

BRB No. 08-0791 BLA

S.N.D.)
(Widow of M.D.))
)
Claimant-Respondent)
) DATE ISSUED: 08/28/2009
v.)
)
MIDWEST COAL COMPANY)
)
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-Award of Benefits of Daniel F. Solomon,
Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (06-BLA-5839) of
Administrative Law Judge Daniel F. Solomon rendered on a survivor'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). The miner died on April 4, 2005,
and claimant filed her survivor's claim on May 16, 2005. Director's Exhibits 2, 8.

In his decision, the administrative law judge credited the miner with at least
twenty-seven years of coal mine employment, as stipulated.¹ The administrative law

¹ The Board will apply the law of the United States Court of Appeals for the

judge found that claimant established that the miner had legal pneumoconiosis, in the form of an obstructive ventilatory impairment due to both smoking and coal mine dust exposure, and that he died due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.205(c).² Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.205(c).³ Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer filed a reply brief, reiterating its contentions.

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 establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1),(3), or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Seventh Circuit, as the miner was last employed in the coal mining industry in Indiana. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² The administrative law judge specifically found that the evidence did not establish simple clinical pneumoconiosis or complicated pneumoconiosis. See Decision and Order at 11.

³ We affirm the administrative law judge's finding of at least twenty-seven years of coal mine employment, as it is unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Gallo and Martin, and in rejecting the opinions of Drs. Rosenberg and Tuteur, to find that the existence of legal pneumoconiosis was established pursuant to Section 718.202(a)(4). Drs. Gallo and Martin opined that the miner's chronic obstructive pulmonary disease (COPD) was due to both smoking and coal dust exposure. Claimant's Exhibits 1 at 51; 2 at 46, 52, 99, 101. Drs. Rosenberg and Tuteur attributed the miner's COPD solely to smoking. Director's Exhibit 13 at 5, 7-8, 12; Employer's Exhibits 1 at 13; 6 at 35, 38, 41; 7 at 50-53, 93-96, 99.

The administrative law judge found that Dr. Gallo rendered a well-reasoned opinion that coal mine dust aggravated the miner's COPD.⁴ By contrast, the administrative law judge discounted the opinions of Drs. Rosenberg and Tuteur. Specifically, the administrative law judge found that Dr. Rosenberg "failed to rationally rule out aggravation from coal mine employment," and did not address the chronic bronchitis component of the miner's obstructive disease. Decision and Order at 10. In addition, the administrative law judge reviewed the findings of a medical study by Attfield and Hodous and determined that the study's findings refuted Dr. Rosenberg's etiology conclusions and supported Dr. Gallo's opinion. With respect to Dr. Tuteur, the administrative law judge found the physician's opinion to be flawed because "he disagreed with the premise that cigarette smoking and mining are additive." Decision and Order at 10. The administrative law judge further found that, although Dr. Tuteur "acknowledged that aggravation can occur" he did not cogently address the miner's twenty-seven years of coal mine dust exposure. *Id.* Additionally, the administrative law judge found that Dr. Tuteur unduly emphasized the negative x-ray readings to exclude a diagnosis of legal pneumoconiosis. The administrative law judge therefore found that claimant established that the miner had legal pneumoconiosis.⁵

⁴ The administrative law judge did not indicate the weight, if any, he accorded to Dr. Martin's opinion.

⁵ After discussing and weighing the opinions of Drs. Tuteur, Rosenberg and Gallo as summarized above, Decision and Order at 5-11, the administrative law judge additionally stated that, in view of the "objective testing, 16 years of coal mine employment, an[d] at least a 15 year smoking history, and the reliance on scientific journal articles, I find that Dr. Cohen's rationale is better reasoned and is more consistent with the regulations." Decision and Order at 11. As employer notes, Dr. Cohen did not render an opinion in this case, and the smoking and coal mine employment histories referenced do not match those in this case. Viewing the administrative law judge's statement in the context of his entire decision, the statement appears to be an editorial error. However, because, as will be discussed, we are remanding this case for further

Employer contends that the administrative law judge selectively analyzed the evidence by applying more rigorous scrutiny to the opinions of Drs. Rosenberg and Tuteur to determine whether they ruled out aggravation by coal dust exposure, while accepting Dr. Gallo's opinion as well-reasoned, with little inquiry into the bases for the doctor's opinion. Employer's Brief at 46, 51. Employer contends that the administrative law judge failed to consider and resolve the conflicting evidence concerning the duration and extent of the miner's smoking history, and then examine the credibility of the medical opinions regarding the cause of the miner's COPD in light of that history. Reply Brief at 4-5. Further, employer asserts that the administrative law judge substituted his own judgment for that of the physicians when he utilized his own review of medical studies, and referred to the preamble to the revised regulations, to discount the opinion of Dr. Tuteur. Employer's Brief at 47-48, 59. Employer argues that the administrative law judge's approach was tantamount to shifting the burden of proof to employer. Employer's Brief at 52.

Employer's contentions generally have merit. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Consolidation Coal Co. v. Director, OWCP* [Stein], 294 F.3d 885, 895, 22 BLR 2-409, 2-426 (7th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). However, in this case, the administrative law judge did not explain his basis for finding Dr. Gallo's opinion to be well-reasoned regarding the existence of legal pneumoconiosis before he accepted it. *Clark*, 12 BLR at 1-155. Moreover, while the administrative law judge found that Drs. Rosenberg and Tuteur did not adequately explain why they "ruled out aggravation" of COPD by the miner's coal dust exposure, employer correctly asserts that claimant bears the burden to establish that the miner's COPD arose out of his coal mine employment, *see Director, OWCP v. Greenwich Collieries* [Ondecko], 512 U.S. 267, 280-81, 18 BLR 2A-6-9 (1994), and the administrative law judge did not subject Dr. Gallo's opinion to the same level of scrutiny. *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).

Further, the extent of the miner's smoking history is relevant to the credibility of the physicians' opinions regarding whether the miner's COPD arose out of his coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Here, the administrative law judge summarized claimant's testimony that the miner smoked approximately one-half pack of cigarettes per day from 1949 until sometime before he quit work in 1984. Decision and Order at 4. However, as employer argues, the record contains evidence which, if credited, could establish that the miner's

consideration of the existence of pneumoconiosis, the administrative law judge, on remand, should clarify his decision with respect to his statement concerning Dr. Cohen.

smoking history was more extensive than was summarized by the administrative law judge.⁶ Because the administrative law judge did not consider all of the evidence relevant to the credibility of the physicians' opinions, we are unable to conclude that substantial evidence supports his finding that the miner's COPD arose out of coal mine employment, based on Dr. Gallo's opinion.

Employer argues further that substantial evidence does not support the administrative law judge's reasons for discounting the opinions of Drs. Rosenberg and Tuteur. We agree. The administrative law judge discounted the opinions of Drs. Rosenberg and Tuteur because he found that Drs. Rosenberg and Tuteur failed to explain why the miner's coal dust exposure did not contribute to, or aggravate, his COPD. Contrary to the administrative law judge's finding, Dr. Rosenberg relied on the miner's smoking and coal mine employment histories, his symptoms of bronchospasms, congestion, and rhonchi, the spirometric pattern including reduced FEV1 and low diffusion capacity, and calculations based on the Attfield and Hodous study to support his opinion that the miner's COPD was due solely to smoking.⁷ Employer's Exhibit 7 at 50-52, 57-62, 73-74, 93-94, 99. Likewise, Dr. Tuteur relied on the miner's coal mine employment and smoking histories, findings on physical examination, the pulmonary function and blood gas studies, the greater statistical likelihood of COPD being related to smoking rather than coal dust exposure, and the "totality of all available medical data," in addition to the negative chest x-rays and CT scans, to support his opinion. Director's

⁶ As noted, claimant testified at the hearing that the miner smoked approximately one-half pack per day from 1949 until sometime in 1984, for approximately thirty-five years. Hearing Transcript at 22. Claimant stated in her answers to interrogatories from employer that the miner smoked one pack per day. Director's Exhibit 15 at 66. Recorded smoking histories found in the miner's treatment records vary, and indicate that the miner smoked one to three packs per day for thirty-five years or more. Director's Exhibit 12 at 175, 180, 302, 345, 493, 575, 577. Dr. Gallo based his opinion on a forty-three year smoking history, and acknowledged that the miner smoked up to three packs per day. Claimant's Exhibit 1 at 8, 19, 22. Dr. Martin recalled the miner's smoking history as close to forty years, but did not know how many packs per day the miner smoked. Claimant's Exhibit 2 at 50. Dr. Tuteur stated that the miner smoked one to three packs per day for forty years. Employer's Exhibit 6 at 32. Dr. Rosenberg estimated the miner's smoking history at two to three packs per day for forty years. Employer's Exhibit 7 at 23-24.

⁷ Dr. Rosenberg did not diagnose the miner with legal pneumoconiosis in part because the miner had the type of emphysema seen in smokers and not the type seen in coal mine employment-related diseases. See Employer's Exhibit 7 at 54-55, 73-74, 93-94, 99.

Exhibit 13 at 8, 12; Employer's Exhibit 6 at 35-38, 51, 58, 63. Thus, substantial evidence does not support the administrative law judge's characterization of these opinions.⁸ *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

In light of the foregoing errors, we must vacate the administrative law judge's finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for further consideration. Specifically, on remand, the administrative law judge should consider all of the relevant evidence and determine the extent of the miner's smoking history, then reassess the medical opinion evidence in light of his determination. *See* 30 U.S.C. §923(b); *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge, on remand, should reconsider the opinions of Drs. Gallo, Martin, Rosenberg, and Tuteur, taking into account the respective analyses and the quality of the physicians' comparative reasoning, along with the physicians' qualifications.⁹ *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-35, 2-37, (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001). We reject employer's assertion that the administrative law judge, in assessing the reasoning of the opinions, was prohibited from referring to the Department of Labor's findings in the preamble to the revised regulations, concerning the medical literature on coal mine dust and obstruction. *See J.O. v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA (June 24, 2009). However, we instruct the administrative law judge, on remand, to refrain from engaging in his own analysis of medical study findings. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 382, 9 BLR 2-239, 2-247 (7th Cir. 1987); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Pursuant to Section 718.205(c), employer contends that the administrative law judge erred in relying on the opinions of Drs. Gallo and Martin and in rejecting the well-reasoned opinions of Drs. Rosenberg and Tuteur, to find that claimant established that the miner's death was due to pneumoconiosis. Because we have vacated the administrative law judge's finding as to the existence of pneumoconiosis, we also vacate his finding

⁸ Since both Drs. Rosenberg and Tuteur agreed that coal mine dust can cause or aggravate obstruction, the administrative law judge did not explain his decision to discredit their opinions for allegedly disagreeing with the concept that smoking and coal dust exposure are additive. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

⁹ Drs. Gallo, Rosenberg, and Tuteur are Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibits 6 at 4; 7 at 4; Claimant's Exhibit 1 at 3. Dr. Martin is Board-certified in Family Practice and Palliative and Hospice Medicine. Claimant's Exhibit 2 at 4.

pursuant to Section 718.205(c) and instruct him to reconsider this issue, if reached, on remand. Further, in the interest of judicial economy, and to avoid any repetition of error on remand, we briefly address two issues raised by employer.

Employer argues that the administrative law judge erred in relying on the opinions of Drs. Gallo and Martin to establish that the miner's death was due to pneumoconiosis because both physicians used qualified language in their opinions, and because the administrative law judge mechanically credited their opinions in view of their status as treating physicians. While a physician's use of cautious language does not necessarily reflect equivocation, *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), we instruct the administrative law judge, on remand, to take into account the specific language of the opinions of Drs. Gallo and Martin in assessing the probative value of the doctors' opinions.¹⁰ *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 890, 22 BLR 2-514, 2-528 (7th Cir. 2002); *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 335-36, 22 BLR 2-581, 2-588-89 (7th Cir. 2002); *V.M. v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-75 (2008). The administrative law judge must also identify and explain fully the reasons for according the opinions of Drs. Gallo and Martin greater weight based on their status as treating physicians. *See McCandless*, 255 F.3d at 470, 22 BLR at 2-318-19.

¹⁰ Dr. Gallo opined that the miner's "COPD and coal dust exposure certainly would've been a contributing cause, but not being present in his terminal state, I would not be able to answer accurately." Claimant's Exhibit 1 at 50-51. Dr. Martin opined that "His conditions hastened – were the cause of his death, absolutely. He died of chronic lung disease, and I believe it was hastened by his exposure." *Id.* Dr. Martin was asked to clarify, and responded, "Yes, he died at a faster rate than I could predict by his smoking history." *Id.* However, when again asked whether pneumoconiosis hastened the miner's death, Dr. Martin responded, "I am unwilling to give you an opinion under oath either way 100 percent. . . . I can't tell you if he would have lived a month or to 2006. I didn't tell you he would have died sooner, I didn't say he would have died the same day." Claimant's Exhibit 2 at 85, 87.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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