB No. 10-0163 BLA

ROBERT MITCHELL, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
FRIENDSHIP ENERGY, INCORPORATED)	DATE ISSUED: 11/18/2010
)	
and)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Ann Marie Scarpino (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5620) of Administrative Law Judge Daniel F. Solomon awarding benefits 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). This case involves a claim filed on April 9, 2007. After crediting claimant with at least twelve years of coal mine employment,¹ the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis,² in the form of obstructive lung disease due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. 718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response to employer's appeal.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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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 (1989) (*en banc*).

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).

³ Because employer does not challenge 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a 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*).

Impact of the Recent Amendments

By Order dated September 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Claimant, employer, and the Director have responded.

The recent amendments to the Act, which became effective on March 23, 2010, apply to claims filed after January 1, 2005. The parties agree that, although the amendments apply to claimant's claim based on its filing date, the amendments do not affect the adjudication of the claim, because there is no evidence, and no allegation that, claimant had at least fifteen years of coal mine employment.⁴

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The Administrative Law Judge's Finding

In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Simpao, Baker, Selby, and Broudy. Dr. Simpao opined that claimant has "legal Coal Workers' Pneumoconiosis and COPD" with "12 years of coal dust exposure [as] the significant contributing factor" Director's Exhibit 15. Dr. Simpao further stated

⁴ Section 1556 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). On his claim for benefits, claimant alleged only twelve years of coal mine employment. Director's Exhibit 2.

that claimant's "43 pack year smoking history . . . is only an aggravating factor in his pulmonary impairment." *Id.* Dr. Baker opined that claimant's COPD was "caused predominantly by his cigarette smoking," with "some contribution of a significant degree from his coal dust exposure." Claimant's Exhibit 5. By contrast, Drs. Selby and Broudy opined that claimant does not suffer from any lung condition caused by his coal mine dust exposure. Employer's Exhibits 1, 3. Dr. Selby diagnosed asthma due to genetics and environmental factors not related to coal mine dust inhalation. Employer's Exhibits 1, 5 at 13. Dr. Selby also diagnosed moderate to severe emphysema due to smoking. *Id.* Dr. Broudy diagnosed COPD due to smoking.⁵ Employer's Exhibit 3.

The administrative law judge found that Dr. Simpao's diagnosis of legal pneumoconiosis, in the form of COPD attributable to both coal mine dust exposure and cigarette smoking, was the "most cogent" and "most closely reflect[ed] current laws." Decision and Order at 10. Despite acknowledging that Dr. Simpao "was not as well qualified as the other physicians," he found that Dr. Simpao's opinion was the most "consistent with the regulatory scheme." *Id.* The administrative law judge found that Dr. Baker's diagnosis, while not completely explained, was entitled to "some weight for being well documented and for supporting Dr. Simpao's opinion." *Id.*

The administrative law judge further found that the opinions of Drs. Selby and Broudy were "less rational." Decision and Order at 10. Specifically, he found that neither Dr. Selby, nor Dr. Broudy, accounted for the effect of claimant's twelve years of coal mine dust exposure on his pulmonary impairment. *Id.* Further, the administrative law judge found that Dr. Selby improperly based his opinion on the fact that claimant's pulmonary function study results improved after the administration of a bronchodilator, a fact not supported by the record. Consequently, the administrative law judge found that Dr. Selby's basis for his asthma diagnosis was flawed. *Id.* at 9. The administrative law judge also questioned Dr. Selby's reliance and emphasis on the CT scan evidence, explaining that CT scan evidence is relevant to the existence of clinical pneumoconiosis, not legal pneumoconiosis. *Id.* Additionally, the administrative law judge accorded less weight to Dr. Broudy's opinion because the doctor opined only that coal mine dust exposure was not the primary cause of claimant's COPD, and because the doctor relied on studies that predated the new regulations. *Id.* at 10. Finally, the administrative law judge found that the opinions of Drs. Selby and Broudy conflicted with each other, in that only Dr. Selby diagnosed asthma. *Id.*

⁵ Drs. Selby and Broudy also noted that claimant had a significant portion of his right lung removed due to smoking-induced lung cancer. Employer's Exhibits 1, 3.

Consequently, based upon Dr. Simpao's opinion, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 10.

Discussion

Employer argues that the administrative law judge erred in failing to explain his finding that Dr. Simpao's opinion was well-reasoned. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). However, in crediting Dr. Simpao's opinion, the administrative law judge erred in not addressing the validity of the specific reasoning that Dr. Simpao provided for his opinion.⁶ *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99 (6th Cir. 1983). Specifically, the administrative law judge did not address Dr. Simpao's basis for attributing claimant's COPD to his coal mine dust exposure.

Employer also contends that the administrative law judge erred in crediting Dr. Simpao's opinion, that both coal mine dust exposure and smoking contributed to claimant's pulmonary impairment, because it "most closely reflect[ed] current law." Decision and Order at 10. The amended regulations recognize that obstructive lung disease can be caused by coal mine dust exposure. 20 C.F.R. §718.201(a)(2). Employer accurately notes, however, that this factor alone is not a sufficient basis to credit Dr. Simpao's opinion, since the regulations "do nothing to help Dr. Simpao explain why coal dust is a causative factor in this particular case." Employer's Reply Brief at 13; *see* 65

⁶ In a report dated August 13, 2007, Dr. Simpao opined that:

[Claimant] does have legal Coal Workers' Pneumoconiosis and COPD as evidenced by his PFS, physical findings, and symptomatology. His PFS indicated a mild degree of restrictive and moderate degree of obstructive airway disease.

[Claimant's] 12 years of coal dust exposure is the significant contributing factor in his declining pulmonary status. He does have a 43 pack year smoking history, however, this is only an aggravating factor in his pulmonary impairment.

Director's Exhibit 15.

Dr. Simpao also opined that claimant's "coal dust exposure is responsible for his declining pulmonary function." *Id.*

Fed. Reg. 79923 (Dec. 20, 2000) (explaining that “[i]t remains the claimant’s burden of persuasion to demonstrate that his obstructive lung disease arose out of his coal mine employment and therefore falls within the statutory definition of pneumoconiosis.”). It is the duty of the administrative law judge to consider whether Dr. Simpao’s diagnosis of legal pneumoconiosis is reasoned and documented, taking into consideration the objective evidence, underlying documentation, and rationale provided by Dr. Simpao in support of his opinion. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer further contends that the administrative law judge mischaracterized Dr. Selby’s opinion. We agree. The administrative law judge accorded less weight to Dr. Selby’s opinion because he based his diagnosis of asthma on inaccurate information, *i.e.*, the fact that claimant’s pulmonary function improved after the administration of a bronchodilator. Contrary to the administrative law judge’s characterization, Dr. Selby was aware that claimant’s pulmonary function study results did not improve after the administration of a bronchodilator, explaining that this fact did not exclude a diagnosis of asthma. Employer’s Exhibits 2 at 9, 5 at 14. Dr. Selby indicated that reversibility is only one factor used to make a diagnosis of asthma. *Id.* In claimant’s case, Dr. Selby noted that he was taking a beta blocker, which can make asthma worse and less responsive to bronchodilators. Employer’s Exhibits 2 at 9, 5 at 15. Dr. Selby based his diagnosis of asthma on claimant’s history of “variable shortness of breath,” coming at nighttime or triggered by cold air. Employer’s Exhibit 2 at 9. Consequently, the administrative law judge mischaracterized Dr. Selby’s opinion.⁷ *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Employer also contends that the administrative law judge erred in his consideration of Dr. Broudy’s opinion. The administrative law judge accorded less weight to Dr. Broudy’s opinion because the doctor opined only that coal mine dust exposure was not the primary cause of claimant’s COPD, not that it was not a contributing cause. Given the relative lengths of claimant’s coal mine dust exposure and smoking histories (12 to 14 years of coal dust exposure as opposed to 40 years of more of cigarette smoking), Dr. Broudy opined that it was “far more likely than not that [claimant’s] impairment was *all due to cigarette smoking.*” Employer’s Exhibit 3 (emphasis added). Although Dr. Broudy noted his agreement with Dr. Baker that cigarette smoking was the predominant cause of claimant’s pulmonary impairment, Dr. Broudy further clarified that he believed that the contribution to claimant’s COPD from

⁷ The administrative law judge also questioned Dr. Selby’s reliance and emphasis on the CT scan evidence. However, there is no indication that Dr. Selby based his opinion, regarding the cause of claimant’s emphysema, on the CT scan evidence. Employer’s Exhibits 1, 2, 5.

coal mine dust exposure was “insignificant.”⁸ *Id.* Thus, contrary to the administrative law judge’s characterization, Dr. Broudy excluded claimant’s coal mine dust exposure as a cause of his COPD.⁹

In light of the above-referenced errors, we vacate the administrative law judge’s finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for further consideration. On remand, when considering 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. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

In light of our decision to vacate the administrative law judge’s finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate his finding that the evidence established 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 necessary, on remand.

⁸ Dr. Broudy explained that, “In spite of the history of significant exposure, I’ve excluded coal dust as a causative agent because of the lack of radiographic findings and the far more likely explanation for his impairment due to his cigarette smoking.” Employer’s Exhibit 3.

⁹ Employer also contends that the administrative law judge erred in characterizing the opinions of Drs. Selby and Broudy as conflicting, because Dr. Selby diagnosed asthma, while Dr. Broudy diagnosed emphysema. Employer’s contention has merit. Although Dr. Selby diagnosed asthma, he also diagnosed emphysema unrelated to coal mine dust exposure. Thus, Dr. Selby’s opinion is consistent with Dr. Broudy’s opinion in that both physicians attributed claimant’s obstructive lung disease to his cigarette smoking, not his coal mine dust exposure.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge