

BRB No. 09-0154 BLA

S.M.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	DATE ISSUED: 10/29/2009
CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand–Denying Benefits (04-BLA-6703) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed on September 4, 2003, 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 case is on appeal before the Board for a second time. When the claim was initially before the administrative law judge, he found thirteen and one-half years of coal mine employment established. The administrative law judge found that, while the x-ray evidence did not establish the existence of clinical pneumoconiosis, the medical opinion evidence

established that claimant had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On weighing the x-ray and medical opinion evidence together, the administrative law judge found pneumoconiosis established at 20 C.F.R. §718.202(a), that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), that claimant had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Benefits were, accordingly, awarded.

Pursuant to employer's appeal, the Board agreed with employer that the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4), on the issue of legal pneumoconiosis, was incomplete and/or erroneous in several respects. [*S.M.*] v. *Eastern Assoc. Coal Corp.*, BRB No. 06-0532 BLA (Feb. 22, 2007) (unpub.). First, the Board held that the administrative law judge should have considered whether the medical opinions of Drs. Foreman and Kingsley, claimant's treating physicians, were sufficiently reasoned to be accorded determinative weight based on their treating physician status pursuant to 20 C.F.R. §718.104(d). Next, because Dr. Gaziano's medical opinion supported a finding of clinical pneumoconiosis, and not legal pneumoconiosis, the Board held that the administrative law judge should have considered whether Dr. Gaziano's opinion, when weighed against the conflicting evidence of record, established the existence of clinical pneumoconiosis. Additionally, the Board agreed with employer that, even though there was evidence in the record indicating that claimant was a non-smoker, the administrative law judge should have addressed whether Dr. Eziri's opinion, attributing claimant's obstructive airway lung disease to his coal mine employment because he was a non-smoker, was reasoned. Specifically, the Board noted that the administrative law judge must resolve the conflict in the evidence regarding whether claimant was a smoker, and weigh the medical opinion evidence accordingly. In particular, the Board noted that both Drs. Tuteur and Zaldivar questioned claimant's self-reported smoking history in light of claimant's elevated carboxyhemoglobin test results, which were evidence of current smoking. The Board directed the administrative law judge to address the significance of this fact in light of the opinions of Drs. Eziri, Gaziano, Foreman, and Kingsley, who reported that claimant was a non-smoker, but did not discuss the meaning of claimant's elevated carboxyhemoglobin test results. Finally, the Board held that the administrative law judge should have considered the significance of Dr. Tuteur's opinion, that it was not possible to address the cause of claimant's chronic obstructive pulmonary disease because of conflicting evidence on the issue and in the absence of additional medical data, in his weighing of the other medical opinion evidence. Specifically, the Board observed that "[i]f Dr. Tuteur's opinion is credited, none of the physicians of record could accurately address the cause of claimant's chronic obstructive pulmonary disease in the absence of additional medical data." [*S.M.*], slip. op. at 7.

In view of the above-referenced errors, the Board vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4), and remanded the case for

reconsideration of the medical opinion evidence on the issue. The Board further instructed the administrative law judge to separately consider whether the medical opinion evidence established the existence of “clinical pneumoconiosis” and/or “legal pneumoconiosis.” Additionally, the Board instructed that, should the administrative law judge find that the medical opinion evidence established clinical or legal pneumoconiosis at Section 718.202(a)(4), he should weigh all of the evidence relevant to pneumoconiosis, *i.e.*, the x-ray and medical opinion evidence, together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210-11, 22 BLR 2-162, 2-173-74 (4th Cir. 2000) at Section 718.202(a), before determining whether the evidence as a whole establishes pneumoconiosis. Finally, the Board held that, because the administrative law judge’s reconsideration of the evidence, relevant to pneumoconiosis, could affect his weighing of the evidence on the issue of disability causation, the administrative law judge’s findings pursuant to 20 C.F.R. §718.204(c) were likewise vacated and the case was remanded for reconsideration under that subsection, if reached. [*S.M.*], slip. op. at 8. In conclusion, therefore, the Board vacated the administrative law judge’s findings of pneumoconiosis at Section 718.202(a)(1) and disability causation at Section 718.204(c), and remanded the case for reconsideration thereunder.¹

On remand, after considering the above instructions, the administrative law judge determined that the medical opinion evidence did not establish that claimant’s chronic obstructive pulmonary disease was caused by coal dust exposure and that claimant did not, therefore, establish legal pneumoconiosis at Section 718.202(a)(4). The administrative law judge also determined that the medical opinion evidence did not establish clinical pneumoconiosis at Section 718.202(a)(4), and that the evidence as a whole did not establish clinical or legal pneumoconiosis. He, therefore, denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his analysis of the medical opinion evidence under Section 718.202(a)(4) and, consequently, erred in concluding that it failed to establish legal pneumoconiosis. Employer responds, urging that the administrative law judge’s decision denying benefits be affirmed because claimant failed to adequately state a basis for review. In the alternative, employer contends that the administrative law judge properly found that the medical opinion evidence did not support a finding of pneumoconiosis. The Director, Office of Workers’ Compensation Programs, has not filed a brief in this appeal.

The Board’s scope of review is defined by statute. The Board must affirm the findings of the administrative law judge if they are rational, supported by substantial

¹ Because the administrative law judge’s finding of total disability pursuant to Section 718.204(b) was unchallenged when the case was previously on appeal, the only elements of entitlement at issue on remand are pneumoconiosis and disability causation. *See Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

evidence, and in accordance with applicable law.² 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 under 20 C.F.R. Part 718 in a miner’s claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant first challenges the administrative law judge’s finding that the diagnosis of legal pneumoconiosis by Drs. Kingsley and Foreman was based solely on claimant’s recitation of his symptoms and that they failed, therefore, to provide a reasoned diagnosis of pneumoconiosis. Claimant argues, however, that each physician prescribed medication for claimant’s pulmonary condition and that, in particular, Dr. Kingsley’s report of January 6, 2006, catalogues treatment for the conditions of runny nose, postnasal drainage, chest congestion productive cough, and diagnoses “[p]ossible bronchitis in a patient that has a history of black lung and diabetes.” Claimant’s Exhibit 6.

The administrative law judge specifically addressed the opinions of Drs. Kingsley and Foreman, claimant’s treating physicians, pursuant to Section 718.104(d). The administrative law judge observed that Dr. Kingsley’s treatment of the miner, consisting of six visits during a four month period, was “limited to diagnosing and prescribing medication for bronchitis,” and “mentioned black lung disease only in response to [claimant’s] reference to the disease or to note [claimant’s] application for black lung benefits... [and] did not perform any testing for the purpose of diagnosing its existence.” Decision and Order on Remand at 2-3. Also, the administrative law judge noted that claimant did not see a doctor for twenty-five years prior to his November 4, 2003 visit to Dr. Kingsley. *Id.* at 2. Similarly, the administrative law judge found that Dr. Foreman’s treatment of claimant was comprised of six visits over a six month period, and revealed “the absence of treatment for a pulmonary condition except for prescriptions for medication and the one unsuccessful pulmonary function test [that claimant did not complete].” *Id.* The administrative law judge concluded, therefore, that, in the absence of pulmonary testing results, any diagnosis of a pulmonary condition was based “solely on claimant’s recitation of his symptoms,” and provided no basis for a finding of a pulmonary condition caused by coal dust exposure. *Id.* at 3. The administrative law

² Because claimant’s last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

judge also found that the references to “black lung” in the medical reports were by history, that the finding of pulmonary symptoms was based on that history alone, and that no independent pulmonary evaluation was made, based on objective test results. Accordingly, the administrative law judge concluded that black lung disease was related by the miner and was not independently diagnosed by the physicians. *Id.* at 2-3.

A diagnosis of pneumoconiosis that is premised solely on claimant’s history and symptoms may be found unreasoned. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984). Contrary to claimant’s assertions that Drs. Kingsley and Foreman also treated him for “actual pulmonary problems,” the doctors’ office notes, based on the physical examinations of November 26, 2003 and December 10, 2003, chronicle treatment for a cold or the flu, mention breathing difficulties, but also note that claimant’s “lungs are clear” and that he has “[n]o shortness of breath.” Claimant’s Exhibit 6. Dr. Kingsley treated claimant for the conditions of diabetes, high cholesterol, obesity and hypertension. Claimant’s Exhibit 6. Similarly, a medical report by Dr. Foreman notes treatment for conditions including diabetes and obesity, and mentions that claimant is “in the process of a disability claim for black lung.” *Id.* at 7. On January 6, 2005, Dr. Foreman related that claimant received a DUI and encountered difficulty satisfying the evaluator with his effort on the breathalyzer test. Dr. Foreman noted claimant’s weight at “350+” pounds, and stated: “[w]e checked pulmonary function but he almost passed out with trying to do it so it was terminated. He comes back and I think he has obvious both obstructive and restrictive defect.” *Id.* at 8, 17. The record, therefore, supports the administrative law judge’s finding that the treating physicians’ main focus was on claimant’s hypertension, obesity, and diabetes, and various communications sorting out the DUI breathalyzer documentation.

Consequently, based on the administrative law judge’s consideration of the evidence, we conclude that the administrative law judge reasonably assigned less weight to the medical opinions of Drs. Kingsley and Foreman, because they failed to point to any underlying documentation, other than claimant’s subjective complaints, to support their conclusions. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-138 (2006)(*en banc*)(Boggs, J., concurring), *aff’d on recon.*, 24 BLR 1-1 (2007) (*en banc*); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19-20 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Moreover, the administrative law judge properly inquired into the particulars of the course of claimant’s medical treatment, in assessing the degree of “special consideration” merited by the treating physician relationship. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 191 n.2, 22 BLR 2-566, 2-567 n.2 (4th Cir. 2002). Consequently, the administrative law judge’s determination, that the evidence provided by the treating physicians was insufficiently reasoned to establish pneumoconiosis, is affirmed. *See* 20 C.F.R. §718.104(d)(5).

Next, claimant argues that, contrary to the Board's holding, Dr. Gaziano's medical opinion establishes legal pneumoconiosis, in addition to clinical pneumoconiosis, because Dr. Gaziano attributed claimant's impairment to coal mine employment. However, as the Board noted, Dr. Gaziano's check-box indication that claimant suffered from an occupational lung disease caused by his coal mine employment, "reflect[ed] his opinion as to the cause of claimant's coal worker's pneumoconiosis, not a separate diagnosis of 'legal pneumoconiosis.'" [S.M.], slip. op. at 5 n.6. Accordingly, claimant's assertion, that the administrative law judge should have found legal pneumoconiosis based on Dr. Gaziano's diagnosis, is rejected. See *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Further, the administrative law judge rationally found that although Dr. Gaziano's diagnosis of coal workers' pneumoconiosis constituted a finding of clinical pneumoconiosis, it was contrary to the weight of the evidence of record, as a preponderance of the x-ray evidence did not establish clinical pneumoconiosis and none of the other physician's opinions of record contained a diagnosis of clinical pneumoconiosis. The administrative law judge, therefore, properly found that Dr. Gaziano's opinion and the medical opinion evidence as a whole, did not establish clinical pneumoconiosis.³ See *Compton*, 211 F.3d at 210-11, 22 BLR at 2-173-74; Decision and Order on Remand at 3-4.

Additionally, claimant contends that the administrative law judge erred in rejecting Dr. Eziri's opinion, attributing claimant's obstructive airways lung disease to coal mine employment, as unreasoned, solely because claimant was a non-smoker. Decision and Order on Remand at 4. Claimant asserts, however, that Dr. Eziri's opinion is reasoned because it was based on a physical examination, x-ray and objective testing and because Dr. Eziri considered "all of claimant's potential risk factors." See Claimant's Brief at 14. In his medical report of October 21, 2003, Dr. Eziri diagnosed obstructive airways disease and hypoxemia and, in the section designated "etiology of cardiopulmonary disease," stated: "[o]ccupational history since he is a non-smoker," and suggested referral for a "complete pulmonary [function] test." Director's Exhibit 12 at 4. In considering the opinion, the administrative law judge properly rejected it because Dr. Eziri failed to explain how claimant's work history was the cause of his respiratory impairment and the doctor failed to explain how his underlying documentation supported his opinion. See *Clark*, 12 BLR at 1-155. We, therefore, affirm the administrative law judge's finding that Dr. Eziri's opinion was not reasoned and did not establish legal pneumoconiosis at Section 718.202(a)(4).

³ The administrative law judge's finding that the medical evidence does not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4) is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, claimant asserts that, in view of Dr. Tuteur's opinion that he lacked sufficient information to determine the cause of claimant's pulmonary condition, the administrative law judge should not have accorded any weight to his opinion as to the cause of claimant's respiratory impairment. The Board previously instructed the administrative law judge to consider: Dr. Tuteur's testimony that the conflicting medical data in this case made it impossible to assign an etiology to claimant's chronic obstructive pulmonary disease, without additional medical data. The Board observed that acceptance of Dr. Tuteur's medical opinion would logically mean that none of the other physicians of record could validly ascertain the cause of claimant's pulmonary condition. The Board, therefore, directed the administrative law judge to evaluate the significance of Dr. Tuteur's opinion on the weight accorded to the other medical opinions.

On remand, the administrative law judge noted that because Dr. Gaziano did not diagnose a chronic obstructive pulmonary disease, his medical opinion was not relevant to the cause of claimant's respiratory impairment. Decision and Order on Remand at 5. Further, the administrative law judge rationally discounted the opinions of Drs. Kingsley and Foreman, claimant's treating physicians, because they were not sufficiently reasoned. *Id.* Finally, the administrative law judge noted that Dr. Eziri's medical opinion was also unreasoned because he failed to sufficiently explain the basis for his finding that coal dust exposure was the cause of claimant's condition. Summarizing the evidence, the administrative law judge observed: "none of these physicians considered the potential causes identified by Dr. Tuteur, that is, the elevated carboxyhemoglobin results with respect to smoking cigarettes, and the existence of multiple other factors that contribute to breathlessness including: morbid obesity; uncontrolled hypertension; poorly controlled diabetes mellitus; and the past history of alcohol use." *Id.* Because the rationales offered by the other doctors failed to account for these factors, including the elevated carboxyhemoglobin results, the administrative law judge accepted, as determinative, Dr. Tuteur's conclusion that it was not possible to ascertain the cause of claimant's chronic pulmonary disease. A physician's omission to fully address what role, if any, other health conditions play in the miner's pulmonary condition renders his opinion on etiology less persuasive. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we conclude that the administrative law judge properly evaluated Dr. Tuteur's rationale, and the sophistication of, and bases for, his conclusions. These are permissible criteria for crediting the medical opinion of Dr. Tuteur, over the contrary medical opinions of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). Accordingly, having identified and considered the deficiencies in the medical reports supportive of a finding of pneumoconiosis, the administrative law judge rationally accepted, as determinative, Dr. Tuteur's conclusion that it is not possible to ascertain the cause of claimant's chronic pulmonary disease.

In conclusion, as the evidence of record supports the administrative law judge's credibility determinations, and as claimant raises no further substantive arguments, the administrative law judge's finding that pneumoconiosis was not established is affirmed.

Because the evidence of record fails to establish pneumoconiosis at Section 718.202(a), an essential element of entitlement, we need not address the issue of disability causation at Section 718.204(c). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge