

BRB No. 03-0258 BLA

MICHAEL A. TULLIO)	
)	
Claimant-Respondent)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY, INCORPORATED)	DATE ISSUED: 12/19/2003
)	
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 J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William J. Evans and Katherine E. Venti (Parsons, Behle & Latimer), Salt Lake City, Utah, for employer.

Timothy S. Williams (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (01-BLA-0920) of

Administrative Law Judge Daniel J. Roketenetz on a duplicate claim¹ 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).² Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that claimant established nineteen years of qualifying coal mine employment. Next, the administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and total respiratory disability, and therefore, that claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309. Addressing the merits of entitlement, the administrative law judge found that claimant established pneumoconiosis arising out of coal mine employment and total respiratory disability due to pneumoconiosis.³ Accordingly, he awarded benefits. Subsequently, claimant's counsel filed an attorney's fee petition; no objections were filed by employer, and the administrative law judge awarded attorney's fees to claimant's counsel totaling \$11,544.12 representing 53.8 hours of legal services rendered at a rate of \$200.00 per hour and \$784.12 for expenses.

On appeal, employer argues that the administrative law judge erred in failing to consider all the evidence of record, in assigning less weight to the opinion of Dr. Farney, and in substituting his own opinion for that of the medical experts. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a limited response letter, arguing that the administrative law judge erred in applying the rebuttable presumption set forth in Section 718.305 because Section 718.305 applies only to claims filed prior to January 1, 1982 and the instant claim was filed on August 28, 2000. Employer has filed a reply brief, reiterating its challenges to the administrative law judge's weighing of Dr. Farney's opinion and, concurring with the Director that the administrative law judge misapplied Section 718.305, and urging that the case be remanded for further consideration.⁴

¹ Claimant is Michael Anthony Tullio, who filed his first application for benefits on February 17, 1994, which the district director denied on July 1, 1994. Director's Exhibit 29. Claimant did not pursue this denial. Subsequently, claimant filed a duplicate application for benefits on August 28, 2000, which is the subject of the case *sub judice*. Director' Exhibit 1.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ Under his total disability analysis, the administrative law judge erroneously cited Section 718.204(c)(1), (2), and (3) rather than Section 718.204(b)(2)(i)-(iii). Decision and Order at 18-19. We deem this error to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁴ We affirm the administrative law judge's determinations regarding length of coal

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to Section 718.202(a)(4), employer argues that the administrative law judge's rejection of Dr. Farney's opinion is not supported by the evidence of record and was irrational. Employer contends that the administrative law judge improperly discounted Dr. Farney's opinion because Dr. Farney believed that claimant was a habitual smoker, contrary to the evidence of record and Dr. Farney's formal hearing testimony. Employer argues that because Dr. Farney's report and formal hearing testimony clearly demonstrate that he based his opinion on a cigarette smoking history of nine to thirty pack years, the administrative law judge improperly discredited Dr. Farney's opinion because he relied on an inaccurate smoking history.

Initially noting that claimant's smoking history fluctuated around twenty-five pack years, the administrative law judge credited claimant's formal hearing testimony that he smoked for nine years before quitting in 1975 or 1976, as corroborated by his wife's testimony and a majority of the smoking histories contained in the record. In considering the opinion of Dr. Farney, the administrative law judge found that Dr. Farney's reliance on a variable smoking history of as much as thirty pack years constituted a belief that claimant "continued to be a habitual smoker," contrary to his own findings that claimant quit smoking after a nine pack year history. The administrative law judge also discounted Dr. Farney's opinion on the basis that, while Dr. Farney found positive nicotine values in claimant's urinalysis, he admitted that he was unaware of the fact that claimant chewed tobacco, a habit which could also produce the results seen in claimant's urinalysis. Decision and Order at 15-16.

In a report dated April 10, 2001, Dr. Farney recorded a cigarette smoking history of "9-30 pack years," additionally noted a history of "5-6 cigarettes per day for 18 years," and, after conducting a pulmonary evaluation of claimant, found that claimant suffers from chronic obstructive pulmonary disease that was not related to coal dust exposure and was solely the result of cigarette smoking. Director's Exhibits 24, 25. Dr. Farney, also a witness during the formal hearing held on May 15, 2002, was examined by employer's counsel,

mine employment, and pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), 718.204(b)(2)(i)-(iv), and 725.309 inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 13, 14, 17-19.

claimant's counsel, and the administrative law judge, at which time he testified that the results of claimant's urinalysis, a test performed to determine the presence of nicotine products including cotarnine, indicated a level of nicotine similar to that observed in habitual smokers, thereby demonstrating an "ongoing exposure to tobacco products." Hearing Transcript at 72. Nevertheless, a review of the formal hearing transcript reveals that, contrary to the administrative law judge's finding, Dr. Farney did not rely on any assumption that claimant was currently smoking cigarettes at the time he generated his report because claimant's carboxyhemoglobin was zero. When asked about claimant's smoking history in arriving at his conclusions, he testified that he assumed "the very minimum of about 10 pack years" but it was evident that claimant may have a twenty or thirty pack year history, and any references to tobacco products included in his report meant only that claimant had been exposed to tobacco. Hearing Transcript at 115-116. The administrative law judge erred, therefore, in his characterization of Dr. Farney's opinion as one establishing that claimant was a habitual smoker or, as one based on an inaccurate smoking history. See *Tackett v. Director*, OWCP, 7 BLR 1-703, 1-706 (1985); *Goode v. Eastern Assoc. Coal Co.*, 6 BLR 1-1064 (1984). Hence, we must vacate the administrative law judge's Section 718.202(a)(4) determination and remand the case for the administrative law judge to reconsider the relevant medical opinion evidence at Section 718.202(a)(4). See *Tackett*, 7 BLR at 706; *Goode*, 6 BLR at 1-1066.

Employer also argues that the administrative law judge likewise erred in crediting the opinion of Dr. Poitras because Dr. Poitras relied on virtually the same smoking history as Dr. Farney. Employer contends that despite the two consistent smoking histories of a range of nine to thirty pack years obtained by both Drs. Poitras and Farney, the administrative law judge irrationally discredited Dr. Farney's opinion based on an inaccurate smoking history while crediting Dr. Poitras' opinion based on an accurate smoking history. Dr. Poitras, who opined that claimant suffered from severe obstructive lung disease caused by coal mine employment and cigarette smoking, assumed a nine pack year smoking history in a report dated October 3, 2000 and a follow-up letter dated January 29, 2001. Director's Exhibits 8, 9. However, on April 19, 2002, Dr. Poitras indicated a smoking history "somewhere between 9 and 30 pack years" and even relied upon a history as great as thirty pack years.⁵ Claimant's Exhibit 1. The administrative law judge found that Dr. Poitras's opinion was entitled to determinative weight because Dr. Poitras relied on a cigarette smoking history of nine pack years, which was consistent with his prior finding of a nine pack year smoking history. Decision and Order at 5.

⁵ In opining that claimant's both coal mine employment and cigarette smoking contributed to claimant's severe obstructive lung disease, Dr. Poitras stated, "Even at 30 pack years tobacco [use], his degree of respiratory impairment is in my opinion excessive for a smoker only situation." Claimant's Exhibit 1.

It is well established that the administrative law judge, as trier-of-fact, must assess the weight and sufficiency of the evidence and determine which evidence is more probative. *Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 13 BLR 2-285 (7th Cir. 1990), *cert. denied*, 498 U.S. 827 (1990); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 1189, 7 BLR 2-202, 2-207 (4th Cir. 1985). Pursuant to Section 718.202(a)(4), claimant must demonstrate that coal dust exposure was a significant causative factor to his respiratory disease to establish the existence of pneumoconiosis as defined by the Act. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983); *see Wisniewski v. Director, OWCP*, 929 F.2d 952, 15 BLR 2-57 (3d Cir. 1991). Although the administrative law judge properly assessed the probative value of the medical opinion evidence by determining whether the physicians relied on accurate assumptions of claimant's cigarette smoking history, the administrative law judge's crediting of Dr. Poitras's opinion, in this case, was unreasonable because the administrative law judge erred in characterizing Dr. Poitras's opinion as being based on a nine pack year history when, in fact, in his April 2002 opinion, Dr. Poitras relied on a cigarette smoking history of nine to thirty pack years. *See Tackett*, 7 BLR at 706; *Goode*, 6 BLR at 1-1066. The administrative law judge's crediting of Dr. Poitras's opinion is, therefore, vacated. On remand, the administrative law judge must consider Dr. Poitras's opinion in light of all the evidence he reviews.

Employer argues that the administrative law judge substituted his opinion for that of Dr. Farney when he not only misconstrued Dr. Farney's responses to hypotheticals posed to him during the formal hearing but also when he relied on these same answers, that were based on inaccurate hypothetical information, as a basis for finding Dr. Farney's opinion less persuasive. Employer contends that, notwithstanding Dr. Farney's reliance on claimant's nineteen year coal dust exposure, the same as that relied upon by Dr. Poitras, the administrative law judge impermissibly found Dr. Farney's opinion less probative because initially, Dr. Farney characterized claimant's coal dust exposure as "moderate," but after answering questions posed by the administrative law judge, agreed that it was "pretty substantial and pretty egregious." Employer further asserts that there is no objective evidence of record establishing whether claimant's exposure during that nineteen year period was greater than average, or rather, that it was not "moderate" as described by Dr. Farney, nor is there evidence that quantifies the amount of dust in the air at any given time during claimant's employment that would support the administrative law judge's description. Therefore, employer asserts that the administrative law judge's use of this basis for finding that Dr. Farney's opinion was deficient is unsupported by the record.

Finding that claimant's account of the dusty conditions in his coal mine employment was credible, the administrative law judge determined that claimant's testimony revealed a far greater than "moderate" coal dust exposure as characterized by Dr. Farney and inquired of Dr. Farney whether he would agree that claimant's coal dust exposure during his mine jobs

constituted “pretty substantial and pretty egregious exposure.” Hearing Transcript at 124-125. Because Dr. Farney agreed with the administrative law judge’s characterization of claimant’s coal dust exposure as “pretty substantial and pretty egregious,” the administrative law judge consequently found that Dr. Farney’s opinion was less probative because it was based on an inaccurate assumption that claimant’s coal dust exposure was moderate. Decision and Order at 16.

Although the administrative law judge is permitted to assess the credibility of the witnesses at the formal hearing, particularly when that determination is crucial to resolving a factual dispute, *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1984), the administrative law judge is not permitted to engage in medical speculation without foundation in the record or set his own medical expertise against that of the physician, *Dolzanie v. Director, OWCP*, 6 BLR 1-865, 1-867 (1984). Our review of the evidence of record reveals that there is no evidence quantifying the amount of dust exposure or attributing any aggregate description of the coal dust exposure claimant endured during his nineteen years in coal mine employment. Accordingly, the administrative law judge’s rejection of Dr. Farney’s opinion on the basis that Dr. Farney relied on an inaccurate assumption concerning claimant’s coal dust exposure is not supported by substantial evidence. Because Dr. Farney relied on a coal mine employment history of nineteen years, consistent with the administrative law judge’s determination, and therefore, there is no evidence of a discrepancy between the administrative law judge’s finding as to claimant’s length of coal mine employment and the period relied upon by Dr. Farney, we must vacate the administrative law judge’s finding. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985).

Employer further contends that the administrative law judge’s hypothetical query requesting Dr. Farney to assume a fictitious five pack year cigarette smoking history was similarly irrational. Employer contends that, by finding that Dr. Farney’s “diagnosis would differ” if he relied on a five year smoking history, the administrative law judge impermissibly substituted his opinion for that of Dr. Farney, particularly in light of the administrative law judge’s admission that this was an “inaccurate smoking history.” Employer’s argument has merit.

Noting that he asked Dr. Farney to assume a hypothetical situation consisting of a five pack year cigarette smoking history, the administrative law judge concluded, “Although this hypothetical also gives an inaccurate smoking history, Dr. Farney’s response indicates that his diagnosis would differ if given an accurate smoking history.” Decision and Order at 16; *see* Hearing Transcript at 124-125. The administrative law judge posed a hypothetical asking Dr. Farney to assume a five pack year smoking history, to agree that this was “inconsequential,” to assume that the miner had a family history of emphysema, and to consider the potential genetic susceptibility to contracting a respiratory disease, and asked

whether his opinion concerning the etiology of the respiratory disease would change, to which Dr. Farney replied, in the context of the hypothetical, considering “these pulmonary function measurements[,] that would be a case that I would present to pulmonary grand rounds because it’s so highly unusual.” Hearing Transcript at 125-126. Dr. Farney’s response, however, is not a definitive conclusion nor does it necessarily demonstrate that his “opinion would differ,” as so found by the administrative law judge. The administrative law judge’s reliance in part on Dr Farney’s answer to a hypothetical set of facts containing “an inaccurate smoking history,” as a means of determining that Dr. Farney’s opinion was further undermined exceeds the administrative law judge’s discretion in this case. *See Dolzanie*, 8 BLR at 1-867 (administrative law judge is not permitted to engage in medical speculation without foundation in record).

Finally, employer argues that the administrative law judge’s Decision and Order reflects an overall lack of attention to the evidentiary record because he erred in finding that the prior claim was denied based on claimant’s failure to establish pneumoconiosis, total disability, or total disability causation since, in the prior claim, claimant established total disability. Also, employer contends that the administrative law judge incorrectly stated that in the prior claim, claimant submitted a non-qualifying blood gas study and, in conjunction with the duplicate claim, submitted a qualifying study when the record demonstrates that claimant submitted qualifying tests in the prior claim. Employer’s argument fails because the examples proffered concern the issue of total disability, an issue uncontested by employer in this case. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 17-19.

The Director, in his response letter, argues that the administrative law judge applied an incorrect legal standard in determining that claimant’s totally disabling respiratory impairment was due at least in part to pneumoconiosis. The Director contends that the administrative law judge erred in relying on the fifteen-year rebuttable presumption as a basis for finding that pneumoconiosis contributed to claimant’s total disability because this provision, applicable only to claims filed prior to January 1, 1982, is inapplicable to the instant claim which was filed in August 2000. The administrative law judge found that, because claimant established nineteen years of coal mine employment and the existence of a totally disabling respiratory impairment, he was entitled to invocation of the rebuttable presumption that the total disability arose from pneumoconiosis pursuant to Section 718.305. The administrative law judge found further that, because employer proffered no evidence to rebut this presumption, claimant affirmatively established total disability causation. Decision and Order at 19.

Section 718.305 provides a rebuttable presumption that miners with fifteen years or more of qualifying coal mine employment and evidence demonstrating the presence of a totally disabling respiratory impairment are totally disabled due to pneumoconiosis. However, this provision “is not applicable to any claim filed on or after January 1, 1982.” 20

C.F.R. §718.305(e). Consequently, we must vacate the administrative law judge's Section 718.305 finding inasmuch as this regulation is inapplicable to the case at bar because it was filed on August 28, 2000. 20 C.F.R. §718.305(e); Director's Exhibit 1. If the administrative law judge finds that claimant established the existence of pneumoconiosis on remand, he must also determine whether claimant established that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment pursuant to the provision set forth in Section 718.204(c). *See* 20 C.F.R. §718.204(c). Furthermore, if the administrative law judge finds the evidence sufficient to establish entitlement to benefits, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed and enforceable inasmuch as it was unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Supplemental Decision and Order Awarding Attorney's Fees at 1.

Accordingly, on remand the administrative law judge must determine whether the medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and if reached, whether the evidence of record demonstrates total disability due to pneumoconiosis pursuant to Section 718.204(c).

Accordingly, the Decision and Order – Award of 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

BETTY JEAN HALL
Administrative Appeals Judge