

BRB No. 08-0391 BLA

D.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE	)	DATE ISSUED: 12/16/2008
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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5229) of Administrative Law Judge Pamela Lakes Wood 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). The administrative law judge noted that the district director's finding of twenty-eight years of coal mine employment was not contested,<sup>1</sup> and found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in her evaluation of the medical opinion evidence relevant to the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response agreeing with claimant that the administrative law judge erred in her analysis of the medical opinions. Claimant filed a reply brief, restating his position, and employer filed an additional brief, challenging the Director's position.<sup>2</sup>

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, the miner must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

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<sup>1</sup> The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as the miner's coal mine employment occurred in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

<sup>2</sup> We affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that clinical pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4). These findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Section 718.202(a) provides alternative methods for establishing pneumoconiosis. Thus, claimant may establish pneumoconiosis under any of the methods provided at 20 C.F.R. §718.202(a)(1)-(4).<sup>3</sup> *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

“Legal pneumoconiosis” is defined in 20 C.F.R. §718.201(a)(2) as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2). Pursuant to 20 C.F.R. §718.201(b), a disease “arising out of coal mine employment” includes “any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 482, 22 BLR 2-265, 2-278 (7th Cir. 2001).

Relevant to the existence of legal pneumoconiosis, the record contains the opinions of Drs. Cohen, Tuteur, and Repsher. Dr. Cohen diagnosed moderate chronic obstructive pulmonary disease (COPD), chronic bronchitis, and emphysema, and stated that the etiology of all of these conditions was the miner’s twenty-nine years of exposure to coal dust and his thirty-three to forty pack year history of cigarette smoking. Director’s Exhibit 9; Claimant’s Exhibit 6. Dr. Repsher noted a seventy pack year smoking history, and diagnosed moderate COPD “overwhelmingly most likely due to his long, heavy, and probably continued cigarette smoking habit.” Employer’s Exhibit 7. He found no evidence of coal workers’ pneumoconiosis by x-ray, pathology, pulmonary function study or blood gas study. *Id.* Dr. Tuteur noted a smoking history of one and one-half packs per day for twenty-three years. He opined that claimant did not have coal workers’ pneumoconiosis or “any other coal mine dust induced disease process of sufficient severity and profusion to produce clinical symptoms, physical examination abnormalities, impairment of pulmonary function, or radiographic changes.” Employer’s Exhibits 6, 10. Dr. Tuteur stated that claimant has a primary pulmonary process, that is “cigarette smoke induced chronic obstructive pulmonary disease manifested by mild chronic bronchitis and even more mild emphysema.” *Id.* In his deposition, he explained his belief that a person with claimant’s smoking history has a twenty percent risk of developing the type and severity of COPD that claimant had, and that a coal miner who

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<sup>3</sup> Although the United States Courts of Appeals for the Third and the Fourth Circuits have held that all relevant evidence at 20 C.F.R. §718.202(a)(1)-(4) must be weighed together in determining whether pneumoconiosis is established at Section 718.202(a), *Penn Allegheny Coal Co.*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the Seventh Circuit has not adopted this standard.

worked underground for thirty years, as claimant did, but who never smoked, has a less than one percent risk of developing this medical condition. Employer's Exhibit 10 at 9.

In evaluating the opinions of Drs. Cohen, Tuteur, and Repsher, pursuant to Section 718.202(a)(4), the administrative law judge found that while “[e]ach of the three opinions is reasoned and documented (apart from Dr. Repsher’s reliance upon an inaccurate smoking history),” they did not establish the existence of legal pneumoconiosis. Decision and Order at 14. In so finding, the administrative law judge initially determined that, in addition to his twenty-eight year coal mine employment history, claimant also had an approximately thirty-four pack year history of cigarette smoking. Decision and Order at 9. Considering each of the medical opinions in light of these histories, the administrative law judge concluded:

All of the physicians agree that the Claimant’s chronic obstructive pulmonary disease could have been caused by coal mine dust exposure but none of them have suggested a basis for distinguishing between the potential effects of coal mine dust exposure and cigarette smoking in this case . . . . Without specific information indicating the extent to which coal mine dust contributed to the COPD in this case, however, it is not possible to say that coal mine dust was a significant or substantial etiological agent, as required by the amended regulations.

Notably, in amending the regulations in December 2000, the Department of Labor discussed the strong epidemiological evidence supporting an association between coal dust exposure and obstructive pulmonary disability (65 Fed. Reg. 79937-79945 (Dec. 20, 2000)), but it nevertheless chose to require that each individual claimant establish by a preponderance of the evidence that such an association occurred in that individual’s case. *Id.* at 79938. This is a heavy burden that can rarely be met in any case, such as the instant case, where there is no basis for assessing the degree of contribution by two etiological factors – here, smoking and coal mine dust. After considering the medical opinion evidence in toto, I find that Claimant has failed to meet that burden.

Decision and Order at 16-17.

On appeal, claimant asserts that the administrative law judge erred in finding that Dr. Cohen’s opinion, that both coal dust exposure and cigarette smoking contributed to claimant’s COPD, chronic bronchitis, and emphysema, was not sufficient to establish the existence of legal pneumoconiosis. We agree. Contrary to the administrative law judge’s finding, the United States Court of Appeals for the Seventh Circuit has held that there is no requirement that a physician determine with precision what percentage of claimant’s

conditions is caused by each causative factor.<sup>4</sup> *Summers*, 272 F.3d at 482-483, 22 BLR at 2-281. Therefore, because the administrative law judge focused on the failure of each of the physicians to distinguish between the relative impact of claimant’s smoking and coal dust exposures, we vacate the administrative law judge’s finding that legal pneumoconiosis has not been established pursuant to Section 718.202(a)(4).

On remand, the administrative law judge must consider whether the medical opinions establish that any of claimant’s pulmonary conditions are significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §§718.201(b), 718.202(a)(4); *Summers*, 272 F.3d at 482, 22 BLR at 2-278. Further, in light of the argument raised by claimant and the Director that the administrative law judge erred in finding that claimant faced a “heavy” burden of proof, we note that the administrative law judge must determine whether claimant has established the existence of legal pneumoconiosis by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). In deciding whether claimant has met his burden, the administrative law judge must evaluate each medical opinion and determine whether it is a reasoned and documented medical opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In particular, the administrative law judge should consider whether Dr. Repsher’s overstated smoking history affected his opinion regarding the cause of claimant’s disease and impairment. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). In addition, the administrative law judge should reconsider Dr. Tuteur’s opinion, that coal dust exposure causes COPD only in rare cases, in light of the Director’s argument that Dr. Tuteur’s opinion, in the instant case, expresses the same personal views that the Seventh Circuit Court found to be flawed in *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).<sup>5</sup> Moreover, the administrative law judge must

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<sup>4</sup> We note that there is no suggestion in Dr. Cohen’s opinion that coal mine dust played only a *de minimis* role in causing claimant’s disease. *See* Director’s Exhibit 9; Claimant’s Exhibit 6; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003).

<sup>5</sup> In *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008), the court stated that Dr. Tuteur’s view that the miner’s condition “had to be caused by cigarette smoking because miners rarely have clinically significant obstruction from coal dust.” would “lead to the logical conclusion” that Dr. Tuteur “categorically excludes obstruction from coal-dust-induced lung disease and would not attribute any miner’s obstruction, no matter how severe, to coal dust.” *Beeler*, 521 F.3d at 726, 24 BLR at 2-103. The court stated that Dr. Tuteur’s view conflicted with the Department’s review of medical literature, and its statement that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners.” *Id.*, *citing*,

explain her weighing of the evidence, in compliance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Claimant next contends that, in summarizing the evidence of record, the administrative law judge erred in finding that all of the pulmonary function studies yielded non-qualifying values. Claimant's Brief at 8-9. We disagree. Pursuant to the regulations, the results of a pulmonary function study are sufficient to demonstrate total disability if the FEV1 value is equal to or less than the value specified in Appendix B for the miner's age, sex and height, *and either* the values are equal to or less than the values listed for the miner's age, sex and height for the FVC, *or* the MVV, *or* the FEV1/FVC ratio is equal to or less than 55%. 20 C.F.R. §718.204(b)(2)(i)(A)-(C). Because claimant's FEV1 results on both the tests administered on April 12, 2005, and on the post-bronchodilator test administered on March 15, 2002, were greater than the values listed in the table in Appendix B, *see* Director's Exhibit 9; Claimant's Exhibit 6; Employer's Exhibit 6, these tests do not demonstrate total disability pursuant to Section 718.204(b)(i). In addition, although the FEV1 value on the pre-bronchodilator test administered on March 15, 2002 was less than the value in the table, no MVV was reported, the FVC value was higher than the value in the table, and the FEV1/FVC ratio was 56%. Employer's Exhibit 6. Therefore, this test did not yield qualifying values, 20 C.F.R. §718.204(b)(i). We, therefore, affirm the administrative law judge's finding that the pulmonary function study evidence was non-qualifying.

Finally, claimant requests that the Board take judicial notice that Dr. Tuteur has testified in many state and federal black lung cases, but never on behalf of a miner. Claimant's Brief at 12. The evaluation and weighing of the credibility of the medical evidence is within the purview of the administrative law judge. *See Anderson*, 12 BLR at 1-113. We, therefore, decline to further address claimant's argument.

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65 Fed. Reg. 79938 (Dec. 20, 2000). The court also noted that Dr. Tuteur did not rely on "information particular to [the miner] to conclude that smoking was the only cause of his obstruction," and he did not cite to any medical literature to support his view. *Beeler*, 521 F.3d at 726, 24 BLR at 2-103-4.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, 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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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge