

BRB No. 09-0691 BLA

FLOYD B. COX)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ENERGY COAL INCOME PARTNERSHIP)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	DATE ISSUED: 08/31/2010
PNEUMOCONIOSIS FUND)	
)	
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.

Leonard Stayton, Inez, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05668) of Administrative Law Judge Pamela Lakes Wood rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ The administrative law judge credited claimant with eight years and three months of coal mine employment and adjudicated this claim, filed on June 22, 2006, pursuant to 20 C.F.R. Part 718. The administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but that the evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).² The administrative law judge further found that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found, however, that the evidence was insufficient to establish that

¹ By Order dated April 7, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Cox v. Energy Coal Income Partnership*, BRB No. 09-0691 BLA (Apr. 7, 2010)(unpub. Order). The Director, Office of Workers' Compensation Programs, claimant and employer have responded, agreeing that Section 1556 does not apply to the instant claim as claimant has not alleged at least fifteen years of coal mine employment. Based upon the parties' responses, and our review, we hold that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as there is no evidence of, and no allegation that, claimant has at least fifteen years of coal mine employment.

² Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.³

On appeal, claimant contends that the administrative law judge did not properly weigh the evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) or to total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response to the merits of claimant's appeal unless requested to do so by the Board.⁴

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law.⁵ 33 U.S.C. §921(b)(3), as incorporated into the Act 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

³ Employer filed a Motion for Reconsideration on June 4, 2009, which the administrative law judge denied on June 18, 2009. In her Order Denying Reconsideration, the administrative law judge noted that the motion did not allege error in her Decision and Order but, instead, was submitted to clarify that Dr. Jarboe's x-ray reading was not designated as part of employer's evidence.

⁴ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant had "at most" eight years and three months of qualifying coal mine employment and her findings that claimant establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(c), and total disability pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 3; see Decision and Order at 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered the opinions of Drs. Hussain, Dahhan, Jarboe, Sikder and Lafferty. Dr. Hussain, a Board-certified pulmonologist, diagnosed clinical pneumoconiosis and coronary artery disease, based upon his July 26, 2006 Department of Labor examination, and opined that claimant has a moderately severe impairment due to pneumoconiosis. Director's Exhibit 9. In his subsequent deposition, Dr. Hussain stated that he believed that the mild impairment shown in the pulmonary function testing was due, in part, to obesity, as well as to inconsistent and poor effort. Employer's Exhibit 5 at 10, 13. Dr. Hussain, however, further explained that he would not attribute claimant's hypoxemia to obesity, in light of the nodular opacities reported on the x-ray reading. *Id.* at 13-14. He also stated that his opinion as to the etiology of claimant's impairment would change if claimant was currently smoking, "[b]ecause it would be more attributable to his tobacco smoking." *Id.* at 15-16.

Dr. Dahhan examined claimant on October 21, 2006, and found neither clinical nor legal pneumoconiosis, based upon negative x-rays and the absence of a pulmonary impairment related to coal dust inhalation. Director's Exhibit 11. He diagnosed a "mild restrictive ventilatory impairment" due to "significant obesity" and a blood gas exchange abnormality due to morbid obesity, hypertension, and fluid retention. *Id.*

Dr. Jarboe examined claimant on July 26, 2007, and found neither clinical nor legal pneumoconiosis. Employer's Exhibit 1. Dr. Jarboe opined that claimant was totally disabled from a pulmonary standpoint due to a combination of cigarette smoking and hypoventilation caused by obesity, with the obesity resulting in a restrictive ventilatory defect and disabling hypoxemia, and the cigarette smoking resulting in a small amount of airflow obstruction due to air trapping. Employer's Exhibits 1, 4 at 15-17, 20-26, 30.

Dr. Sikder, claimant's treating pulmonologist, stated in a letter dated December 15, 2006, that claimant had chronic obstructive pulmonary disease with multiple medical problems and was disabled, in part, due to his occupational exposure. Director's Exhibit 13. In her pulmonary evaluation dated June 6, 2006, Dr. Sikder attributed claimant's respiratory insufficiency to his weight. *Id.*

Dr. Lafferty, claimant's treating physician, indicated in treatment records from 2004 that claimant's respiratory difficulties were due to obesity. Director's Exhibit 13. Dr. Lafferty subsequently stated, in a letter dated December 5, 2006, that claimant suffered from hypoxemia and shortness of breath due to pneumoconiosis, that his pulmonary condition disabled him and that the disability was related to claimant's many years working in and around coal mines. *Id.*

In weighing the medical opinions regarding disability causation pursuant to 20 C.F.R. §718.204(c), the administrative law judge stated that:

Dr. Hussain attributed a portion of the Claimant's disability to his coal mining as well as to his obesity, but his opinion relied upon an inaccurate history of underground coal mining, rather than strip mining, and he indicated that his opinion would change if the Claimant continued to smoke (which Drs. Dahhan and Jarboe suspected based upon their testing).

Decision and Order at 17-18. The administrative law judge also determined that, although the opinions of Drs. Dahhan and Jarboe were entitled to less weight because they did not diagnose clinical pneumoconiosis, their views of how morbid obesity prevents proper lung ventilation were relevant and probative regarding the probable effect of claimant's obesity on his breathing. *Id.* at 18. The administrative law judge further noted that, while Dr. Dahhan attributed claimant's respiratory disability primarily to his obesity, he also opined that hypertension and fluid retention may have contributed to claimant's blood gas abnormality and that, even if claimant had clinical pneumoconiosis, he would not change his opinion that it would not have a significant effect on claimant's breathing. *Id.* The administrative law judge found that Dr. Jarboe's opinion, attributing claimant's restrictive ventilatory defect and disabling hypoxemia to his obesity and resulting hypoventilation, with a small amount of the airflow obstruction, possibly due to smoking-induced air trapping, was not entitled to significant weight because the doctor did not acknowledge that the x-ray evidence could be positive for pneumoconiosis. *Id.*

The administrative law judge observed that, in December 2006, Dr. Lafferty stated that claimant's respiratory disability was due to his "many years" working in and around coal mines and his pneumoconiosis, but that in medical records from 2004, he indicated that claimant's dyspnea was most likely related to his morbid obesity. Decision and Order at 18. Regarding Dr. Sikder's "conclusory" report, prepared in December 2006, the administrative law judge noted that Dr. Sikder attributed claimant's chronic obstructive pulmonary disease and disability to coal dust exposure, in part, contrary to the administrative law judge's finding that the existence of legal pneumoconiosis was not established, and that the doctor did not diagnose clinical pneumoconiosis. *Id.* In addition, the administrative law judge indicated that Dr. Sikder opined that claimant's respiratory insufficiency was primarily due to his weight in her June 2006 report. *Id.* The administrative law judge concluded that, in spite of her status as claimant's treating physician, Dr. Sikder's report and records did not constitute a well-reasoned and well-documented opinion. *Id.*; see 20 C.F.R. §718.104(d). Upon concluding that there were no reasoned medical opinions establishing that pneumoconiosis caused or worsened claimant's breathing impairment, the administrative law judge found that claimant's pulmonary disability was due to obesity with, "at most," a negligible contribution from claimant's coal dust exposure or smoking. Decision and Order at 18.

Claimant argues that it was error for the administrative law judge to discount Dr. Hussain's opinion because the doctor recorded a history of underground coal mine employment rather than strip mining.⁶ Claimant's Brief at 14-15. Claimant further contends that the administrative law judge erred in discrediting Dr. Hussain's opinion on the ground that the doctor stated that his opinion might change if claimant was still smoking. *Id.* at 15. Claimant also maintains that the opinions of Drs. Sikder and Lafferty were entitled to determinative weight, based upon their status as treating physicians. *Id.* at 15-16. In addition, claimant contends that the administrative law judge erred in crediting the opinion of Dr. Dahhan and argues that his statement, that even if claimant had pneumoconiosis, it would not be a contributing factor in his impairment, is contrary to the Act. Claimant's Brief at 16.

We hold that claimant's allegations of error regarding the administrative law judge's weighing of the opinions of Drs. Sikder and Lafferty are without merit. The administrative law judge acted within her discretion as fact-finder, in determining that these opinions were conclusory and entitled to little weight, as both doctors failed to adequately explain their conclusions and offered conflicting opinions as to whether claimant's totally disabling impairment was due to obesity or to coal dust exposure. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Hicks*, 138 F.3d at 535, 21 BLR at 2-340, *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We also reject claimant's contention that the administrative law judge erred in failing to determine that Dr. Dahhan's opinion is contrary to the Act, as Dr. Dahhan did not rule out the possibility that simple pneumoconiosis can be totally disabling. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); Director's Exhibit 11.

We find merit, however, in claimant's assertion that the administrative law judge did not adequately explain the basis for her rejection of Dr. Hussain's opinion at 20 C.F.R. §718.204(c). The Administrative Procedure Act (APA) requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented in the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C.

⁶ Claimant raises similar arguments regarding the administrative law judge's finding, at 20 C.F.R. §718.202(a)(4), that Dr. Sikder's opinion was not a credible medical opinion diagnosing legal pneumoconiosis. Claimant's Brief at 13; *see* Decision and Order at 13. We will address claimant's allegations at 20 C.F.R. 718.204(c), however, as the issue of whether claimant has legal pneumoconiosis is subsumed in the administrative law judge's consideration of total disability causation under 20 C.F.R. §718.204(c).

§932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In this case, the administrative law judge did not comply with the APA when weighing Dr. Hussain's opinion, that claimant is totally disabled due to hypoxia caused by pneumoconiosis. The administrative law judge did not explain how Dr. Hussain's mistaken belief that claimant worked underground, rather than in strip mines, detracted from the credibility of his opinion.⁷ In addition, in light of her finding that smoking provided, "at most," a "negligible" contribution to claimant's impairment, the administrative law judge did not adequately explain her decision to discredit Dr. Hussain's opinion because he stated that his conclusion would change if claimant did not actually quit smoking. Decision and Order at 18. Furthermore, the administrative law judge did not consider whether Dr. Hussain's explanation for attributing claimant's disabling hypoxia to pneumoconiosis rendered his opinion well-reasoned and well-documented on the issue of disability causation.

Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), and remand the case for further consideration. We specifically instruct the administrative law judge to explain the bases for her findings with respect to Dr. Hussain's opinion, and provide a rationale for her credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. On remand, the administrative law judge must specifically address whether Dr. Hussain's opinion is reasoned and documented, and determine whether claimant has satisfied his burden of establishing that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR at 1-27.

⁷ Perhaps the administrative law judge inferred that claimant was exposed to less coal mine dust as a strip miner, but she made no explicit factual finding on this issue, nor did she identify any evidence in support of this inference.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge