BRB No. 09-0185 BLA

C.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 09/17/2009
BIG ELK CREEK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Decision on Motion for Reconsideration of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Decision on Motion for Reconsideration (08-BLA-5022) of Administrative Law Judge Janice K. Bullard 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). This claim was filed on December 27, 2006.[1] Director's Exhibit 2. The administrative law judge credited claimant with twenty-five years of coal mine employment,[2] as stipulated by the parties. Based upon the opinion of Dr. Rasmussen, the administrative law judge found that claimant established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema that arose out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(4).[3] The administrative law judge further found that the medical evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). With respect to whether claimant's legal pneumoconiosis is a substantially contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c), the administrative law judge found Dr. Rasmussen's opinion that "legal pneumoconiosis . . . contributes in a material fashion to [claimant's] disabling lung disease," to be unexplained. Director's Exhibit 11 at 24, 27. The administrative law judge therefore found that claimant failed to establish that he is totally disabled due to legal pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge denied benefits. The administrative law judge summarily denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that Dr. Rasmussen's opinion is not well-reasoned regarding the issue of total disability due to legal pneumoconiosis pursuant to Section 718.204(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director),

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[1] Claimant's prior claim was withdrawn, and thus is treated as if it were never filed. Decision and Order at 2 n.1; Director's Exhibit 28.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 6, 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] 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).

responds, agreeing with claimant that the administrative law judge erred in her analysis of Dr. Rasmussen's opinion with respect to whether claimant is totally disabled due to legal pneumoconiosis. Employer has filed a response to the Director's brief, reiterating that the administrative law judge's finding should be affirmed. Additionally, both claimant and employer challenge the administrative law judge's discounting of the opinions of their respective doctors relevant to the issues of legal pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(c).[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. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of 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).

Pursuant to Section 718.204(c), the administrative law judge considered the opinions of Drs. Rosenberg, Vuskovich, Baker, Sandlin, and Rasmussen. Drs. Rosenberg and Vuskovich did not diagnose claimant with legal pneumoconiosis, and they attributed claimant's totally disabling pulmonary impairment to smoking. Employer's Exhibits 1, 5, 12. Dr. Baker stated "there is a chance that approximately 25 to 30% [of claimant's totally disabling pulmonary impairment] could be caused by his coal dust exposure." Claimant's Exhibit 2. Dr. Sandlin diagnosed claimant with coal workers' pneumoconiosis and severe COPD that combine to disable him. Dr. Sandlin opined that "it would be highly likely that Coal Workers' Pneumoconiosis contributes a very significant portion of his disability." Claimant's Exhibit 3. Dr. Rasmussen linked claimant's total disability to his pneumoconiosis, by stating that claimant's legal pneumoconiosis "contributes in a material fashion to his disabling lung disease." Director's Exhibit 11 at 24, 27.

[4] The administrative law judge's length of coal mine employment determination, as well her findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that total respiratory disability was established pursuant to Section 718.204(b), are unchallenged on appeal. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge discounted the opinions of Drs. Rosenberg and Vuskovich because they did not diagnose legal pneumoconiosis, contrary to her finding that claimant has legal pneumoconiosis. Decision and Order at 22. Moreover, the administrative law judge discounted Dr. Baker's opinion as equivocal, and found that Dr. Sandlin's opinion was not well-reasoned. *Id.* Lastly, the administrative law judge discounted the opinion by Dr. Rasmussen, who performed the Department of Labor (DOL) evaluation, after finding that the opinion was not well-reasoned. Decision and Order at 22-23. The administrative law judge found that Dr. Rasmussen offered no explanation for his opinion that claimant's legal pneumoconiosis is a contributing cause of his total disability. *Id.*

We first address claimant's challenge to the administrative law judge's finding that claimant did not establish total disability due to pneumoconiosis pursuant to Section 718.204(c). Claimant argues, and the Director agrees, that the administrative law judge's finding that Dr. Rasmussen's opinion is not well-reasoned as to disability causation is inconsistent with her finding that Dr. Rasmussen's opinion is well-reasoned as to legal pneumoconiosis. Thus, both claimant and the Director argue that the administrative law judge's finding that claimant did not establish disability causation based on Dr. Rasmussen's opinion is irrational. We agree.

Pursuant to Section 718.202(a)(4), the administrative law judge found that Dr. Rasmussen's opinion was the only well-reasoned opinion of the five opinions of record. Decision and Order at 17. The administrative law judge found that Dr. Rasmussen's diagnosis of COPD and emphysema, due to both coal mine dust exposure and cigarette smoking, was well-reasoned because Dr. Rasmussen discussed the relevant studies in the medical literature linking coal dust exposure to chronic lung diseases, and observed that coal dust exposure-related diseases can be found despite the lack of positive x-ray evidence. Also, the administrative law judge found that Dr. Rasmussen took into account claimant's smoking history, and opined that both smoking and coal dust exposure combine to cause claimant's pulmonary impairment. Lastly, the administrative law judge found that Dr. Rasmussen's observation, that both smoking and coal dust exposure cause the same type of emphysema, is consistent with the DOL's findings regarding the prevailing medical literature discussed in the preamble to the revised regulations. The administrative law judge declined to discount Dr. Rasmussen's opinion although the doctor had "somewhat underestimate[d]" claimant's smoking history at forty-two pack years, since the doctor had determined that claimant's smoking history was sufficiently significant to be one of the causes of claimant's pulmonary condition.[5] The

[5] Dr. Rasmussen relied on a smoking history of one pack per day for forty-two years, whereas the administrative law judge resolved the varying smoking histories of

administrative law judge concluded that Dr. Rasmussen's opinion supported a finding of legal pneumoconiosis pursuant to Section 718.202(a)(4), stating:

> In sum, four of the five opinions [Drs. Baker, Rosenberg, Sandlin, and Vuskovich] are compromised to a significant degree. Only Dr. Rasmussen clearly considered the results of [the] testing, Claimant's history, and the existing medical knowledge as found by the Department. As such, I accord his opinion substantial weight and [it] supports a finding that Claimant has established the presence of legal pneumoconiosis.

Decision and Order at 18.

In contrast, the administrative law judge subsequently found that Dr. Rasmussen offered no explanation for his opinion that claimant's legal pneumoconiosis is a contributing factor to his total disability pursuant to Section 718.204(c). Decision and Order at 22-23. The administrative law judge stated:

> Dr. Rasmussen's opinion, while strongest on a finding of pneumoconiosis, does not address causation well, either. His entire statement regarding causation occurs in the last sentence of his report, when he concludes that Claimant "has legal pneumoconiosis . . . which contributes in a material fashion to his disabling lung disease." DX 11 at 27. Although Dr. Rasmussen did not apportion causation to some degree beyond "material," that term certainly means more than an infinitesimal contribution of the sort discussed in *Peabody Coal*, *supra*. The problem with Dr. Rasmussen's opinion is that he offers no explanation for *why* he believes that pneumoconiosis is a contributing factor specifically in Claimant's case. There is no statement, for example, that the damage to Claimant's lungs is greater than would have been caused by smoking alone. As such, I find that Dr. Rasmussen's opinion is not a sufficient basis on which to find that pneumoconiosis is a cause of Claimant's disability.

Id.

The Director argues that, in view of the administrative law judge's reasons for finding that Dr. Rasmussen's diagnosis of disabling COPD with emphysema due to coal mine employment was well-supported and explained, she erred in finding that Dr. Rasmussen's disability causation opinion was unsupported and unexplained. Director's

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record to find that claimant had a smoking history of sixty to seventy pack years. Decision and Order at 14-15.

Brief at 3. Because Dr. Rasmussen diagnosed claimant with only legal pneumoconiosis, we are persuaded by the Director's assertion that "where the disease and disability are one and the same, a doctor's support and explanation of the cause of the disease must also be considered support and explanation of the cause of the resultant impairment." *Id.* Consequently, we agree with the Director that the administrative law judge erred in concluding that "Dr. Rasmussen's only support for his disability diagnosis was 'the last sentence of his report, when he concludes that Claimant has legal pneumoconiosis . . . which contributes in a material fashion to his disabling lung disease.'" *Id*. at 3-4; *see Peabody Coal Co. v. Lowis*, 708 F.2d 266, 276, 5 BLR 2-84, 2-98 (7th Cir. 1983); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-93 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984). The administrative law judge's finding that Dr. Rasmussen's opinion is not well-reasoned as to disability causation is not supported by substantial evidence. *See generally Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483-84, 23 BLR 2-44, 2-71 (6th Cir. 2003)(rejecting employer's argument that the medical opinion relied upon to support the award did not contain a disability causation opinion where the administrative law judge rationally found that the limitations due to a pulmonary disease were due to pneumoconiosis because pneumoconiosis was the only pulmonary disease diagnosed). Thus, we vacate the administrative law judge's finding that claimant did not establish total disability due to pneumoconiosis pursuant to Section 718.204(c).

Because we have vacated the administrative law judge's denial of benefits, we next address employer's challenges to the administrative law judge's analysis of several conflicting opinions regarding the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[6]

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Rasmussen, Baker, Sandlin, Rosenberg, and Vuskovich. Drs. Rasmussen and Baker diagnosed legal pneumoconiosis. Director's Exhibit 11; Claimant's Exhibit 2. Dr. Sandlin diagnosed coal workers' pneumoconiosis and severe COPD. Claimant's Exhibits 3, 4. Drs. Rosenberg and Vuskovich opined that claimant's COPD is due to smoking only. Employer's Exhibits 1, 5, 12.

[6] Employer's arguments in its response brief that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Vuskovich, that claimant does not have pneumoconiosis, are in support of the administrative law judge's denial of benefits. Thus, we address those arguments, although employer has not filed a cross-appeal. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-67 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991)(*en banc*); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

The administrative law judge found that Dr. Rasmussen's opinion of legal pneumoconiosis was well-reasoned, but that Dr. Baker's opinion was equivocal and that Dr. Sandlin did not adequately connect claimant's pulmonary impairment to his coal mine employment. Decision and Order at 16-17. The administrative law judge discounted the opinions of Drs. Rosenberg and Vuskovich because the physicians failed to explain their reasons for opining that claimant's coal mine employment was not a contributor to his pulmonary impairment. Decision and Order at 17-18.

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Vuskovich pursuant to Section 718.202(a)(4) for the reason given. We agree with employer, in part. The administrative law judge found that the opinions of Drs. Rosenberg and Vuskovich, that claimant does not have pneumoconiosis, were not well-reasoned because they conflicted with the DOL's findings underlying the amended regulations. Specifically, the administrative law judge discounted Dr. Rosenberg's opinion because he stated that the focal type of emphysema caused by coal dust exposure differs from centrilobular emphysema caused by smoking. The administrative law judge discounted Dr. Vuskovich's opinion because he stated that the effects of smoking and coal dust exposure are not additive. We reject employer's assertion that the administrative law judge, in assessing the reasoning of the doctors' opinions, erred in referring to the DOL's findings in the preamble to the revised regulations concerning the medical literature on coal mine dust and obstructive lung disease. *J.O. v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA (June 24, 2009). However, we agree with employer that the administrative law judge focused primarily on one aspect of these doctors' opinions to discredit them, when each doctor provided several reasons for his opinion that claimant's COPD is unrelated to coal mine dust exposure.[7] *See Lowis*, 708 F.2d at 276, 5 BLR at 2-98; *Justice*, 11 BLR at 1-93; *Hess*, 7 BLR at 1-297. Thus, the administrative law judge's finding that Drs. Rosenberg and

[7] Dr. Rosenberg opined that claimant's chronic obstructive pulmonary disease (COPD) is due to smoking because claimant has a markedly reduced FEV1 percent, marked air trapping in association with a diffuse emphysematous process on chest x-ray, and a reduced diffusing capacity, findings incompatible with a coal mine employment-related disease, but compatible with a smoking-related disease. Employer's Exhibits 1 at 5-8; 12 at 3. Dr. Vuskovich explained that claimant's COPD is due to smoking because claimant has air trapping, is resistant to bronchodilators, does not wheeze, and he was an early smoker, findings which are all incompatible with a coal dust exposure-related disease but compatible with a smoking-related disease. Employer's Exhibit 5 at 15. The administrative law judge did not discuss these reasons when she determined that Dr. Vuskovich "provided no rationale for failing to consider Claimant's coal mine employment as a potential contributor to his pulmonary condition." Decision and Order at 18.

Vuskovich did not explain why coal dust exposure is not a contributor to claimant's COPD is not supported by substantial evidence. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 515-16, 22 BLR 2-625, 2-651 (6th Cir. 2003). As the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Vuskovich for the reasons she provided, we vacate her finding of legal pneumoconiosis pursuant to Section 718.202(a)(4), and remand this case to the administrative law judge for reconsideration. Because we have vacated the administrative law judge's finding pursuant to Section 718.202(a)(4), we instruct the administrative law judge on remand to reweigh all of the medical opinions of record.[8]

If, on remand, the administrative law judge again finds legal pneumoconiosis established pursuant to Section 718.202(a)(4), she must reconsider whether claimant is totally disabled due to legal pneumoconiosis pursuant to Section 718.204(c) under the proper legal standard. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989). In considering whether claimant is totally disabled due to pneumoconiosis, the administrative law judge has the discretion to accord less weight to the opinions at disability causation that do not diagnose legal pneumoconiosis. *See Smith*, 127 F.3d at 507, 21 BLR at 2-185-86; *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams*, 886 F.2d at 826, 13 BLR at 2-63-64.

[8] Contrary to employer's assertion, Dr. Rasmussen's opinion, attributing claimant's COPD to both smoking and coal dust exposure, is sufficient to establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Decision on Motion for Reconsideration are 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge