BRB No. 14-0084 BLA

JAMES E. DUTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LBJ ENERGY INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 11/21/2014
	)	
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 Awarding Benefits in a Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2011-BLA-05673) of Administrative Law Judge Christine L. Kirby rendered on a claim filed on April 12, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least 18.72 years of underground coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge acknowledged employer's concession that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), thus establishing a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] The administrative law judge further found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption.[3] Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting claimant with a history of coal mine employment sufficient to invoke the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in her consideration of claimant's smoking history and in finding that employer failed to

[1] Claimant filed six previous claims, all of which were finally denied. Director's Exhibits 1-6. Claimant's most recent prior claim, filed on March 17, 2006, was denied by Administrative Law Judge Pamela Lakes Wood on January 9, 2009, because claimant failed to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 6.

[2] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c).

[3] Relevant to this case, amended Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

establish rebuttal of the amended Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the record establishes at least fifteen years of qualifying coal mine employment and a twenty pack-year smoking history. The Director also urges the Board to reject employer's argument regarding the credibility of Dr. Fino's opinion.[4]

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.[5] 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).

I. Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge's finding of 18.72 years of underground coal mine employment cannot be affirmed, as the administrative law judge did not fully consider the relevant evidence and did not adequately explain how she arrived at her conclusion. These contentions have merit. In order to invoke the amended Section 411(c)(4) presumption, claimant must establish that he worked at least fifteen years in underground coal mine employment or in in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305(b)(1)(i), (2). The administrative law judge's calculation of the number of years of coal mine work will be upheld when it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985). In making this determination, the administrative law judge must explain what evidence she credits or rejects and set forth the underlying rationale. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *Fee v. Director, OWCP*, 6 BLR 1-11 (1984).

[4] Because employer does not challenge the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 9. 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, 1-202 (1989) (en banc).

In this case, the administrative law judge initially considered employer's concession to 13.72 years of underground coal mine employment and stated:

> I have examined Employer's brief on the issue of length of coal mine employment. In its brief, Employer asserts that the Social Security earnings records establish at most only 13.72 years of coal mine employment. I find that Employer has computed this time accurately based solely on the Social Security earnings records.

Decision and Order at 6; *see* Director's Exhibit 7. The administrative law judge then addressed claimant's hearing testimony and the employment history forms submitted with the applications for benefits, and credited claimant with fourteen months of coal mine employment at Slade Creek Coal Company, nine months at K&L Coal Company, fourteen months at Hagi 2, one year at Ruel Fuller and one year at Rocky Coal Company, for a total of five years and one month of work that was not reflected on claimant's Social Security Earnings Records (SSERs). Decision and Order at 6, *citing* Director's Exhibits 1-6; Transcript of August 28, 2012 Hearing at 6-10. Upon adding this figure to the 13.72 years reported on the SSERs, the administrative law judge credited claimant with a total of at least 18.72 years of coal mine employment. Decision and Order at 6.

Employer argues that the administrative law judge's finding must be vacated, as she did not adequately identify the evidence supporting her conclusion or the method by which she computed five unreported years of coal mine employment, thereby violating the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[6] In support of its contention, employer observes that the administrative law judge's citation of Director's Exhibits 1-6 was insufficient, in light of the fact that these exhibits consist of a total 1,770 pages. Employer further maintains that, contrary to the administrative law judge's finding, claimant's testimony as to the periods of coal mine employment that do not appear on his SSREs is not consistent with his written descriptions of his coal mine employment history. Employer's Brief at 8; *see* Decision and Order at 5. Employer also asserts that the administrative law judge miscalculated the length of claimant's employment with Rocky Coal Company, Mr. Ruel Fuller, Atomic Fuel Coal Company and Hagi 2.

The Director responds and asserts that "the record soundly establishes at least [fifteen] years of coal mine employment," even if the administrative law judge's calculation is not entirely accurate. Director's Brief at 3. As set forth by the Director, a

[6] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

statement submitted by LBJ Energy, dated September 20, 1996, indicates that claimant worked there for 4.01 years, from September 11, 1989 until September 13, 1993. *See* Director's Exhibit 4 at 67. In addition, the Director refers to a statement from Old Ralph Mining, dated December 5, 1994, that indicates that claimant worked there for 6.09 years, from March 10, 1982 until April 11, 1998. *See* Director's Exhibit 4 at 68. The Director further asserts that claimant's SSERs establish coal mine employment of 0.09 years in 1976, 1.0 years in 1977, 0.87 years in 1978, 1.0 years in 1979, 1.0 years in 1980, 1.0 years in 1981, 0.28 years in 1982 and 0.01 years in 1989, for a total of 5.25 years. Director's Brief at 3. The Director concludes, therefore, that "the documentary evidence of record establishes 15.35 years of coal mine employment (4.01 + 6.09 + 5.25 = 15.35)." *Id*.

Based on our review of the record and claimant's hearing testimony, we are unable to discern the method that the administrative law judge used to calculate the five years and one month of underground coal mine employment that was not accounted for on claimant's SSERs. Although the administrative law judge indicated that she compared claimant's hearing testimony to the employment history forms that claimant submitted with his applications for benefits, the administrative law judge did not resolve the numerous conflicts between the two types of evidence. Accordingly, we hold that the administrative law judge's finding of at least fifteen years of underground coal mine employment is not in compliance with the APA, as the administrative law judge did not fully set forth the rationale underlying her finding and did not resolve the conflicts in the relevant evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-161, 1-165 (1985). We must vacate, therefore, the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment, sufficient to invoke the amended Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-27.

In addition, we do not concur with the Director's assertion that, because the documentary evidence of record conclusively establishes at least fifteen years of underground coal mine employment, remand is unnecessary. The relevant evidence in the present case is voluminous and conflicting, while the evidence cited by the Director consists of two single page forms on which officials from LBJ Energy and Old Ralph Mining reported claimant's tenure as 4.01 and 6.09 years, respectively. Director's Exhibit 4 at 67, 68. Whether these forms are credible, and entitled to probative weight, are questions for the administrative law judge to resolve in her role as trier-of-fact. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993). The Board cannot reweigh the evidence or render its own findings of fact.[7] *See*

[7] Moreover, the Director, Office of Workers' Compensation Programs, used the formula set forth in 20 C.F.R. 725.101(a)(32)(iii), which provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained or the miner's coal mine employment lasted less than a calendar year, "the adjudication officer *may*" determine the length of the miner's work history by dividing the miner's yearly

Piney Mountain Coal Co. v. Mays, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, we must remand this case to the administrative law judge for reconsideration of whether claimant established the fifteen years of underground coal mine employment necessary for invocation of the amended Section 411(c)(4) presumption. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-126; *Muncy*, 25 BLR at 1-27.

In so doing, the administrative law judge must be mindful that claimant bears the burden of proof on this issue. *See Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003). The administrative law judge must consider all relevant evidence of record in ascertaining the dates and length of claimant's underground coal mine employment including, but not limited to, claimant's testimony, the employment history forms submitted in the current and previous claims, and claimant's SSERs, and resolve all conflicts in the evidence. The administrative law judge should then set forth her findings on remand in detail, including the underlying rationale as required by the APA. *See Wojtowicz*, 12 BLR at 1-165. In particular, the administrative law judge must resolve the conflicts between claimant's testimony and the various employment history forms that he submitted regarding his work for Hagi 2, Ruel Fuller, Atomic Fuel Coal Company and Rocky Coal Company.[8]

If the administrative law judge finds, on remand, that claimant has established fifteen years of underground coal mine employment, she may reinstate her finding that claimant invoked the amended Section 411(c)(4) presumption. Conversely, if the administrative law judge finds on remand that claimant is unable to establish the fifteen years of underground coal mine employment necessary for invocation of the amended

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income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii) (emphasis added); *see* Director's Brief at 3. Because use of this formula is discretionary, the administrative law judge was not, and is not, required to apply it in this case.

[8] Employer states that claimant testified that he worked for Atomic Fuel Company, which was owned by a person named Ruel Fuller, but the administrative law judge erred in crediting claimant with employment with both Atomic Fuel Company and Ruel Fuller. *See* Decision and Order at 6; Transcript of August 28, 2012 Hearing at 26-27. Employer also maintains that, contrary to the administrative law judge's finding, claimant's Social Security earnings records (SSERs) reflect that Rocky Coal Company paid claimant $11,336.74 in 1979. *See* Director's Exhibit 3. In addition, because employer included a year of employment with Rocky Coal Company in its concession that claimant's SSERs reflect 13.72 years of underground coal mine employment, and the administrative law judge accepted that concession, employer asserts that the administrative law judge credited claimant's employment with Rocky Coal Company twice.

Section 411(c)(4) presumption, she must consider whether claimant has established entitlement pursuant to 20 C.F.R. Part 718 without benefit of the presumption.

II. Rebuttal of the Amended Section 411(c)(4) Presumption

A. Existence of Pneumoconiosis

In the interest of judicial economy, we also address employer's arguments that the administrative law judge erred in finding that it failed to rebut the amended Section 411(c)(4) presumption. Because the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either clinical or legal pneumoconiosis,[9] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii).

With respect to the presumed existence of pneumoconiosis, the administrative law judge considered six interpretations of two analog x-rays dated June 25, 2010 and May 15, 2012. Decision and Order at 10. Drs. DePonte and Alexander, both Board-certified radiologists and B readers, interpreted the June 25, 2010 x-ray as positive for pneumoconiosis, while Dr. Scott, a Board-certified radiologist and B reader, interpreted this x-ray as negative. Director's Exhibits 15, 22; Employer's Exhibit 6. The x-ray dated

[9] The regulation at 20 C.F.R. §718.201(a)(1) provides:

> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by 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). Legal pneumoconiosis" is defined at 20 C.F.R. §718.201(a)(2) as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation further provides that "this definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*

May 15, 2012, was interpreted by Dr. Alexander as positive for pneumoconiosis, while Dr. Scott found it to be negative. Claimant's Exhibit 3; Employer's Exhibit 1. The administrative law judge found that the June 25, 2010 x-ray was positive for pneumoconiosis, based on the preponderance of positive readings, while the May 15, 2012 x-ray was in equipoise, as the readings by equally qualified radiologists were evenly divided between positive and negative. Decision and Order at 10. The administrative law judge concluded that the weight of the x-ray evidence, as a whole, was positive and, therefore, insufficient to establish rebuttal of the presumption. *Id*.

The administrative law judge also considered two readings of a digital x-ray dated October 28, 2010. Decision and Order at 12. Dr. Alexander interpreted this x-ray as positive and Dr. Wiot, a Board-certified radiologist and B reader, interpreted this x-ray as negative. Claimant's Exhibit 1; Director's Exhibit 16. The administrative law judge found that the digital x-ray evidence was in equipoise and was insufficient to rebut the presumption. Decision and Order at 12.

Employer contends that the administrative law judge erred in failing to address the argument presented in its closing brief, that the analog and digital x-ray readings of Dr. Alexander should not be accorded any weight because he read the May 15, 2012 x-ray as positive for pneumoconiosis, despite the fact that it was obtained after claimant had a double lung transplant,[10] "thereby undermining his credibility and [his] ability to remain objective." Employer's Brief at 21. Because the administrative law judge did not discuss the merit, if any, of employer's contention regarding Dr. Alexander, we vacate the administrative law judge's finding that employer failed to establish the absence of clinical pneumoconiosis. On remand the administrative law judge must consider whether Dr. Alexander's credibility is undermined by his interpretations of both the pre-double lung transplant and post-double lung transplant x-rays as positive. We also instruct the administrative law judge to render a finding as to whether the parties put forth evidence establishing that digital x-rays are "medically acceptable and relevant to entitlement," as required by 20 C.F.R. §718.107(b).[11]

After considering the reports of Drs. Carrott and Oesterling, the administrative law judge determined that the pathology evidence did not assist employer in rebutting the presumed existence of pneumoconiosis, because Dr. Carrott diagnosed simple

[10] Claimant underwent a double-lung transplant on September 12, 2011.

[11] This instruction, and the subsequent instructions involving the administrative law judge's weighing of specific items of medical evidence, also apply if the administrative law judge determines that claimant has not invoked the amended Section 411(c)(4) presumption and considers whether claimant has established entitlement to benefits under 20 C.F.R. Part 718 without benefit of the presumption.

pneumoconiosis and she found that Dr. Oesterling's opinion, that claimant did not have an occupational lung disease, was entitled to little weight. Decision and Order at 11; Claimant's Exhibit 5; Employer's Exhibit 2. Employer alleges that the administrative law judge erred in crediting Dr. Carrott's diagnosis of clinical pneumoconiosis because Dr. Carrott did not include a microscopic description of the lung tissue, as required under the quality standards set forth in 20 C.F.R. §718.106. Because the pathology report was part of claimant's hospitalization and treatment records, employer is incorrect in arguing that it is subject to the quality standards. 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008). Nevertheless, the administrative law judge should have rendered an explicit determination as to whether the pathology report was reliable and specified the weight to which it was entitled. 20 C.F.R. §718.101; *see* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). We vacate, therefore, the administrative law judge's finding that Dr. Carrott diagnosed simple clinical pneumoconiosis in his pathology report and instruct the administrative law judge to reconsider this report on remand. In doing so, the administrative law judge must initially determine the true author of the report, as our review of the record indicates that it was prepared and electronically signed by Drs. Mills and Green, pathologists, whereas Dr. Carrott, a surgeon, received a copy of the report.[12] Claimant's Exhibit 5.

The administrative law judge must also reconsider Dr. Oesterling's pathology report on remand. As employer contends, the administrative law judge did not explain how Dr. Oesterling's failure to specify claimant's employment and smoking histories detracted from the credibility of his statement that he did not see any nodular changes consistent with clinical pneumoconiosis.[13] *See* 20 C.F.R. §718.201(a)(1), (2); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); Employer's Exhibit 2.

Employer next alleges that the administrative law judge erred in discrediting the medical opinions of Drs. Fino and Rosenberg that claimant does not have clinical pneumoconiosis. The administrative law judge rejected these opinions because she found that they were contradicted by her finding that the x-ray evidence was positive for clinical

[12] This pathology report, dated September 13, 2011, contains diagnoses of pneumonectomy, marked emphysema and interstitial fibrosis, anthracosilicosis and eight anthracosilicotic nodules in the left lung. Claimant's Exhibit 5. It also contains diagnoses of pneumonectomy, marked emphysema and interstitial fibrosis, anthracosilicosis and five anthracosilicotic nodules in the right lung. *Id*.

[13] Dr. Oesterling reported the presence of emphysematous changes. Employer's Exhibit 2. However, The Department of Labor indicated, in the preamble to the revised regulations that became effective in 2001, that emphysema is a type of obstructive lung disease that can fall within the definition of legal pneumoconiosis. 65 Fed. Reg. 79,939 (Dec. 20, 2000); 20 C.F.R. §718.201(a)(2).

pneumoconiosis and that the pathology evidence was insufficient to establish that claimant does not have clinical pneumoconiosis. Decision and Order at 13-15. Because we have vacated the administrative law judge's findings with respect to the x-ray and pathology evidence, we also vacate her decision to discredit the opinions of Drs. Fino and Rosenberg on the issue of the existence of clinical pneumoconiosis. The administrative law judge must address these opinions on remand in light of her reconsideration of the x-ray and pathology evidence. If, however, the administrative law judge finds clinical pneumoconiosis established on remand, she may reinstate these findings.

Employer further asserts that the administrative law judge erred in finding that Dr. Fino's opinion, that claimant does not suffer from legal pneumoconiosis, was entitled to little weight because Dr. Fino stated that the failure of claimant's obstructive impairment to progress after he left the mines precluded a diagnosis of legal pneumoconiosis. Employer maintains that Dr. Fino merely observed that "it would be unlikely" for claimant to develop an obstructive impairment due to coal dust exposure if he did not have an obstructive impairment when he retired from mining. Employer's Brief at 23, *quoting* Employer's Exhibit 7 at 9. We need not determine whether this allegation of error has merit, because the administrative law judge provided a valid alternative rationale for discrediting Dr. Fino's opinion. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The administrative law judge acted within her discretion as fact-finder in according "diminished weight" to Dr. Fino's opinion on the ground that he relied on "generalities from various medical studies without explaining why claimant could not represent the case of the unusual miner who deviated from the subjects set forth in the studies cited." derived from Decision and Order at 13; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Accordingly, we affirm the administrative law judge's discrediting of Dr. Fino's opinion on the issue of the existence of legal pneumoconiosis. Decision and Order at 13.

Finally, employer maintains that the administrative law judge's erroneous finding as to the length of claimant's smoking history caused her to render flawed credibility determinations regarding the medical opinion evidence relevant to the existence of legal pneumoconiosis. Employer contends that, because "it appears that [the administrative law judge] relied upon a smoking history of 'at least' twenty pack-years, but not as great as sixty-pack years," she found a forty pack-year range that lacks the specificity required by the APA. Employer's Brief in Support of Petition for Review at 18. In addition, employer argues that the administrative law judge failed to consider evidence relevant to the length of claimant's smoking history. These arguments have merit, in part.

In the administrative law judge's Decision and Order, she acknowledged employer's post-hearing brief allegation that claimant had a sixty pack-year smoking

history. Decision and Order at 6. The administrative law judge then summarized the various smoking histories for claimant and concluded:

> . . . Claimant has been inconsistent in reporting his smoking history. While at times it appears that Claimant minimized his smoking history, on several occasions when seeking treatment he reported a maximum history of 20 pack-years. I find insufficient evidence to support Employer's argument that Claimant has a 60 pack[-]year[] history. However, I find that Claimant has at least a 20 pack-year history of cigarette smoking.

Id. at 8; Director's Exhibits 1, 3, 4, 5; Claimant's Exhibit 4; Employer's Exhibit 9. The quoted passage makes clear that, contrary to employer's contention, the administrative law judge rationally determined that the evidence she reviewed did not support a finding of sixty pack-years of smoking. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). Thus, employer is also incorrect in maintaining that the administrative law judge relied on a forty pack-year range when assessing the credibility of the medical opinions.

Employer, however, correctly observes that the administrative law judge did not discuss the April 20, 1987 treatment note that claimant was smoking 1.5 packs per day; the April 19, 2010 treatment note that claimant had a lengthy smoking history of two packs per day; and another treatment note from the same date reporting that claimant smoked one-to-two packs a day for thirty-five years. Because the administrative law judge has not specifically addressed this relevant evidence, we must vacate her smoking history finding of at least twenty pack-years. *See Gillen v. Peabody Coal Co*., 16 BLR 1-22, 1-26 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). On remand, the administrative law judge must consider the treatment notes dated April 20, 1987 and April 19, 2010, in conjunction with the other relevant evidence, and render a specific finding as to the length of claimant's smoking history. *See Bobick*, 13 BLR at 1-54.

In light of the administrative law judge's reliance on her smoking history finding when discrediting Dr. Rosenberg's opinion, that claimant does not have legal pneumoconiosis, we must also vacate this finding.[14] The administrative law judge must reconsider Dr. Rosenberg's opinion on remand to determine whether he had an accurate understanding of claimant's smoking history. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

[14] Because the administrative law judge provided a valid rationale for discrediting Dr. Fino's opinion, that claimant does not have legal pneumoconiosis, the flaws in her consideration of claimant's smoking history do not require that we vacate her credibility determination with respect to Dr. Fino's opinion. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

B. Total Disability Causation

Because the administrative law judge relied on her findings regarding employer's failure to rebut the presumed existence of legal pneumoconiosis to determine that employer did not rebut the presumed causal relationship between pneumoconiosis and claimant's total disability, we must also vacate this finding. The administrative law judge must reconsider the issue of total disability causation in light of her reconsideration of the evidence relevant to the existence of legal pneumoconiosis on remand. The administrative law judge must set forth her findings on remand in detail, including the underlying rationale of her decision, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim 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.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge