

BRB No. 04-0741 BLA

CALEB EUGENE TEDDER)
)
 Claimant-Petitioner)
)
 v.)
)
 SEXTET MINING COMPANY)
)
 and)
)
 UNDERWRITERS SAFETY AND CLAIMS) DATE ISSUED: 06/22/2005
)
 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 on Remand – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Caleb Eugene Tedder, Madisonville, Kentucky, *pro se*.

John C. Morton and Keith A. Utley (Morton Law Offices), Henderson, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order on Remand – Denial of Benefits (01-BLA-1224) of Administrative Law Judge Robert L. Hillyard in a miner’s 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). Initially, the administrative law judge credited claimant with thirty-four years of coal mine employment pursuant to the parties’ stipulation, Hearing Transcript at 7. 2002 Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *Id.* at 13, 17. Accordingly, the administrative law judge denied benefits.

In response to claimant’s appeal, the Board vacated the administrative law judge’s Section 718.202(a)(4) finding and remanded this case for him to reconsider the opinions of Drs. Chavda and O’Bryan pursuant to this subsection.³ *Tedder v. Sextet Mining Company*, BRB No. 03-0250 BLA (Oct. 31, 2003)(unpub.). Additionally, the Board vacated the administrative law judge’s finding that claimant failed to establish total disability and disability causation, and remanded this case for the administrative law judge to reconsider the relevant evidence regarding these issues. *Id.*

On remand from the Board, the administrative law judge found that the medical opinion evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 6. The administrative law judge further found that claimant established total respiratory disability pursuant to Section

¹ Claimant is Caleb Eugene Tedder, the miner, who filed his claim for benefits on December 8, 2000. Director’s Exhibit 1.

² Claimant was represented by counsel when he filed his present appeal to the Board. However, after filing a Petition for Review and brief, claimant’s counsel withdrew as claimant’s attorney of record. In an Order dated September 8, 2004, the Board noted claimant’s counsel’s withdrawal from the case and noted that the Board would, therefore, review this appeal under the general standard of review, which is whether the administrative law judge’s Decision and Order is rational, in accordance with law, and supported by substantial evidence.

³ The Board affirmed the administrative law judge’s accord of less weight to the opinions of Drs. Anderson, Westerfield, and Myers at 20 C.F.R. §718.202(a)(4). *Tedder v. Sextet Mining Company*, BRB No. 03-0250 BLA (Oct. 31, 2003)(unpub.).

718.204(b)(2), but failed to establish that his disability is due to pneumoconiosis pursuant to Section 718.204(c). *Id.* at 9.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds,⁴ urging the Board to remand this case for the administrative law judge to reconsider his weighing of the evidence at Sections 718.202(a)(4) and 718.204(c).⁵ Director's Brief at 2-3.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

Pursuant to Section 718.202(a)(4), the Board remanded this case for the administrative law judge to reconsider his weighing of the opinions of Drs. Chavda and O'Bryan. Specifically, the Board instructed the administrative law judge to consider Dr. Chavda's finding of the presence of legal pneumoconiosis and to explain how Dr. O'Bryan's opinion is better supported than Dr. Chavda's opinion. Additionally, the Board instructed the administrative law judge on remand to reconsider Dr. O'Bryan's opinion in light of the fact that this physician relied on a sixty-year smoking history when the administrative law judge found that claimant had only a thirty-five year smoking history.⁶

⁴ The Director, Office of Workers' Compensation Programs (the Director), originally filed a cross-appeal in this case, which he later requested be withdrawn. The Board granted the Director's request on August 10, 2004.

⁵ We affirm the administrative law judge's finding of thirty-four years of coal mine employment and his finding that claimant established total respiratory disability because these findings are not adverse to claimant and are unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁶ In fact, in his first Decision and Order, the administrative law judge found that "Claimant smoked one and one-half packs of cigarettes per day for thirty-five years, for a total of fifty-two and one-half pack years." 2002 Decision and Order at 4.

Regarding Dr. Chavda, the administrative law judge, on remand, considered this physician's finding that claimant has obstructive and restrictive lung disease due to coal dust exposure. Decision and Order on Remand at 4. The administrative law judge both accorded "little weight" to Dr. Chavda's opinion because he found that the objective evidence does not support his diagnosis of legal pneumoconiosis, and gave it no weight. *Id.* at 4, 6.

The Director asserts, in his response brief, that several of the administrative law judge's criticisms of Dr. Chavda's opinion "are wide of the mark" and that the Board should, therefore, remand this case for the administrative law judge "to reconsider his finding that Dr. Chavda failed to adequately explain his conclusion." Director's Brief at 2-3. We agree in some measure with the Director. For example, the administrative law judge correctly noted that the x-ray Dr. Chavda relied on was negative (0/1) for pneumoconiosis. However, Dr. Chavda also noted the existence of small opacities on the x-ray and testified that they are typically seen in pneumoconiosis patients. Director's Exhibit 14; Employer's Exhibit 36 at 17. Further, he testified that coal dust exposure is capable of producing obstructive and restrictive lung disease and a reduction in breathing capacity even in the absence of a diagnosis with changes on x-ray. Director's Exhibit 36 at 23. Because the administrative law judge indicated both that he was giving less weight to Dr. Chavda and that he was not crediting Dr. Chavda's opinion, we vacate the administrative law judge's Section 718.202(a)(4) finding and instruct him on remand to determine the proper weight of Dr. Chavda's opinion, taking into consideration the issues raised by the Director and claimant. *See Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *see generally Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985).

In considering Dr. O'Bryan's opinion on remand, the administrative law judge initially noted that this physician incorrectly stated claimant's smoking history. Decision and Order on Remand at 5. The administrative law judge found fifty-two and one-half pack years and Dr. O'Bryan recorded sixty-four and one-half pack years⁷ in one report, and "sixty-plus" years of smoking in a later report. The administrative law judge stated that although Dr. O'Bryan relied on an incorrect smoking history, "he did closely state [claimant's] coal dust exposure history at 35 years." *Id.* The administrative law judge further stated that "[k]nowing the Claimant's coal dust exposure history, [Dr. O'Bryan] opined that although the etiology could not be definitely determined, the objective data discussed above favored a smoking etiology over a dust-related lung disease." *Id.* Thus,

⁷ In his June 19, 2001 report, Dr. O'Bryan recorded a smoking history of one and one-half packs per day for forty-three years which equates to sixty-four and one-half pack years. A pack year is defined as "one package of cigarettes consumed per day per year." *In re Simon Litigation*, 211 F.R.D. 86, 2002 WL 31375510 (E.D.N.Y.).

the administrative law judge concluded that Dr. O'Bryan's opinion is "well reasoned" and "afford[ed] his opinion great weight." *Id.* In doing so, the administrative law judge added that Dr. O'Bryan "independently supported his no pneumoconiosis diagnosis with x-ray, arterial blood gas, individual medical history, and physical examination data which did not support a clinical or legal pneumoconiosis diagnosis." *Id.*

For the reasons outlined below, we vacate the administrative law judge's finding that Dr. O'Bryan's opinion is "well reasoned" and remand this case for the administrative law judge to reconsider this physician's opinion. First, we remand this case to the administrative law judge for him to further elaborate on his finding that Dr. O'Bryan's inaccurate notation of claimant's smoking history did not affect the credibility of his opinion regarding the cause of claimant's lung disease. Specifically, we instruct the administrative law judge that, in reconsidering this issue on remand, he must determine whether the discrepancy between his finding of fifty-two and one-half pack years and Dr. O'Bryan's notation of sixty-four and one-half pack years in one report and "sixty-plus" years of smoking in a later report affects the credibility of his opinion. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We also instruct the administrative law judge, on remand, to explain the rationale for his conclusions, as required by the Administrative Procedure Act. *See* 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); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Second, the administrative law judge failed to address the differing diagnoses made by Dr. O'Bryan in his two reports. While Dr. O'Bryan opined that claimant has a "moderate *restrictive* ventilatory impairment" in his June 19, 2001 reports, he later states, in a supplemental report dated October 27, 2001, that the pulmonary function and blood gas studies and physical findings suggest that claimant has an *obstructive* disease. Director's Exhibit 34; Employer's Exhibit 1. In fact, in his later opinion, Dr. O'Bryan bases his finding that claimant does not have pneumoconiosis on the fact that he finds obstructive, rather than restrictive, disease. Employer's Exhibit 1. Because the administrative law judge found Dr. O'Bryan's opinion to be well reasoned without addressing this significant inconsistency in Dr. O'Bryan's two reports, we remand this case for him to do so. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Additionally, the Director contends that Dr. O'Bryan's opinion regarding the existence of pneumoconiosis is "unreasoned and lacks any probative value" because it is "based on the categorical assumption that coal dust exposure cannot cause obstruction" and the regulations make clear that coal dust exposure can cause obstructive impairments. Director's Brief at 2. In his October 2001 report, Dr. O'Bryan stated that claimant's

objective studies exhibit an obstructive disease which is “totally inconsistent for interstitial lung disease such as pneumoconiosis” and that “coal workers' pneumoconiosis results in a restrictive ventilatory impairment.” Employer’s Exhibit 1. Therefore, Dr. O’Bryan found that claimant’s ventilatory impairment is related to his smoking history. *Id.* We instruct the administrative law judge to determine on remand whether Dr. O’Bryan’s statements regarding restrictive versus obstructive impairment are inconsistent with the Act and sufficient to render his opinion unreasoned. *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1321, 19 BLR 2-192, 2-205-07 (7th Cir. 1995); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 173, 21 BLR 2-34, 2-46 (4th Cir. 1997).

Pursuant to Section 718.204(c), the administrative law judge considered the evidence regarding the cause of claimant’s total respiratory disability. The administrative law judge found Dr. Chavda’s opinion, that claimant’s disability is due to his coal dust exposure and smoking history, to be unreasoned because he does not offer an explanation or support for his etiology determination. Decision and Order on Remand at 8. In doing so, the administrative law judge noted that pulmonary function and blood gas studies are diagnostic only of the severity of the impairment and not the etiology of the impairment. *Id.* The administrative law judge next reviewed Dr. O’Bryan’s opinion that claimant’s impairment is due to his smoking history. The administrative law judge stated, “[n]oting Dr. O’Bryan’s superior credentials, I afford his opinion substantial weight in support of total pulmonary disability but not supporting disability due to pneumoconiosis.” *Id.* Thus, the administrative law judge concluded that claimant does not suffer from total disability due to pneumoconiosis by “afford[ing] more weight to the well-reasoned etiology opinion offered by Dr. O’Bryan over the unsupported etiology determination made by Dr. Chavda.” *Id.* at 9.

We vacate the administrative law judge’s finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). The record reveals that both Dr. Chavda and O’Bryan are Board-certified in internal medicine and pulmonary disease. Employer’ Exhibit 1. Therefore, it is uncertain why the administrative law judge accorded Dr. O’Bryan’s opinion substantial weight over Dr. Chavda’s opinion on this basis. Moreover, except for noting Dr. O’Bryan’s credentials, the administrative law judge does not provide a rationale as to why he finds this physician’s opinion entitled to substantial weight. Because it is unclear why the administrative law judge credited Dr. O’Bryan’s opinion over Dr. Chavda’s opinion, it is difficult to determine whether the administrative law judge’s weighing of these opinions is rational. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). In addition, the administrative law judge’s reconsideration of Dr. O’Bryan’s and Dr. Chavda’s opinions at Section 718.202(a)(4) may affect his credibility determinations regarding these opinions at Section 718.204(c). *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-103-4 (6th

Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *see also Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63 (6th Cir. 1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Accordingly, in light of the foregoing, we instruct the administrative law judge to reconsider the opinions of Dr. Chavda and O'Bryan pursuant to Section 718.204(c) on remand. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Additionally, the administrative law judge considered the opinions of Drs. Anderson, Westerfield, Myers, and Larsen regarding the cause of claimant's total respiratory disability. In weighing these opinions, the administrative law judge stated:

[i]n the previous Decision and Order, I held that the six year old opinions of Drs. Anderson, Westerfield, Myers, and Larsen were well reasoned, did not support a finding of total disability due to pneumoconiosis, and were entitled to substantial weight. The Board did not disturb those findings, but it did suggest that the age of these opinions should be considered when weighing all of the narrative opinion evidence.

Decision and Order on Remand at 7. Because Drs. Anderson, Westerfield, and Larsen do not offer an opinion regarding the cause of claimant's total respiratory disability, these physicians' opinions are not relevant to Section 718.204(c). Director's Exhibits 13, 36. However, Dr. Myers opined that claimant's pulmonary impairment was due to coal workers' pneumoconiosis and diabetes. Director's Exhibit 13. The administrative law judge relied on [t]he newer medical data, taken in 2001," and found "that, at some point, [claimant] became totally disabled due to a moderate restrictive pulmonary impairment." Decision and Order on Remand at 9. Although the date of the medical evidence is important when considering whether claimant has or does not have a pulmonary impairment, this factor is not as relevant when considering the *etiology* of that impairment pursuant to Section 718.204(c). 20 C.F.R. §718.201(a)(2); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997). Because the administrative law judge may have discredited Dr. Myers' opinion regarding the cause of claimant's total respiratory disability on the basis that his opinion was six years older than the opinions of Drs. Chavda and O'Bryan, we instruct the administrative law judge to reconsider Dr. Myers' opinion pursuant to Section 718.204(c) on remand.

Lastly, in the Petition for Review and brief filed by claimant's counsel before he withdrew from the case, claimant requests that the case be reassigned to a different administrative law judge on remand. However, because claimant has not demonstrated

any bias or prejudice on the part of the administrative law judge, we deny his request. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-108 (1992).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge