

BRB No. 08-0607 BLA

D.K., on Behalf of G.K.¹)
)
 Claimant-Respondent)
)
 v.)
)
 KINDALL MINING, INCORPORATED) DATE ISSUED: 04/16/2009
)
 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 Awarding Benefits of Alice M. Kraft,
Administrative Law Judge, United States Department of Labor.

Shelly Rigsby (Southwestern Indiana Respiratory Disease Program), Terre
Haute, Indiana, for claimant.²

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (07-BLA-5342) of
Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the
provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹ Claimant is the miner's widow, and is pursuing the miner's claim on his behalf.

² In her letter to the Board, Shelly Rigsby indicated that she is a lay advocate.

amended, 30 U.S.C. §901 *et seq.* (the Act).³ The administrative law judge credited the miner with at least twenty years of coal mine employment⁴ based on the parties' stipulation. Decision and Order at 3. 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, in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.201(a)(2), 718.203(b).⁵ The administrative law judge further found that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iv), 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in her 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 the miner's totally disabling 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.⁶

³ The miner filed his claim for benefits on July 25, 2005. Director's Exhibit 2. The miner died on October 28, 2005, while his claim was pending. Director's Exhibit 11. The district director awarded benefits in a proposed decision and order dated November 9, 2006. Director's Exhibit 35. The employer requested a hearing and the claim was forwarded to the Office of Administrative Law Judges on December 28, 2006. Director's Exhibits 37, 41.

⁴ The record indicates that the miner's coal mine employment was in Indiana. Director's Exhibits 3, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁵ 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). "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).

⁶ Because the 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 Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was 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).

Employer initially contends that the administrative law judge erred in according greater weight to the opinion of Dr. Spech, than to the opinion of Dr. Castle, in determining that legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4). Dr. Spech, who is Board-certified in Internal Medicine, Critical Care Medicine and Pulmonary Disease, examined and tested the miner in September and October of 2005. Dr. Spech recorded the miner's smoking history as "1½ to 2 packs per day for over 50 years," quitting "7 years earlier," Director's Exhibit 12 at 26, and diagnosed "severe" to "very severe" obstructive lung disease with emphysema and chronic hypoxemia. Director's Exhibit 12 at 25-27. Dr. Spech did not indicate the etiology of the miner's obstructive lung disease in either his September or October 2005 reports. However, Dr. Spech also completed a questionnaire dated January 10, 2006. In response to the question of whether the miner had a chronic lung disease that was caused by his coal mine employment, Dr. Spech stated "possibly." Director's Exhibit 12 at 39. When asked to indicate whether the miner suffered from clinical or legal pneumoconiosis, as defined in the regulations, Dr. Spech declined to check "yes" or "no," and again wrote "possibly" next to the pre-printed definition of legal pneumoconiosis. Director's Exhibit 12 at 39. When asked to elaborate as to the basis for his diagnosis, Dr. Spech stated: "Patient had severe COPD most likely due to heavy smoking history, but I cannot say with certainty if dust exposure from coal mine employment significantly contributed or aggravated this condition." Director's Exhibit 12 at 39. Dr. Spech further explained that "Dust exposure likely aggravated COPD, but probably did not 'significantly contribute' to COPD." Director's Exhibit 12 at 39. When asked to apportion the effects of coal mining and smoking on the miner's lung disease, Dr. Spech attributed "80+%" of the miner's COPD to smoking and "<20%" to coal mine dust. Director's Exhibit 12 at 39.

Dr. Castle, who is a Board-certified Internist and Pulmonologist, reviewed the medical records and recorded a smoking history of 2 packs per day for more than 50 years in his report dated March 14, 2006. Dr. Castle opined that the miner had a totally

disabling respiratory condition prior to his death, and that this condition was “due to tobacco smoke-induced airway obstruction.” Director’s Exhibit 14 at 8. Dr. Castle based his conclusion on his review of pulmonary function studies that “showed evidence of very severe airway obstruction with a significant degree of reversibility with a normal total lung capacity . . . consistent with [the miner’s] long and consistent tobacco smoking habit.” Dr. Castle explained that this was in contrast to the type of mixed irreversible obstructive and restrictive ventilatory defect generally caused by pneumoconiosis. Director’s Exhibit 14 at 8. Following a review of additional medical records, in a supplemental report dated July 25, 2006, Dr. Castle reiterated his opinion and added that the miner also suffered from “tobacco smoke induced bullous emphysema.” Employer’s Exhibit 3.

Evaluating the medical opinions, the administrative law judge noted that Dr. Spech was an examining physician, a lung specialist, and had reviewed the objective studies. Reviewing Dr. Spech’s opinion, the administrative law judge specifically found:

Initially his responses to the questionnaire appeared equivocal, as he declined to mark “yes” or “no” to questions as to the role, if any, coal dust played in the Miner’s lung disease, in stead [*sic*] using the word “possibly.” In response to a question worded specifically to track the regulatory language defining legal pneumoconiosis, he said that coal dust “aggravated” but did not “significantly contribute” to the Miner’s COPD. Subsequently, however, he assigned about 20% of the responsibility for the Miner’s obstructive lung disease to exposure [to] coal dust. I conclude that this formulation meets the definition of legal pneumoconiosis found in 20 CFR §718.201(a)(2) as refined in (b), i.e., that Dr. Spech believed that the Miner’s COPD was substantially aggravated by dust exposure in coal mine employment within the meaning of the regulation. Given Dr. Spech’s qualifications as a specialist, and his opportunity to examine the Miner, take histories, and review objective test results, I find his opinion to be well documented and reasoned, and I give his opinion substantial weight.

Decision and Order at 17.

Reviewing Dr. Castle’s opinion, the administrative law judge noted that Dr. Castle was also a lung specialist and had access to review all the medical evidence. The administrative law judge then stated:

Review of his opinion, however, discloses that he focused exclusively on the presence of clinical pneumoconiosis. Thus he referred to the absence of physical or x-ray findings consistent with interstitial conditions, or findings of restriction, as opposed to obstruction, on pulmonary function testing, all

findings associated with clinical pneumoconiosis. In addition, although he observed that the miner's obstructive disease was consistent with tobacco induced disease, he offered no explanation of any kind why coal dust did not contribute to or aggravate the Miner's obstructive disease. I find his opinion to be less well reasoned than Dr. Spech's, and give it less weight.

Decision and Order at 17.

Employer specifically asserts that the administrative law judge erred in relying on Dr. Spech's opinion to find legal pneumoconiosis established, asserting that Dr. Spech's opinion is vague, equivocal, and neither well-reasoned nor documented. Employer's Brief at 4. Employer's contentions have merit, in part.

An administrative law judge is not required to discount an opinion expressed in qualified terms, *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), but must explain the basis for his interpretation. *See United States Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501, 1-503 (1984). In evaluating Dr. Spech's opinion, the administrative law judge specifically acknowledged the equivocal nature of Dr. Spech's initial statements, that the miner "possibly" suffered from legal pneumoconiosis. Decision and Order at 17. However, the administrative law judge acted within her discretion in finding that Dr. Spech's subsequent conclusion, that about 20% of the miner's obstructive lung disease was due to coal mine dust exposure, was sufficient to constitute a diagnosis of legal pneumoconiosis within the meaning of the regulation at 20 C.F.R. §718.201(a), (b). *See Peabody Coal Co. v. Shonk*, 906 F.2d 264, 270 (7th Cir. 1990); *Migliorini v. Director, OWCP*, 898 F.2d 1292, 1295, 13 BLR 2-418, 2-422 (7th Cir. 1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); Decision and Order at 17. Further, the administrative law judge could rationally determine that Dr. Spech's opinion was "well documented," because it was based on a physical examination, smoking and employment histories, and the results of objective testing. *See Shonk*, 906 F.2d at 270; *Migliorini*, 898 F.2d at 1295, 13 BLR at 2-422; *Clark*, 12 BLR at 1-153; Decision and Order at 17.

However, the administrative law judge did not adequately explain her determination to credit Dr. Spech's opinion as well reasoned. The Administrative Procedure Act provides that an administrative law judge must set forth her "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). Moreover, as employer contends, the administrative law judge did not subject Dr. Spech's opinion to the same scrutiny that she

applied to Dr. Castle's opinion. Employer's Brief at 6. The administrative law judge discredited Dr. Castle's opinion, that the miner's impairment was consistent with tobacco-induced disease, as not well reasoned on the ground that the physician "offered no explanation of any kind why coal dust did not contribute to or aggravate the Miner's obstructive disease."⁷ Decision and Order at 17. However, the administrative law judge did not similarly inquire into whether Dr. Spech had offered any explanation for his opinion that coal dust had contributed to the miner's COPD. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999)(*en banc*); *Wright v. Director, OWCP*, 7 BLR 1-475, 1-477 (1984).

In light of the foregoing errors by the administrative law judge, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for the administrative law judge to reconsider the medical opinion evidence and adequately explain her findings. Specifically, the administrative law judge should consider the documentation and reasoning of the medical opinions and reconsider the weight to be accorded the opinions of Drs. Spech and Castle. *See* 20 C.F.R. §718.201(a)(2); *see Shonk*, 906 F.2d at 270; *Clark*, 12 BLR at 1-153.

Employer next contends that the administrative law judge erred in her analysis of the medical opinions when she found that the evidence established that the miner's total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). 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, she must reconsider the evidence pursuant to 20 C.F.R. §718.204(c).

⁷ As noted above, Dr. Castle attempted to explain, based upon the pattern of reversibility, why he believed that smoking was the cause of the miner's obstructive lung disease. Director's Exhibit 14 at 8.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge