BRB No. 07-0180 BLA

R.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PBS COALS, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 10/24/2007
	)	
ROCKWOOD CASUALTY 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 on Remand of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon LLP), Pittsburgh, Pennsylvania, for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 on Remand (04-BLA-5057) of Administrative Law Judge Daniel L. Leland awarding 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 subsequent claim filed on January 25, 2002.[1] In the initial decision, the administrative law judge noted that employer conceded that claimant was totally disabled, thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1996 claim became final. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered claimant's 2002 claim on the merits. After crediting claimant with eighteen years of coal mine employment, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence did not establish that claimant's total disability was 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 did not provide valid reasons for discrediting the opinions of Drs. Schaaf and Begley that claimant has pneumoconiosis. Therefore, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c) and remanded the case to the administrative law judge for further consideration.[2] *[R.K.] v. PBS Coals, Inc.*, BRB No. 05-0606 BLA (Apr. 27, 2006) (unpub.).

On remand, 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). Weighing all of the relevant evidence together, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R.

---

[1] Claimant initially filed a claim for benefits on February 26, 1996. Director's Exhibit 1. The district director denied benefits on June 12, 1996 because claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. *Id.* There is no indication that claimant took any further action in regard to his 1996 claim. Claimant filed a second claim on January 25, 2002. Director's Exhibit 3.

[2] The Board affirmed, as unchallenged, the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3). *[R.K.] v. PBS Coals, Inc.*, BRB No. 05-0606 BLA (Apr. 27, 2006) (unpub.), slip op. at 2.

§718.202(a). The administrative law judge also found that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(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 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. In a limited response brief, the Director, Office of Workers' Compensation Programs, contends that the Board should reject employer's argument that the administrative law judge erred in relying upon *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) as authority to reject Dr. Fino's disability causation opinion because Dr. Fino did not diagnose pneumoconiosis. In a reply brief, employer argues that the administrative law judge erred in rejecting Dr. Fino's disability causation opinion.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living 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).

Employer contends that the administrative law judge committed numerous errors in finding that the medical opinion evidence established the existence of legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(4). Drs. Begley and Schaaf opined that claimant suffered from chronic obstructive pulmonary disease attributable to both smoking and coal dust exposure. Claimant's Exhibits, 4, 9, 10. Dr. Fino opined that claimant's chronic obstructive pulmonary disease was due solely to smoking. Employer's Exhibit 5.

[3] "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). A disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2)(b).

In his consideration of whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge found that Dr. Begley's opinion was entitled to "heightened consideration" based upon his status as claimant's treating physician. Decision and Order on Remand at 6. The administrative law judge also found that the opinions of Drs. Begley and Schaaf, that claimant has a pulmonary impairment significantly related to, or substantially aggravated by, his coal dust exposure, were entitled to greater weight because they accounted for the contributory impact of both claimant's coal dust exposure and cigarette smoking. *Id.* The administrative law judge accorded less weight to Dr. Fino's opinion because he did not adequately address the degree to which claimant's pulmonary impairment was affected by coal dust exposure. *Id.* The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 6-7.

Employer initially contends that the administrative law judge erred in his consideration of Dr. Fino's opinion. The administrative law judge accorded less weight to Dr. Fino's opinion because he found that, while Dr. Fino clearly opined that claimant's obstructive lung disease was significantly related to smoking, the doctor did not adequately explain why claimant's obstructive lung disease could not also have been significantly related to his coal dust exposure. Decision and Order at 6.

In considering Dr. Fino's opinion, the administrative law judge focused upon Dr. Fino's statement that claimant's smoking history was sufficient to cause his entire pulmonary problem. Decision and Order on Remand at 6; Employer's Exhibit 5 at 14. *Id.* However, the administrative law judge did not address several statements made by Dr. Fino, which indicate that he did not believe that claimant's obstructive lung disease was significantly related to his coal dust exposure. For example, in his June 24, 2003 report, Dr. Fino stated, "Even if I assume that coal mine dust inhalation played some role in the obstruction, it was not clinically significant." Employer's Exhibit 5.

Thus, Dr. Fino considered claimant's condition, *assuming* that coal dust inhalation played "some role" in causing claimant's obstruction. Moreover, even assuming that coal dust exposure played "some role" in the obstruction, Dr. Fino opined that the contribution by coal mine dust inhalation was not "clinically significant."

Additionally, in his June 24, 2003 report, Dr. Fino opined that "[a]lthough [nineteen] years in the mines is sufficient in some individuals to cause a coal mine dust related pulmonary condition, it has not caused a problem for [claimant]." Employer's Exhibit 5. Further, Dr. Fino testified that claimant had a zero percent contribution of coal mine dust exposure and a one hundred percent contribution from cigarette smoking in his disability. Employer's Exhibit 5 at 25-26. Moreover, the record reflects that Dr. Fino

provided a detailed rationale as to why he did not believe that claimant's obstructive lung disease was attributable to his coal dust exposure. *See* Employer's Exhibit 5 at 14-17. Consequently, the administrative law judge's finding that Dr. Fino did not adequately address whether claimant's coal dust exposure contributed to his obstructive lung disease is not supported by substantial evidence. *See* 33 U.S.C. §921(b)(3); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also challenges the administrative law judge's additional bases for according less weight to Dr. Fino's opinion. The administrative law judge stated that:

> Additionally, while Dr. Fino concluded that Claimant's employment history is clinically insignificant based on his duration of coal mine work above ground, Dr. Fino also testified that he assumed that Claimant had "all of the coal dust exposure necessary to cause a coal mine dust related condition." Therefore, Dr. Fino has undermined his primary rationale for deemphasizing the impact of Claimant's coal dust exposure in his impairment.

Decision and Order on Remand at 7.

During his deposition, Dr. Fino was asked whether he was assuming that, because claimant worked above ground, claimant had less coal dust exposure than a miner who worked underground. Dr. Fino answered:

> In this particular case, I don't know what his coal dust exposures are. I can't say that with any accuracy. What I can say it that when you look at epidemiologic studies of above ground workers versus underground workers, with the exception of if you are a driller, that generally you do. But I prefer to assume that he had --- I'm assuming that he had all of the coal dust exposure necessary to cause a coal mine dust related condition.

Employer's Exhibit 5 at 20.[4]

Although Dr. Fino acknowledged that claimant's nineteen years of coal mine dust exposure *may* cause a coal mine dust-related pulmonary condition, the doctor explained why he did not believe that claimant's coal dust exposure contributed to his pulmonary condition in this case. *See* Employer's Exhibit 5 at 14-17. Thus, the record reflects that Dr. Fino's opinion was not based primarily upon the miner's status as a surface miner.

[4] At the February 15, 2005 hearing, claimant testified that all of his coal mine employment was surface mining. Transcript at 11. Although claimant testified that he was a heavy equipment operator, he was not questioned as to the degree of his coal dust exposure. *Id.*

Consequently, the administrative law judge erred in according less weight to Dr. Fino's opinion on this basis. *See Tackett,* 7 BLR at 1-706.

The administrative law judge also accorded less weight to Dr. Fino's opinion, stating that:

> Dr. Fino also reasoned that Claimant's hypercarbia is uncommon in coal mine dust pulmonary conditions and is thus related to his smoking history. Dr. Schaaf and Dr. Begley both testified that hypercarbia is not exclusive to smoking related impairment [sic]. In light of the foregoing, I find that Dr. Fino's opinion disregarding the significance of coal dust in Claimant's obstruction is poorly reasoned, and is accorded diminished weight.

Decision and Order on Remand at 7.

As employer accurately notes, Dr. Fino did not testify that hypercarbia is exclusive to smoking-related pulmonary impairments. Rather, Dr. Fino testified that hypercarbia is very unusual in a coal mine dust-related pulmonary condition *unless* there is also evidence of "severe fibrosis, [a] very high profusion category x-ray, or progressive massive fibrosis." Employer's Exhibit 5 at 16. Dr. Fino further noted that hypercarbia is "quite common in individuals who have significant smoking-related lung disease." *Id.* Because Dr. Fino never opined that hypercarbia is exclusive to a smoking-related impairment, the fact that Drs. Schaaf and Dr. Begley opined that hypercarbia is not exclusive to smoking-related pulmonary impairments does not undermine Dr. Fino's opinion. *See Tackett,* 7 BLR at 1-706. Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and instruct the administrative law judge to reconsider Dr. Fino's opinion on remand.

Employer also argues that the administrative law judge erred in not addressing whether Dr. Begley had an accurate understanding of the extent of claimant's coal dust exposure. The administrative law judge credited claimant with eighteen years of coal mine employment. The administrative law judge noted that Dr. Begley was aware that claimant's coal mine employment ended in 1996, and that the doctor characterized claimant's coal dust exposure as "heavy." Decision and Order on Remand at 3; Claimant's Exhibit 10 at 22-23, 28. The administrative law judge, however, erred in not addressing whether Dr. Begley had an accurate understanding of the duration of claimant's coal dust exposure. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984) (holding that an administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health).

Employer argues that the administrative law judge erred in not addressing whether

the opinions of Drs. Begley and Schaaf, that claimant's chronic obstructive pulmonary disease was attributable to both cigarette smoking and coal dust exposure, were sufficiently reasoned. We agree. 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). Although the administrative law judge found that the opinions of Drs. Begley and Schaaf were entitled to great weight, he did not address whether they were sufficiently reasoned.[5]

Employer also argues that the administrative law judge erred in crediting Dr. Begley's opinion based upon his status as claimant's treating physician. The administrative law judge found that "Dr. Begley has established a relationship with [c]laimant that is sufficient to attain a greater understanding of [c]laimant's condition." Decision and Order on Remand at 6. The administrative law judge, however, failed to provide a basis for his conclusion. On remand, the administrative law judge should consider whether Dr. Begley's opinion is entitled to additional weight based upon his status as the miner's treating physician in light of the factors set out at 20 C.F.R. §718.104(d)(1)-(4). The administrative law judge should also consider that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

On remand, when reconsidering whether the medical opinion evidence is sufficient to establish 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, and the documentation underlying their medical judgments. *See Balsavage v. Director, OWCP*,

[5] Employer contends that the administrative law judge erred in not addressing the fact that Dr. Schaaf did not consider the impact of claimant's continued smoking on his pulmonary condition. Employer argues that Dr. Schaaf's finding that claimant stopped smoking three months before he examined him in January 2004 conflicts with Dr. Begley's deposition testimony that claimant was still smoking in December of 2004. On remand, the administrative law judge found that claimant's testimony and the various physician opinion evidence was consistent and demonstrated that claimant has a forty pack-year smoking history. Given that Dr. Schaaf relied upon a forty pack-year smoking history and attributed claimant's chronic obstructive pulmonary disease in part to smoking, we reject employer's contention that Dr. Schaaf did not have an accurate understanding of claimant's smoking history.

295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986).

Additionally, because the administrative law judge must reevaluate whether the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). We, therefore, need not address whether the administrative law judge properly discredited Dr. Fino's disability causation opinion because Dr. Fino did not diagnose pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated, 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