BRB No. 09-0143 BLA

V.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AGIPCOAL USA, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 10/26/2009
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

V.S., Elkins, West Virginia, *pro se*.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order On Remand (05-BLA-5582) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge)

awarding benefits on a subsequent claim[1] 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 is the second time this case is before the Board. In the initial decision, the administrative law judge, after crediting claimant with ten years of coal mine employment, found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and remanded the case for reconsideration. The Board instructed the administrative law judge to weigh the previously submitted evidence in conjunction with the newly submitted evidence; to consider the entirety of Dr. Renn's rationale for opining that claimant does not have pneumoconiosis, including his reliance on claimant's medical treatment records; to consider the credibility of the lymph node biopsy with regard to Dr. Ghamande's diagnosis of silicosis; to explain the weight accorded to Dr. Ghamande's opinion in light of his reliance on non-conforming pulmonary function studies to support his opinion; and, after considering whether the medical opinion evidence supports a finding of pneumoconiosis, to weigh together all of the relevant evidence to determine whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a).[2] *V.S. v. Agipcoal USA, Inc.*, BRB No. 07-0274 BLA, slip op. at 4-7 (Dec. 21, 2007)(unpub.). The Board additionally instructed that, if, on remand, the administrative law judge again found that the evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a), she was to consider whether the pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b). Further, in light of its decision to vacate the administrative law judge's finding at 20 C.F.R. §718.202(a), the Board vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R.

[1] Claimant's initial claim, filed on January 31, 2001, was denied on January 17, 2002, by the district director for failure to establish total disability. Director's Exhibit 1. The record does not reflect that claimant took any further action until filing the instant claim for benefits on April 15, 2004. Director's Exhibit 3.

[2] The administrative law judge found that the x-ray and biopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2).

§718.204(c), and directed the administrative law judge to consider further all of the relevant evidence thereunder, if reached, on remand.[3] *Id*. at 7.

On remand, the administrative law judge again found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that claimant's totally disabling respiratory impairment is due to pneumoconiosis under 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 evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that claimant's totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant, without the assistance of counsel, responds by letter, generally urging the Board to affirm the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

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*).

Relevant to 20 C.F.R. §718.202(a)(4), Drs. Bellotte, Ghamande, and Fino, diagnosed silicosis or coal workers' pneumoconiosis, while Dr. Renn opined that claimant does not have pneumoconiosis. Director's Exhibits 13, 15, 17-20; Claimant's Exhibits 1-2; Employer's Exhibits 1-4, 6, 8. Considering this evidence, the administrative law judge found Dr. Ghamande's opinion to be well-reasoned. In so finding, the administrative law judge considered the Board's instructions and found that

[3] The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the evidence developed since the prior denial established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *V.S. v. Agipcoal USA, Inc.*, BRB No. 07-0274 BLA, slip op. at 2 (Dec. 21, 2007)(unpub.).

"the [lymph node] biopsy evidence does not undermine the credibility of Dr. Ghamande's opinion, which is that the biopsy evidence supports a diagnosis of silicosis but does not establish it." Decision and Order on Remand at 5. Further, the administrative law judge found that Dr. Ghamande's reliance on a non-conforming pulmonary function study "was not inappropriate in supporting his diagnosis of pneumoconiosis," because "[i]n general, pulmonary function studies are not diagnostic of pneumoconiosis" and the principle value in Dr. Ghamande's reliance on the non-conforming study was to "establish a baseline of the [c]laimant's level of impairment, as well as to recognize that the [c]laimant had a restrictive impairment [prior to claimant's bypass surgery and ARDS]." *Id*. at 6. The administrative law judge therefore found Dr. Ghamande's opinion entitled to "substantial weight." *Id*.

By contrast, the administrative law judge found that Dr. Renn's opinion was not well-reasoned and that his opinion "falls short of the other medical opinions," because "Dr. Renn failed to consider whether . . . [c]laimant could have pneumoconiosis (silicosis), in addition to his sarcoidosis, and failed to assess the evidence in that light." Decision and Order on Remand at 8. The administrative law judge also found that Dr. Renn "might not have had the opportunity to assess the entire realm of evidence" because Dr. Renn did not have access to Dr. Bellotte's 2001 evaluation prior to the date of his deposition.[4] *Id*. at 9 n.10.

Employer initially asserts that the administrative law judge erred in crediting Dr. Ghamande's opinion because, according to employer, Dr. Ghamande's opinion cannot constitute a credible diagnosis of pneumoconiosis where Dr. Ghamande based his opinion on non-conforming pulmonary function studies. We disagree. As the administrative law judge stated, pulmonary function studies are not diagnostic of pneumoconiosis. Decision and Order on Remand at 6. Moreover, substantial evidence supports the administrative law judge's finding that Dr. Ghamande's use of the non-conforming studies was to establish a baseline measurement of claimant's lung function prior to his cardiac surgery.[5] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998). Further, to the extent employer argues that the non-conforming June 16, 2003 and August 14, 2003 pulmonary function studies cannot support Dr. Ghamande's opinion that claimant had a restrictive impairment prior to his surgery, as the administrative law judge stated, non-conforming pulmonary function studies are not

[4] Although the administrative law judge summarized the opinions of Drs. Bellotte and Fino, she did not explicitly state what weight, if any, she assigned to their opinions.

[5] As noted in the Board's prior decision, the record in this case reflects that following claimant's heart bypass surgery, he developed adult respiratory distress syndrome. *V.S.*, slip op. at 4 n.4.

necessarily unreliable. Decision and Order on Remand at 6 n.5; *see also Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-478-79 (1983). Moreover, the record reflects that the report of the June 16, 2003 pulmonary function study states that the spirometry data is acceptable and reproducible and that claimant's effort was "good" "on all manuverrs [sic]," Director's Exhibit 13, and the report of the August 14, 2003 pulmonary function study states that claimant's cooperation and comprehension were good. Director's Exhibit 17. Thus, contrary to employer's assertion, the administrative law judge acted within her discretion in finding that Dr. Ghamande's reliance on claimant's non-conforming pulmonary function studies did not undermine his diagnosis of silicosis. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *see also Crapp*, 6 BLR at 1-478-79.

We, however, find merit in employer's assertion that the administrative law judge did not adequately explain her finding that Dr. Ghamande's opinion was well-reasoned. Employer's Brief at 16. Although the administrative law judge considered Dr. Ghamande's opinion in light of the factors that the Board instructed her to consider, she did not provide a reason for crediting Dr. Ghamande's opinion as a reasoned diagnosis of silicosis. *See United States Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999). Specifically, although the administrative law judge explained that the lymph node biopsy, which was not diagnostic of silicosis, and the non-conforming pulmonary function studies do not undermine Dr. Ghamande's diagnosis of silicosis, the administrative law judge did not explain how Dr. Ghamande's diagnosis was supported by the x-ray, biopsy, and pulmonary function study evidence he relied upon, but which did not establish the presence of silicosis. Consequently, we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and remand this case for further consideration. On remand, the administrative law judge must reconsider whether Dr. Ghamande's diagnosis of silicosis is reasoned and documented. Further, the administrative law judge must explain her credibility determination on remand. *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647.

We additionally find merit in employer's assertion that the administrative law judge erred in discrediting Dr. Renn's opinion for the reasons provided. Substantial evidence does not support the administrative law judge's finding that Dr. Renn failed to consider whether claimant could have silicosis in addition to his sarcoidosis, or that Dr. Renn might not have had the opportunity to assess the entire realm of evidence because he did not have access to Dr. Bellotte's 2001 evaluation prior to the date of his deposition. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Contrary to the administrative law judge's finding, the record reflects that Dr. Renn considered Dr. Bellotte's 2001 report at the deposition, and he opined that Dr. Bellotte's report supported his opinion because it showed that claimant was in "great shape" in 2001. Employer's Exhibit 8 at 15, 19, 31-32, 34. Further, contrary to the administrative law

judge's finding, Dr. Renn considered whether claimant could have silicosis in addition to sarcoidosis. However, Dr. Renn concluded that there was no valid scientific medical basis to diagnose silicosis in this case. Employer's Exhibits 1 at 9, 8 at 19. Dr. Renn explained that the x-ray evidence is not consistent with silicosis, the lymph node biopsy is not diagnostic of silicosis, and the restrictive impairment seen on claimant's pulmonary function study is inconsistent with silicosis because silicosis causes an obstructive impairment, which claimant does not have. Employer's Exhibit 8 at 14, 19. Further, to the extent the administrative law judge discredited Dr. Renn's opinion in light of Dr. Bellotte's positive x-ray interpretations, the significance of the administrative law judge's finding is unclear where Dr. Renn's characterization of the x-ray evidence is consistent with the administrative law judge's finding, at 20 C.F.R. §718.202(a)(1), that the x-ray evidence did not establish pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Consequently, the administrative law judge must reconsider the probative value of Dr. Renn's opinion on remand.

We additionally find merit in employer's assertion that the administrative law judge erred in failing to weigh the opinions of Dr. Bellotte at 20 C.F.R. §718.202(a)(4). Employer's Brief at 13. The Board previously remanded this case for the administrative law judge to weigh the previously submitted evidence in conjunction with the newly submitted evidence on remand. Although the administrative law judge summarized Dr. Bellotte's 2001 opinion, the administrative law judge did not make a finding as to its probative value at 20 C.F.R. §718.202(a)(4). *See Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988). Consequently, in considering the medical opinion evidence on remand, the administrative law judge must address both the previously submitted and newly submitted opinions of Dr. Bellotte in conjunction with the newly submitted opinions of Drs. Ghamande, Fino, and Renn, and must explain her credibility determinations.[6]

On remand, after the administrative law judge has considered whether the medical opinion evidence supports a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), she should weigh together all of the relevant evidence to determine whether pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If, on remand, the administrative law judge again finds that the evidence establishes the existence of

[6] We decline to address employer's assertions that the administrative law judge erred in crediting Dr. Ghamande's opinion because Dr. Ghamande based his opinion on an inaccurate coal mine employment history, and because Dr. Ghamande's opinion is too equivocal to constitute substantial evidence in support of claimant's burden of proof. The Board addressed and rejected these arguments the last time this case was before it, and employer has not demonstrated an exception to the law of the case doctrine. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

clinical pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge must then consider whether the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b).

Employer also contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). In light of our decision to vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of all the evidence thereunder, if reached.

Lastly, employer asks that this case be remanded to a different administrative law judge because the case has reached the point of administrative gridlock. Employer's Brief at 11. We decline to grant employer's request. Employer points to no evidence of bias or recalcitrance by the administrative law judge. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Further, based on our review of the administrative law judge's Decision and Order on Remand, there is no evidence that this case has reached the point where a "fresh look" at the evidence is required. *See Hicks*, 138 F.3d at 537, 21 BLR at 2-343.

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

_____
BETTY JEAN HALL
Administrative Appeals Judge