

BRB No. 13-0256 BLA

MARCUS OSBORNE )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 WHITAKER COAL CORPORATION ) DATE ISSUED: 03/12/2014  
 )  
 and )  
 )  
 SUN COAL 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 Awarding Benefits on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2004-BLA-6797) of Administrative Law Judge Lystra A. Harris on a subsequent claim<sup>1</sup> filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the third time. In the last appeal, having previously affirmed Administrative Law Judge Ralph A. Romano's finding of twenty-two years of coal mine employment and his findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), total respiratory disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, the Board affirmed Judge Romano's determination that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. However, the Board vacated his finding that claimant established disability causation pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration. The Board instructed Judge Romano, on remand, to render a finding as to claimant's smoking history, and to assess the probative value of the physicians' opinions in light of this determination. The Board further instructed Judge Romano to apply the same level of scrutiny to each medical opinion, and to explicitly address the comparative credentials of the respective physicians, the explanations for their conclusions, and the documentation underlying their medical judgments, providing a rationale that comports with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated in the Act by 30 U.S.C. §932(a).<sup>2</sup> *Osborne v. Whitaker Coal Corp.*, BRB No. 10-0515 BLA (June 15, 2011) (unpub.).

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<sup>1</sup> Claimant's initial claim for benefits, filed on December 6, 1995, was denied by Administrative Law Judge Alfred Lindeman on the ground that claimant failed to establish the existence of pneumoconiosis. The Board affirmed the denial of benefits. *Osborne v. Whitaker Coal Corp.*, BRB No. 97-1760 BLA (Sept. 11, 1998) (unpub.); Director's Exhibit 1. Administrative Law Judge Thomas F. Phalen denied claimant's request for modification on the ground that claimant failed to establish either a change in conditions or a mistake in a determination of fact, and the Board affirmed the denial of modification and benefits. *Osborne v. Whitaker Coal Corp.*, BRB No. 00-1077 BLA (July 1, 2000) (unpub.); Director's Exhibit 1. Claimant filed his subsequent claim on April 14, 2003. Director's Exhibit 2.

<sup>2</sup> Based upon its decision to vacate the award of benefits, the Board denied claimant's counsel's attorney fee petition in the amount of \$506.25 for legal services rendered to claimant for work performed before the Board from May 15, 2007 to June 2, 2008, but indicated that, pursuant to 20 C.F.R. §802.203(c), the petition may be refiled if the claim were successfully prosecuted on remand. *Osborne v. Whitaker Coal Corp.*, BRB No. 10-0515 BLA (June 15, 2011) (unpub.).

On remand, the case was assigned to Judge Harris (the administrative law judge), who found that the weight of the evidence established disability causation pursuant to Section 718.204(c). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's weighing of the medical opinion evidence in finding disability causation established at Section 718.204(c), arguing that the administrative law judge failed to properly resolve the conflicts in the evidence. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation (the Director), has filed a limited response, urging the Board to reject employer's challenges to the administrative law judge's weighing of Dr. Crouch's biopsy report.

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.<sup>3</sup> 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).

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Myers and Simpao to support her finding of disability causation at Section 718.204(c), arguing that these opinions are insufficient to carry claimant's burden of proof and should have been accorded little weight. Employer maintains that Drs. Myers and Simpao provided conclusory opinions, based on significantly deflated smoking histories and an incomplete picture of claimant's health, in that they did not review the pathology evidence obtained in connection with claimant's lung transplant. Employer also argues that its experts possess superior qualifications and that their contrary opinions are entitled to greater weight. While noting that the administrative law judge credited the contrary opinion of Dr. Rosenberg as well-reasoned,<sup>4</sup> employer asserts

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 4.

<sup>4</sup> Employer's argument, that the administrative law judge erroneously found that Dr. Rosenberg's opinion supported claimant's burden of establishing disability causation, is unsupported by the record. The administrative law judge accurately summarized Dr. Rosenberg's opinion, explicitly noting that the physician concluded that claimant's pneumoconiosis was so minimal that it did not materially worsen claimant's respiratory condition. Decision and Order on Remand at 7-8, 10. The administrative law judge determined that Dr. Rosenberg's opinion was well-reasoned because he revised his original opinion, that claimant did not have clinical pneumoconiosis, after he reviewed Dr. Crouch's biopsy report. Decision and Order on Remand at 10. Nonetheless, the

that the administrative law judge should not have discounted the biopsy report of Dr. Crouch and the medical opinion of Dr. Dahhan, which buttress the opinion of Dr. Rosenberg, for the reasons provided. Employer's Brief at 18-40. Employer essentially requests a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

In evaluating the evidence relevant to disability causation at Section 718.204(c), the administrative law judge followed the Board's remand instructions, and reviewed the conflicting reported accounts of the extent and duration of claimant's smoking history. Relying primarily upon claimant's testimony, the administrative law judge determined that claimant smoked for eighteen to twenty years at the rate of one pack per day. Decision and Order on Remand at 4-5. While acknowledging that Drs. Myers,<sup>5</sup> Simpao, Dahhan and Rosenberg all reported different and inaccurate smoking histories, the administrative law judge permissibly declined to accord less weight to any of their opinions on that basis, because she found that all of these doctors "considered a noteworthy period of smoking." Decision and Order on Remand at 8; *see Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Hence, contrary to employer's argument, the administrative law judge acted within her discretion in finding that Dr. Myers's underestimation of "less than a pack a day for ten years," and Dr. Simpao's underestimation of a cigarette smoking history of one-half pack per day for twelve years did not diminish the overall probative value of their opinions. Decision and Order on Remand at 8; Director's Exhibits 10, 14; *see Rickey*, 7 BLR at 1-108. By contrast, the administrative law judge determined that Dr. Crouch had no knowledge of claimant's smoking history or coal mine employment history, which caused the physician to speculate and/or equivocate in identifying the condition or conditions that necessitated claimant's lung transplant, and the etiology of claimant's emphysema. Decision and Order on Remand at 8-9; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Consequently, the administrative law judge permissibly discounted Dr. Crouch's conclusion, contained in her biopsy report,<sup>6</sup> that "coal dust related changes are insufficient to have caused a

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administrative law judge found that a preponderance of the well-reasoned medical opinions of record established disability causation at 20 C.F.R. §718.204(c). *Id.*

<sup>5</sup> In the Decision and Order on Remand, the administrative law judge referred to Dr. Myers with both the correct spelling of his name, and the incorrect spelling, "Dr. Meyers." *See* Decision and Order on Remand at 4-5, 8-10; *see* Director's Exhibit 14.

<sup>6</sup> We reject employer's argument that it was irrational for the administrative law judge to discount the conclusion regarding disability causation contained in Dr. Crouch's biopsy report on the ground that the physician lacked complete medical, smoking and

clinically significant degree of impairment or disability,” Employer’s Exhibit 6, as lacking an evidentiary foundation. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Pursuant to the Board’s remand instructions, the administrative law judge also reviewed the relative qualifications of the physicians. Decision and Order on Remand at 5-7. Contrary to employer’s arguments, the administrative law judge was not required to accord greater weight to the opinions of the best-qualified physicians,<sup>7</sup> and she permissibly declined to accord less weight to the opinion of Dr. Myers on the ground that he lacked Board-certification in pulmonary medicine. Decision and Order on Remand at 9, n.7; *see Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Finding that Dr. Myers’s opinion, that the “increase of [claimant’s] physical disability is as a result of the chronic dust exposure which he sustained throughout his years of working in and around the coal mines,” was based on a comparison of claimant’s 1995 and 2000 test results, including claimant’s increased x-ray classification, increased obstructive/restrictive defect, and increased activity restrictions, the administrative law judge acted within her discretion in crediting the opinion as well-reasoned. Decision and Order on Remand at 9-10; Director’s Exhibit 14; *see Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Similarly, determining that Dr. Simpao’s opinion, that claimant’s “multiple years of coal dust exposure is medically significant in [claimant’s disabling] pulmonary impairment,” was based on testing demonstrating moderate restrictive airway

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employment histories for claimant. Because employer submitted the affirmative case medical opinions of Drs. Dahhan and Rosenberg, and designated Dr. Crouch’s opinion as a biopsy report, employer argues that the evidentiary limitations at 20 C.F.R. §725.414 precluded employer from providing Dr. Crouch with such additional information. Employer’s Brief at 32-35. However, we agree with the response of the Director, that “[i]f employer wished to have Dr. Crouch credibly opine on the etiology of claimant’s condition—a matter that would almost certainly require consideration of evidence beyond the bare biopsy slides—it could have provided her with such evidence and submitted her opinion in place of either Dr. Dahhan’s or Dr. Rosenberg’s.” Director’s Brief at 2.

<sup>7</sup> We reject employer’s contention that the administrative law judge erred in acknowledging Dr. Simpao as a Board-certified pulmonologist. Employer’s Brief at 23-24. The administrative law judge properly relied on the record qualifications contained in the attachment to Dr. Simpao’s curriculum vitae. Decision and Order on Remand at 5; Claimant’s Exhibit 2. Since employer raised no objection to Dr. Simpao’s qualifications before Judge Romano, employer’s current objection is waived. *See Johnson v. Royal Coal Co.*, 22 BLR 1-132 (2002)(Hall, J., dissenting); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984).

disease and severe obstructive airway disease, positive x-rays, claimant's coal mine employment history, symptomatology and physical examination findings, the administrative law judge permissibly credited the opinion as well-reasoned. Decision and Order on Remand at 5-6, 9; Director's Exhibits 10, 16; *see Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22.

By contrast, while acknowledging Dr. Dahhan's credentials, the administrative law judge determined that Dr. Dahhan's contrary opinion was undermined by defective reasoning. *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Although Dr. Dahhan testified at his deposition that claimant's pneumoconiosis was insufficient, by itself, to cause claimant's disability, the administrative law judge properly observed that pneumoconiosis need not be the complete cause of disability, but must be a substantially contributing cause of the disabling impairment. Decision and Order on Remand at 8-9; Director's Exhibit 5 at 7-8; *see* 20 C.F.R. §718.204(c); *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 2-303 (6th Cir. 2001). While noting that the physician summarily responded in the negative, when asked whether claimant's disability was "in any way...related to, caused by, or hastened by coal dust exposure," Director's Exhibit 5 at 10, the administrative law judge acted within her discretion in concluding that Dr. Dahhan failed to adequately discuss the possible contribution of pneumoconiosis to claimant's disabling respiratory impairment, and in according the opinion little weight. Decision and Order on Remand at 9; *see Clark*, 12 BLR at 1-155.

The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that claimant established disability causation pursuant to Section 718.204(c) by a preponderance of the evidence, and affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge