

BRB No. 00-0166 BLA

RAYMOND ARNOLD WOLF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
D & L COAL COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
WEST VIRGINIA COAL WORKERS'	)	
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

F. Cody Pancake, III, Keyser, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-1034) of Administrative Law Judge Stuart A. Levin awarding benefits on a 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). This case has been before the Board previously. In the original decision, the administrative law judge found twenty-nine years of coal mine employment. Considering entitlement pursuant to the provisions of 20

C.F.R. Part 718, the administrative law judge concluded that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge further found that the record evidence was also sufficient to establish that claimant suffered from a totally disabling respiratory impairment and that claimant's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(b),(c). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203 and 718.204(c)(1)-(4). The Board vacated, however, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b) and remanded the case for further consideration of the opinions of Drs. Renn and Fino in light of *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) and to assess the credibility of Dr. Shroff's opinion. *Wolf v. D & L Coal Co.*, BRB No. 98-0343 BLA (Dec. 16, 1998)(unpublished).

On remand, the administrative law judge concluded that the opinion of Dr. Fino did not violate the holdings of *Stiltner* and *Warth* and was therefore entitled to be given appropriate weight. Decision and Order on Remand at 5. The administrative law judge also fully considered the opinion of Dr. Renn but concluded that it was entitled to no weight as it violated *Stiltner* and *Warth*. Decision and Order on Remand at 4-5. The administrative law judge then concluded, after weighing the evidence, that claimant established the existence of pneumoconiosis and that his disability was due to pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.204(b). Decision and Order on Remand at 5-8. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that the miner's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b). Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally

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<sup>1</sup>Claimant, Raymond Arnold Wolf, filed his claim for benefits on August 16, 1994. Director's Exhibit 1.

disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 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), in finding the existence of pneumoconiosis established and that claimant's total disability was due to pneumoconiosis as he mischaracterized Dr. Raver's status as claimant's treating physician. Employer's Brief at 22. We agree. In finding that claimant established pneumoconiosis and that claimant's disability was due to pneumoconiosis, the administrative law judge noted the opinions of Drs. Fino, Shroff, Raver, McCullough, Bess and Renn. The administrative law judge concluded that although the credentials of Dr. Raver were equal to those of Dr. Fino in the area of pulmonary medicine, Dr. Raver's opinion was entitled to greater weight as he was claimant's treating physician. Decision and Order on Remand at 7-8. Thus, the administrative law judge found the existence of pneumoconiosis established and that claimant's total disability was due to pneumoconiosis as he accorded controlling weight to the medical opinion of Dr. Raver on the basis that he was claimant's treating physician. Decision and Order on Remand at 7-8. The record, however, is devoid of any evidence that Dr. Raver is claimant's treating physician. Rather, the record indicates, as the administrative law judge has previously found, that Dr. Shroff is claimant's treating physician. Decision and Order on Remand at 6; Decision and Order dated November 4, 1997; Director's Exhibits 17, 24, 28, 31; Hearing Transcript at 40. Under the APA, the administrative law judge is required to address all

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<sup>2</sup>The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 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).

<sup>3</sup>Employer also asserts that the administrative law judge incorrectly accorded no weight to the opinion of Dr. Renn. Employer's Brief at 16-20. Contrary to employer's assertions, the administrative law judge fully considered Dr. Renn's opinion and his deposition testimony and rationally acted within his discretion as fact-finder in according no weight to the opinion because it was based on the erroneous assumption that only restrictive disorders can be caused by coal mine employment. See *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order on Remand at 4-5; Director's Exhibits 34, 39.

relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although the administrative law judge is empowered to weigh the evidence, inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, the basis for the administrative law judge's credibility determinations in this particular case can not be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We therefore vacate the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(b) and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge should not credit the opinion of an examining or treating physician solely because the doctor personally examined the miner, since the administrative law judge has a statutory obligation to consider all the relevant evidence. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Further, we note that subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the United States Court of Appeals for the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000). Consequently, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), then the administrative law judge, on remand, must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Compton, supra*.

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<sup>4</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge