BRB No. 09-0200 BLA

R.M. (Widow of G.M.) Claimant-Petitioner v. LUCKY STAR COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/29/2009 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Administrative Law Judge Joseph E. Kane, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

HALL, Administrative Appeals Judge:

Claimant appeals the Decision and Order - Denying Benefits (2007-BLA-05445) of Administrative Law Judge Joseph E. Kane with respect to a survivor's 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).[1] The administrative law judge credited the miner with seven years of coal mine employment and considered the claim,

[1] Claimant is the surviving spouse of the miner, who died on February 18, 2006. Director's Exhibits 1, 12.

filed on March 31, 2006, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that claimant did not establish that the miner was suffering from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Section 718.202(a)(1), (4). Employer has responded and urges the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993); *see* 20 C.F.R. §718.205(c)(5).

Pursuant to Section 718.202(a)(1), the administrative law judge considered readings of five x-rays, all of which were interpreted by Dr. Hayes, who is a Board-

[2] We affirm the administrative law judge's determination that the miner had seven years of coal mine employment and his findings that claimant could not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), (3), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

certified radiologist and B reader. He interpreted x-rays dated April 2, 2004, November 10, 2005, November 12, 2005, December 2, 2005, and January 4, 2005, as negative for pneumoconiosis. Decision and Order at 5; Employer's Exhibits 1-3. Because there were no positive readings, the administrative law judge rationally found that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(1). *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). In addition, the administrative law judge acted within his discretion in determining that the x-ray readings contained in the miner's hospitalization and treatment records were insufficient to establish the existence of pneumoconiosis, as they were not interpreted for the presence or absence of the disease. Decision and Order at 5; Director's Exhibits 14, 15. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and "may have 'selectively analyzed"' the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding under Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinion evidence and the miner's hospital and treatment records. These records detail the miner's treatment for chronic obstructive pulmonary disease (COPD), congestive heart failure, malnutrition, hypertension and abdominal fistulas. Director's Exhibits 14, 15. Dr. Koura, the miner's treating physician, recorded a diagnosis of COPD in his treatment notes.[4] Director's Exhibit 14. In responses to a questionnaire submitted to him by claimant's attorney, Dr. Koura indicated that the miner suffered from a pulmonary disease related to coal dust inhalation, based upon the miner's history of exposure, symptoms of dyspnea, and scarring visible on x-rays. Director's Exhibit 13. Dr. Repsher, who is a Board-certified pulmonologist, reviewed the miner's medical records and concluded in his written report that even if the miner had pneumoconiosis, it did not cause any impairment. Employer's Exhibit 5. At his subsequent deposition, Dr. Repsher testified that the records that he reviewed contained no evidence of either legal or clinical pneumoconiosis. Employer's Exhibit 6 at 8. Dr. Rosenberg, also a Board-certified pulmonologist, reviewed the miner's medical records and determined in his written report that the miner did not have medical or legal pneumoconiosis. Employer's Exhibit 7. Dr. Rosenberg was deposed and reiterated his conclusion that the miner did not suffer from any pulmonary disease related to coal dust exposure.[5] Employer's Exhibit 8 at 12-13, 15, 16.

[4] Dr. Koura's qualifications are not of record.

[5] With respect to the issue of death due to pneumoconiosis, Dr. Koura indicated that "coal mining worsened [the miner's] condition." Director's Exhibit 13. Drs. Repsher and Rosenberg stated that the miner's death was unrelated to pneumoconiosis or any other dust disease of the lung. Employer's Exhibits 5-8.

The administrative law judge found that the miner's hospital and treatment records did not support a finding of pneumoconiosis, as they contained no diagnosis of clinical pneumoconiosis or a respiratory or pulmonary disease related to coal dust exposure. Decision and Order at 6. Regarding the medical opinion evidence, the administrative law judge noted that, in determining the weight to be accorded to each opinion, treating physician status, and the physicians' respective qualifications, are factors to be considered. *Id*. The administrative law judge concluded:

> In the instant case, and while Dr. Koura was the [m]iner's treating physician, I find his opinion to be neither well-reasoned nor well-documented. I do not find it worthy of as much weight as the opinions of Drs. Repsher and Rosenberg. Based upon the medical opinions of the latter two physicians, I find that the evidence fails to establish that the Miner suffered from coal worker's pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Id. at 7.

On appeal, claimant indicates that the Board has held that a documented opinion is one in which the physician has set forth the bases for his diagnoses. Claimant also notes that the Board has held that a report may be adequately documented if it is based upon such items as the miner's history, an examination, and the miner's symptoms. Claimant then states, "[i]n light of these decisions[,] it can be concluded that the report and opinion of Dr. Koura is [sic] well-reasoned[;] therefore, Judge Kane should not have rejected it for the reasons he provided." Claimant's Brief at 4. Claimant further contends that an administrative law judge may not discredit the opinion of a physician whose report is based upon an x-ray interpretation that is contrary to the administrative law judge's findings or because the record contains subsequent negative readings. Claimant also maintains that the administrative law judge substituted his opinion for that of the medical experts. Lastly, claimant alleges that the administrative law judge failed to address Dr. Koura's status as the miner's treating physician.[6]

In order for the Board to ascertain whether a finding challenged on appeal is rational and supported by substantial evidence, the administrative law judge must identify the basis for his or her finding, or it must be readily ascertainable from the administrative law judge's Decision and Order. 20 C.F.R. §802.301(a); *see Harlan Bell Coal Co. v.*

[6] We affirm the administrative law judge's finding that the miner's hospital and treatment records were insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as claimant has not challenged it on appeal. *See Skrack*, 6 BLR at 1-711.

Lemar, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). In addition, the Administrative Procedure Act (APA), 5 U.S.C. §554 *et seq.*, as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), requires that every adjudicatory decision 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In the present case, the administrative law judge provided no explanation for his finding that Dr. Koura's opinion was not well-reasoned or well-documented and, therefore, was entitled to less weight than the opinions of Drs. Repsher and Rosenberg. Decision and Order at 7. Thus, we cannot determine whether the administrative law judge's finding is rational and supported by substantial evidence.

We must vacate, therefore, the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(4) and remand this case to the administrative law judge for reconsideration of the medical opinion evidence. *See Lemar*, 904 F.2d at 1046-47, 14 BLR at 2-4. In addition, although the administrative law judge indicated that Dr. Koura was a treating physician, he did not address the factors set forth in 20 C.F.R. §718.104(d)(1)-(5), presumably in light of his determination that Dr. Koura's opinion was not well-documented or well-reasoned. *See* Decision and Order at 6-7. Because we cannot affirm this finding, the administrative law judge must reconsider Dr. Koura's opinion under 20 C.F.R. §718.104(d) if he determines on remand that it is documented and reasoned. The administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165. If the administrative law judge determines that claimant has established the existence of pneumoconiosis on remand, he must render a finding, pursuant to 20 C.F.R. §718.203, as to whether the miner's pneumoconiosis arose out of coal mine employment. If the administrative law judge finds that claimant has met her burdens of proof at Sections 718.202(a)(4) and 718.203, he must consider whether claimant has proven that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Our dissenting colleague maintains that remanding this case to the administrative law judge is inappropriate, as "the truth" of the administrative law judge's finding, that Dr. Koura's opinion is neither well-reasoned nor well-documented, is "plain on the face" of his decision. Slip op. at 7. In support of her argument, however, our colleague relies upon a number of inferences as to the rationale underlying the administrative law judge's conclusory statement regarding Dr. Koura's opinion. Being forced by the administrative law judge's omissions to engage in an analysis of this sort serves to bolster our view that the administrative law judge did not provide the prerequisites necessary to the proper exercise of our review authority. In addition, contrary to our colleague's assertion, our decision to remand this case to the administrative law judge to allow him to set forth the

rationale underlying his finding does not conflict with the Sixth Circuit case law holding that the task of determining the credibility of a physician's opinion is committed to the discretion of the administrative law judge. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). The law of the Sixth Circuit has also made clear that it is appropriate for the reviewing authority to assess whether the administrative law judge provided a rational explanation for his or her credibility findings and whether these findings are supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307-09, 23 BLR 2-261, 2-284-86 (6th Cir. 2005)(administrative law judge did not provide rational explanation for crediting opinions of Drs. Fino and Broudy, and discrediting opinion of Dr. Rasmussen); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-78, 22 BLR 2-107, 2-120-24 (6th Cir. 2000)(substantial evidence did not support administrative law judge's findings with respect to medical evidence regarding the existence of pneumoconiosis and total disability due to pneumoconiosis).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL
Administrative Appeals Judge

I concur:

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, J., dissenting:

I respectfully dissent from the majority's decision to remand this case to the administrative law judge to explain his determination that Dr. Koura's opinion is neither well-reasoned nor well-documented. I believe that the majority's order is both unnecessary and contrary to the teaching of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises.

The majority's order of remand is unnecessary because when the administrative law judge's credibility determination is read in the context of his opinion, it is clear that Dr. Koura did not adequately support his finding of legal pneumoconiosis. The administrative law judge found that the miner had seven years of coal mine employment. He had smoked cigarettes "off and on through the time claimant and he were married" (1966), last quitting in 2006. Decision and Order at 3. On a questionnaire submitted by claimant's attorney, Dr. Koura stated that he had examined the miner several times "in patient."[7] Director's Exhibit 13. The doctor diagnosed the miner as having a "pulmonary disease that was causally related, in whole or in part, to the inhalation of coal mine dust." *Id*. The doctor identified the bases of his opinion as: a history of exposure to coal dust; dyspnea; and scarring on chest x-ray.[8] *Id*. The doctor opined that the miner's pulmonary disease played a role in either causing or hastening the miner's death because the miner had multiple medical problems and coal mining worsened his condition. *Id*.

The administrative law judge found that all five x-rays which had been read for pneumoconiosis were negative. Decision and Order at 5. He also determined that the only diagnosis of legal pneumoconiosis, Dr. Koura's statement on the questionnaire, was neither "well-reasoned nor well-documented." *Id*. at 6. The truth of that statement is plain on the face of the questionnaire and on the face of the decision. The doctor specifically identified the bases for his opinion: a history of exposure to coal dust;

[7] Dr. Koura thereby indicated that he had treated the miner several times when he was a patient in the hospital. There is nothing to suggest that the miner was the doctor's private patient or that the doctor even saw him outside the hospital. The miner's hospital records identify Dr. Koura as the miner's attending physician. Director's Exhibit 15. In *The American Heritage Medical Dictionary* (2009), an attending physician is defined as "[a] physician who, as a member of a hospital staff, admits and treats patients and may supervise or teach house staff, fellows and students." As the miner's attending physician, Dr. Koura treated the miner for all eighteen of his diagnosed conditions, the majority of which were non-respiratory. *See* Director's Exhibit 15.

[8] The administrative law judge misread "dyspnea" as "dispend." Decision and Order at 5; Director's Exhibit 13.

dyspnea; and scarring on chest x-ray. Director's Exhibit 13. The doctor's explanation cannot withstand scrutiny. First, a history of coal mine employment, even a long history, does not support a diagnosis of pneumoconiosis. *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994)(nineteen year coal mine employment history does not justify diagnosis of legal pneumoconiosis). Second, dyspnea is not a symptom peculiar to pneumoconiosis. The administrative law judge observed that, in the instant case, Dr. Repsher stated that the miner's dyspnea was most likely caused by his heart condition, because his lung function was "unequivocally normal. . . ." Decision and Order at 6, *citing* Employer's Exhibit 5. Third, the doctor cited scarring on chest x-ray. The law is clear that restating an x-ray does not qualify "as a reasoned medical judgment." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107 (6th Cir. 2000). Most assuredly, an administrative law judge may not rely on a doctor's opinion that a patient has medical pneumoconiosis when the physician bases his opinion entirely on x-ray evidence which the administrative law judge has discredited. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2000). In short, the doctor's opinion was so plainly insufficiently reasoned and documented that nothing about it warranted further discussion.

Moreover, claimant's contention that the administrative law judge erred in finding Dr. Koura's opinion not to be well-reasoned and documented must fail under the established law of the Sixth Circuit. That court has held that review of these determinations would require the court to address the doctor's credibility, which would exceed the court's limited scope of review. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). The Board is likewise prohibited from reviewing the reasoning and documentation of the doctor's opinion, because the standards of review for the Board and the court are the same. *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-477 (6th Cir. 2007); *Welch v. Benefits Review Board*, 808 F.2d 443, 445, 9 BLR 2-196, 2-198 (6th Cir. 1986). The Sixth Circuit is emphatic that it is for the administrative law judge as factfinder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility matter.'" *Wolfe*, 298 F.3d at 522, 22 BLR at 2-512, *quoting Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002)(*quoting Director, OWCO v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983)).

Recently, the Sixth Circuit affirmed an award of benefits supported by Dr. Koura's opinions, despite employer's argument that the doctor had "provided no reasoning for his opinions." *Johnson Coal Co. v. Smith*, 306 Fed. Appx. 223 (6th Cir. 2009). In response, the court neither agreed nor disagreed with employer's characterization of the record. Instead, citing *Groves*, 277 F.3d at 836, 22 BLR at 2-330, the court reiterated its principles that the adequacy of a physician's reasoning is a credibility determination for the administrative law judge, and the court lacks the authority to revisit such

determinations under the Black Lung Benefits Act. Accordingly, in revisiting the administrative law judge's determinations that Dr. Koura's opinion was neither well-reasoned nor well-documented, the Board has exceeded its scope of review.

In sum, I believe that the majority's order of remand is both unnecessary and contrary to law. *Barrett*, 478 F.3d at 358, 23 BLR at 2-477; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-330. I would affirm the administrative law judge's Decision and Order – Denying Benefits.

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REGINA C. McGRANERY
Administrative Appeals Judge