

BRB No. 09-0106 BLA

B. H.)
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 Claimant-Respondent)
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 v.)
)
 HOLSTON MINING COMPANY) DATE ISSUED: 09/03/2009
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 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville,
Kentucky, for claimant

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (07-BLA-5814) of
Administrative Law Judge Daniel F. Solomon rendered 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).¹ The administrative law judge credited

¹ Claimant filed his claim for benefits on August 1, 2006. Director's Exhibit 2.
The district director issued a proposed decision and order awarding benefits on April 13,
2007. Director's Exhibit 38. Employer requested a formal hearing before the Office of
Administrative Law Judges on April 23, 2007.

claimant with at least twenty-eight years of coal mine employment² based on the parties' stipulation. Decision and Order at 2. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis,³ in the form of an obstructive ventilatory impairment due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §§718.202(a)(4), 718.201(a), 718.203(b).⁴ The administrative law judge further found that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)⁵, 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal employer contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the cause of claimant's totally disabling

² The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 6; Hearing Tr. at 14. 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, 1-202 (1989)(*en banc*).

³ A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, 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 "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁴ While the administrative law judge also found that claimant did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), he did not make a specific finding as to the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 5-7.

⁵ Because employer does not challenge the administrative law judge's finding that total disability was established pursuant to 20 C.F.R. §718.204(b)(2), we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

respiratory impairment pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal. Employer filed a reply brief, reiterating its contentions.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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).

Employer contends that the administrative law judge erred in relying on the opinion of Dr. Rasmussen, and in rejecting the opinions of Drs. Rosenberg and Broudy, in determining that legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4).⁶ Dr. Rasmussen opined that claimant's chronic obstructive pulmonary disease (COPD) was due to both smoking and coal dust exposure.⁷ Claimant's Exhibits

⁶ The record also contains the opinions of Drs. Baker and Forehand, who each opined that claimant suffers from both clinical and legal pneumoconiosis. Director's Exhibit 12; Claimant's Exhibits 1, 2.

⁷ Dr. Rasmussen, who is Board-certified in Internal Medicine and Forensic Medicine, examined and tested claimant on February 18, 2008. Claimant's Exhibit 3. Dr. Rasmussen noted that claimant began smoking in 1959 at age 16 and smoked "less than a pack of cigarettes a day" until he quit in 1980. *Id.* at 2. Dr. Rasmussen diagnosed clinical and legal pneumoconiosis and emphysema, noting claimant's significant history of dust exposure (30 years), and x-ray changes consistent with pneumoconiosis. *Id.* Dr. Rasmussen opined that, "The two most likely causes of his disabling lung disease are his 20 + years of cigarette smoking as well as his 30 years of coal mine employment. These agents cause identical forms of all types of emphysema including panacinar, centriacinar, bullous, etc." *Id.* at 4.

3, 4. Drs. Rosenberg⁸ and Broudy⁹ attributed claimant's COPD solely to smoking. Employer's Exhibits 4, 6-8, 10, 16.

⁸ Dr. Rosenberg, who is Board-certified in Internal Medicine, Pulmonary Medicine, and Occupational Disease, examined and tested claimant on February 13, 2007. Dr. Rosenberg noted that claimant reported having smoked regularly from the time he was a child until around 1981. Employer's Exhibit 4. Dr. Rosenberg concluded, based on the studies summarized in NIOSH's Recommended Standard for Coal Mine Dust Exposure (1995), that claimant does not have clinical or legal pneumoconiosis, but has chronic obstructive pulmonary disease (COPD) consequent to his long smoking history with an asthmatic component. *Id.* at 4. Dr. Rosenberg reviewed Dr. Forehand's report and prepared an addendum on March 19, 2008. Employer's Exhibit 6. After a review of Dr. Forehand's opinion, that claimant has a totally disabling respiratory impairment due to a combination of smoking and coal dust exposure, Dr. Rosenberg reiterated his conclusion that claimant does not have clinical or legal pneumoconiosis as his decreased FEV1%, according to a variety of epidemiological studies, is caused by smoking, rather than coal mine dust exposure. *Id.* at 3. Dr. Rosenberg also reviewed Dr. Rasmussen's report and prepared an addendum dated April 25, 2008, and again concluded that claimant does not have clinical or legal pneumoconiosis, but rather, has obstructive lung disease related to his long smoking history. Employer's Exhibit 7. Following the hearing, the record was held open for the submission of Dr. Rosenberg's deposition testimony. Hearing Tr. at 39. However, in his decision, the administrative law judge only referenced employer's post-hearing submission of Dr. Rosenberg's April 25, 2008 written report. Decision and Order at 1-2. In addition, while the administrative law judge stated that Dr. Rosenberg testified regarding his opinions on April 9, 2008, the record before the Board does not contain a copy of Dr. Rosenberg's deposition. Decision and Order at 8, 9. We note, however, that in light of our determination to remand this case for further consideration of the evidence, Dr. Rosenberg's deposition testimony is not necessary to our decision herein.

⁹ Dr. Broudy, who is Board-certified in Internal Medicine and Pulmonary Medicine, examined and tested claimant on October 9, 2007, and noted that claimant started smoking at a very young age and recorded a smoking history of one pack per day for twenty to twenty-five years until he quit in 1980. Employer's Exhibit 8. Dr. Broudy diagnosed severe COPD due to cigarette smoking. Dr. Broudy specifically found, "There is hyperinflation of lung zones with air trapping on the lung volume analysis. This suggests enlarged emphysematous type lungs such as would be seen with lung disease due to cigarette smoking. With coal dust exposure one would expect small lungs due to the fibrosis from coal dust exposure." *Id.* at 4. In an addendum dated March 12, 2008, after review of Dr. Forehand's opinion, Dr. Broudy continued to opine that claimant had primary obstructive lung disease with secondary restriction, not due to pneumoconiosis or

In considering the medical opinion evidence relevant to the existence of legal pneumoconiosis, the administrative law judge initially noted:

Every physician rendering an opinion in this record agrees that the miner had totally disabling COPD. Every physician also notes a lengthy history of mining and a history of smoking.

Decision and Order at 10. Acknowledging that the physicians rendered conflicting opinions as to the cause of claimant's COPD, the administrative law judge determined to credit Dr. Rasmussen's opinion:

In reviewing the various reports and testimony, the most cogent and thorough report is rendered by Dr. Rasmussen. Whereas Drs. Rosenberg and Broudy believe the impairment is due entirely to the effects of cigarette smoking indicating their belief that coal mine dust does not cause airways obstruction absent equivalent loss of forced vital capacity with the retention of a normal FEV1/FVC, Dr. Rasmussen argues the contrary.

Decision and Order at 10. The administrative law judge also found Dr. Rasmussen's opinion to be "more consistent with the spirit of the amended regulations which now includes 'aggravation.'" Decision and Order at 11. Moreover, although Dr. Rasmussen did not consider the opinions of Dr. Rosenberg and Broudy, the administrative law judge found that Dr. Rasmussen's opinion nonetheless "addressed each of their claims," and that "[i]n fact, the Attfield and Hodous Study, 'Pulmonary [F]unction of U.S. Coal [M]iners [R]elated to [D]ust [E]xposure [E]stimates,' . . . can be used to support [Dr. Rasmussen's] conclusions." Decision and Order at 11 (citations omitted). The administrative law judge added that, even assuming "employer were correct that Drs. Forehand, Baker and Rasmussen never accounted for the findings reported by Dr. Rosenberg and Dr. Broudy . . . , it is more reasonable to accept Dr. Rasmussen's thesis as contribution is enough as long as there is aggravation." Decision and Order at 12. Thus, the administrative law judge concluded:

inhalation of coal dust, but due to severe COPD with hyperinflation and obstructive airways disease from cigarette smoking. Employer's Exhibit 10. In an addendum dated March 30, 2008, after review of Dr. Rasmussen's report, Dr. Broudy opined that claimant had typical findings of severe COPD due to cigarette smoking, based on the hyperinflation with large lungs. Employer's Exhibit 16. Dr. Broudy further testified regarding his opinion on October 29, 2007. Employer's Exhibit 9.

. . . given the objective testing, 28 years of coal mine employment, a lengthy smoking history, and the reliance on scientific journals, I find that Dr. Rasmussen's rationale is better reasoned and is more consistent with the regulations.

Decision and Order at 12. The administrative law judge therefore found that claimant established the existence of legal pneumoconiosis, based on Dr. Rasmussen's opinion.¹⁰ Decision and Order at 12.

Employer contends that, in finding that claimant established the existence of legal pneumoconiosis in the form of COPD due to both smoking and coal dust exposure, the administrative law judge failed to discuss the opinions of Drs. Broudy and Rosenberg in "any meaningful way," or to provide any rationale for rejecting their conclusions. Employer's Brief at 19-20. Employer further asserts that the administrative law judge substituted his own judgment for that of the physicians when he utilized his own review of medical studies to support the opinion of Dr. Rasmussen. Employer's Reply Brief at 4, 6. In addition, employer contends that, in crediting Dr. Rasmussen's opinion as more consistent with "the spirit of the amended regulations," the administrative law judge mischaracterized Dr. Rasmussen's opinion. Employer's Reply Brief at 5. Rather, employer contends, Dr. Rasmussen's opinion, that "differentiation of coal mine induced and cigarette smoke induced ventilatory function impairment has not been established" is contrary to the Act and its implementing regulations that specifically require claimants to establish that their respiratory condition is due, in part, to coal dust exposure. Employer's Brief at 15-17; Claimant's Exhibit 4 at 2. Thus, employer asserts, the administrative law judge erred in finding Dr. Rasmussen's opinion sufficient to carry claimant's burden of proof to establish that his COPD arose out of his coal mine employment pursuant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 15-17.

Employer's contentions generally have merit. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). However, in this case, while the administrative law judge explained his reasons for crediting the opinion of Dr. Rasmussen, the administrative law judge did not explain his basis for discounting the opinions of Drs. Rosenberg and Broudy regarding the existence of legal pneumoconiosis. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139

¹⁰ The administrative law judge did not indicate the weight, if any, he accorded to the opinions of Drs. Baker and Forehand.

(1999)(*en banc*); *Wright v. Director, OWCP*, 7 BLR 1-475, 1-477 (1984). As employer asserts, like Dr. Rasmussen, Drs. Broudy and Rosenberg provided a thorough analysis of the evidence, and based their opinions on the objective testing, claimant's coal mine employment and smoking histories. In addition, Dr. Rosenberg also discussed the relevant scientific journals, and both Drs. Rosenberg and Broudy reviewed Dr. Rasmussen's reports and responded to his opinions. Employer's Brief at 18-19; Employer's Reply Brief at 5. However, while both Drs. Rosenberg and Broudy reviewed Dr. Rasmussen's reports, and explained why they thought his conclusions were flawed, the administrative law judge did not provide his rationale for finding their opinions to be unpersuasive.¹¹ See *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Hughes*, 21 BLR at 1-139; *Wright*, 7 BLR at 1-477; Employer's Brief at 18-19.

We further agree with employer that the administrative law judge did not explain why he found Dr. Rasmussen's opinion sufficient to meet claimant's burden of proof to establish that his COPD arose out of his coal mine employment, where Dr. Rasmussen also opined that "only a minority of heavily exposed coal miners . . . ever develop[s] significant chronic lung disease," that the "mechanism of lung damage caused by cigarette smoke is identical to that caused by coal mine dust," and that "the differentiation of coal mine induced and cigarette smoking induced ventilatory function impairment has not been established." See *Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Employer's Brief at 15-17; Claimant's Exhibits 3, 4. Moreover, as employer asserts, contrary to the administrative law judge's conclusion, Dr. Rasmussen did not opine that coal mine dust had aggravated claimant's COPD. See *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); Decision and Order at 11, 12; Claimant's Exhibits 3, 4; Employer's Reply Brief at 5.

The Administrative Procedure Act provides that an administrative law judge must set forth his "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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because the administrative law judge did not adequately explain his determination to credit the opinion of Dr. Rasmussen over the opinions of Drs. Broudy and Rosenberg, we are unable to conclude that substantial evidence supports his finding that claimant's COPD arose out of coal mine employment. See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

¹¹ Additionally, a review of the administrative law judge's decision does not reveal even a summary of Dr. Broudy's written report or deposition testimony.

In light of the foregoing errors, we must vacate the administrative law judge's finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for further consideration. Specifically, on remand, the administrative law judge should reconsider the opinions of Drs. Baker, Rasmussen, Forehand, Broudy, and Rosenberg, taking into account the respective analyses and the quality of the physicians' comparative reasoning, along with the physicians' qualifications, and explain the weight he accords their conclusions. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. The administrative law judge should also reconsider whether Dr. Rasmussen's opinion supports his conclusion that claimant's COPD arose in part out of his coal mine employment. In addition, we instruct the administrative law judge, on remand, to refrain from engaging in his own analysis of medical study findings. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 382, 9 BLR 2-239, 2-247 (7th Cir. 1987); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Employer next contends, pursuant to 20 C.F.R. §718.204(c), that the administrative law judge erred in his analysis of the medical opinions when he found that the evidence established that claimant's total disability is due to pneumoconiosis. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). If, on remand, the administrative law judge finds the existence of pneumoconiosis established, he must reconsider the evidence pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Award of 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.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge