

BRB No. 10-0276 BLA

GERALDINE CAIN)
(Widow of HERBERT CAIN, JR.))
Claimant-Respondent)
v.) DATE ISSUED: 02/08/2011
G.A.J.K. COAL CORPORATION)
and)
OLD REPUBLIC INSURANCE COMPANY)
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 Award of Benefits of Thomas F. Phalen,
Jr., Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer.

Jonathan Rolfe (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
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (08-BLA-5318) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a survivor's 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)).¹ The administrative law judge credited the miner with seventeen years of coal mine employment, as stipulated by the parties.² The administrative law judge found that claimant established that the miner had legal pneumoconiosis³ in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4), and also established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established that the miner had legal pneumoconiosis pursuant to Section 718.202(a)(4) and that the miner's death was due to legal pneumoconiosis pursuant to Section 718.205(c). Claimant responds, urging affirmance of the administrative law judge's decision. Claimant further responds that, if the Board cannot affirm the award of benefits, it must remand this case to the administrative law judge for consideration under a recent amendment to the Act that was enacted by Section 1556 of Public Law No. 111-148. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response letter, stating that, if the Board cannot affirm the administrative law judge's award, the case must be remanded for consideration under the recent amendment to the Act.⁴ Employer filed a reply brief, reiterating its contentions on appeal, and noting

¹ Claimant is the surviving spouse of the deceased miner. The miner filed three lifetime claims, all of which were finally denied. Living Miner's Claim at 3, 536, 1255 (unstamped exhibit). The miner died on December 14, 2006, Director's Exhibit 9, and on January 24, 2007, claimant filed her claim for survivor's benefits. Director's Exhibit 2.

² The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ 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).

⁴ For claims filed after January 1, 2005 that were pending on or after March 23, 2010, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act,

that, if the award cannot be affirmed, the case must be remanded for consideration under the amendment to the Act.⁵

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 pursuant to 20 C.F.R. Part 718, 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; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Legal Pneumoconiosis

Pursuant to Section 718.202(a)(4), the administrative law judge discussed and weighed the medical opinions of Drs. Koura, Jarboe, and Naeye.⁶ In his report dated

which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

⁵ By Order dated May 18, 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. The Director, employer, and claimant responded, reiterating their positions that, if the administrative law judge's award of benefits cannot be affirmed, the case must be remanded for consideration under the recent amendment to the Act.

⁶ The administrative law judge found that Dr. Chaney's opinion and the hospital and treatment records did not address the issue of legal pneumoconiosis. Decision and Order at 20; Director's Exhibits 12, 16, 17. These findings are unchallenged on appeal.

March 4, 2003, Dr. Koura attributed the miner's COPD "in substantial part" to his coal mine dust exposure. Living Miner's Claim at 291 (unstamped exhibit).⁷ Dr. Jarboe, in his report dated August 3, 2007, stated that the miner's COPD was due to asthma and smoking, and was unrelated to his coal mine dust exposure. Director's Exhibit 21. Dr. Naeye stated that the miner's COPD was due to his smoking, in a report dated June 22, 2007. Director's Exhibit 19. The administrative law judge found that Dr. Koura's opinion was well-documented and well-reasoned, but that the opinions of Drs. Jarboe and Naeye were insufficiently reasoned. Consequently, the administrative law judge credited Dr. Koura's opinion over those of Drs. Jarboe and Naeye, to find that claimant established that the miner had legal pneumoconiosis pursuant to Section 718.202(a)(4).

Dr. Koura's Opinion

Employer contends 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), by failing to adequately explain his basis for finding Dr. Koura's report to be well-reasoned. Dr. Koura opined that "[the miner's] exposure in the mines is in substantial part the cause of [the miner's] totally disabling lung disease." Living Miner's Claim at 291 (unstamped exhibit). Dr. Koura stated that he based his opinion on the miner's smoking and coal mine dust exposure histories, examinations of the miner, as well as x-rays and pulmonary function studies. *Id.*

In evaluating Dr. Koura's opinion regarding legal pneumoconiosis, the administrative law judge stated:

Dr. Koura treated [the miner] for his pulmonary and respiratory conditions over the course of several years. During that time, he examined [the miner] on many occasions. Dr. Koura's diagnosis of COPD is supported by his treatment records and objective medical testing. In developing his opinion

Therefore, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁷ Dr. Koura's March 4, 2003 medical report is contained in the record of the miner's last claim. In the survivor's claim, claimant designated Dr. Koura's March 4, 2003 report as one of her two affirmative medical reports under 20 C.F.R. §725.414(a)(2)(i). Claimant's Evidence Summary at 7. The administrative law judge admitted Dr. Koura's March 4, 2003 medical report into evidence in the survivor's claim, but the report was not given an exhibit number or placed among the exhibits submitted by the parties in the survivor's claim.

on the etiology of [the miner's] COPD, Dr. Koura considered [the miner's] smoking and occupational histories, the pulmonary function tests, x-ray reports, and his clinical examinations. Factoring in the nature, duration, frequency and extent of Dr. Koura's treatment of [the miner], and the documentation and reasoning of his report, I find that Dr. Koura's diagnosis of legal pneumoconiosis is entitled to full probative weight.

Decision and Order at 17-18. The administrative law judge concluded that Dr. Koura "provided a well-reasoned . . . diagnosis of legal pneumoconiosis." Decision and Order at 20.

We agree with employer's contention, in part. Under the APA, an "administrative law judge must explain his rationale for finding a medical report reasoned and documented." *Collins v. J&L Steel*, 21 BLR 1-181, 1-189 (1999). Here, the administrative law judge did not set forth the rationale underlying his determination that Dr. Koura's opinion was well-reasoned. Consequently, we vacate the administrative law judge's crediting of Dr. Koura's opinion, and remand this case to the administrative law judge for reconsideration of whether Dr. Koura's opinion is documented and reasoned. On remand, the administrative law judge must explain his findings in accordance with the APA. *See Rowe v. Director, OWCP*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Collins*, 21 BLR at 1-189; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Contrary to employer's assertions, however, the record reflects that Dr. Koura had available to him the miner's smoking and occupational histories, as well as the results from two pulmonary function studies, in rendering his March 4, 2003 report. Director's Exhibit 17 at 8, 9, 37, 39, 44. Further, employer argues that the administrative law judge was required to discredit Dr. Koura's opinion because Dr. Koura did not relate the miner's COPD to his coal mine dust exposure in his treatment records, but did so only in his report, and because the same opinion by Dr. Koura was discounted by a previous administrative law judge. These considerations, however, do not rationally require the administrative law judge to discredit the doctor's opinion, and credibility determinations are for the administrative law judge, as the Board is not empowered to reweigh the evidence.⁸ *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

⁸ Additionally, we note that the administrative law judge considered the regulation at 20 C.F.R. §718.104(d), and recited from the court's decision in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003), that, "in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." *See* Decision and Order at 17, *citing Williams*, 338 F.3d at 513,

Dr. Jarboe's Opinion

Employer contends that the administrative law judge erred in discounting Dr. Jarboe's opinion because Dr. Jarboe did not adequately explain why partial reversibility and variability on pulmonary function testing preclude the presence of legal pneumoconiosis. Employer also contends that the administrative law judge erred in discounting Dr. Jarboe's opinion because he relied on a reduced FEV1/FVC ratio to exclude coal mine dust exposure as a cause of the miner's COPD. Dr. Jarboe reasoned that the miner's COPD was due to smoking and asthma, and not coal mine dust exposure, based on the reversibility and variability seen on the miner's pulmonary function studies, because, in his view, COPD caused by coal mine dust exposure causes a fixed impairment. Director's Exhibit 21 at 9-10. Dr. Jarboe also excluded coal mine dust exposure as a cause of the miner's COPD based upon his finding that the miner had a disproportionately reduced FEV1 value in relation to a preserved FVC value, since, according to the doctor, coal mine dust exposure causes a reduction in both the FVC and FEV1, which is proportional. *Id.* at 10.

Employer argues that the administrative law judge erred in finding that, "Dr. Jarboe did not adequately explain why partial reversibility and some variability in pulmonary function test results precludes the presence of legal pneumoconiosis, especially considering [the] [m]iner's consistently poor pulmonary function test results." Decision and Order at 18, *citing Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). Contrary to employer's contention, the administrative law judge acted within his discretion when he found that Dr. Jarboe did not adequately explain why partial reversibility in the results of the miner's pulmonary function studies necessarily eliminated a diagnosis of legal pneumoconiosis. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 18.

22 BLR at 2-647. Thus, we reject employer's contention that the administrative law judge exercised a mechanical preference for the opinion of a treating physician. As to the qualifications of Dr. Koura, the administrative law judge properly found that they are not contained in the record. Contrary to employer's contention, the administrative law judge did not err in inferring that Dr. Koura "possesses the requisite training and experience necessary to provide a pulmonary consultation," based on the hospital record from Hazard-Appalachian Regional Healthcare, documenting that Dr. Koura performed a pulmonology consultation on the miner when he was hospitalized on December 14, 2006. *See Rowe v. Director, OWCP*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 9 n.12.

The administrative law judge also accorded less weight to Dr. Jarboe's opinion because the administrative law judge misconstrued the doctor's opinion as relying on the miner's reduced FEV1/FVC ratio to exclude coal mine dust exposure as a cause of claimant's impairment. Decision and Order at 19.

We agree with employer that the administrative law judge erred in discounting Dr. Jarboe's opinion because the administrative law judge found that it excluded coal mine dust exposure as a cause of the miner's COPD based upon a reduced FEV1/FVC ratio. *See* Decision and Order at 19. Dr. Jarboe did not exclude coal mine dust exposure as a cause of the miner's COPD because the miner's pulmonary function studies showed a reduced FEV1/FVC ratio. Rather, Dr. Jarboe excluded coal mine dust exposure as a cause of the miner's COPD because the miner had a disproportionate reduction in his FEV1/FVC ratio upon pulmonary function testing, and not a proportionate reduction in the FEV1/FVC, as would be seen with a coal mine dust-related disease. As substantial evidence does not support the administrative law judge's characterization of Dr. Jarboe's opinion, we vacate the administrative law judge's discounting of Dr. Jarboe's opinion, and remand this case to the administrative law judge for reconsideration of this opinion.

Dr. Naeye's Opinion

Employer next contends that the administrative law judge "mischaracterized Dr. Naeye's opinion as providing 'no reasoning' and 'no explanation' for his opinion as to etiology" of the miner's COPD, aside from the lack of clinical pneumoconiosis and the sparse amount of black pigment in the miner's lungs. Employer's Brief at 20, *citing* Decision and Order at 20. Employer asserts that Dr. Naeye specifically identified two other bases for his opinion that the miner's COPD was not coal dust-related. Employer states that Dr. Naeye indicated that the miner's autopsy tissue slides showed irreversible pulmonary and bronchial lesions caused by cigarette smoking, and that his clinical records showed reversibility upon bronchodilator pulmonary function testing. *Id.* After reviewing the miner's autopsy tissue slides, Dr. Naeye concluded:

There are no findings of coal worker[s'] pneumoconiosis in the lungs of this man. Specifically, the toxic constituent in coal mine dust (fibrogenic silica crystals) are absent in his lungs. Even black pigment, which is non-toxic and remains in the lungs of ex-miners for the remaining years of their lives, is sparse. What is present and led to this man's death are the irreversible pulmonary and bronchial lesions caused by cigarette smoking. The 2 packs of cigarettes he reported he smoked each day are the cause of the centrilobular emphysema, severe chronic bronchitis and bronchiolitis in his lungs. . . .

Director's Exhibit 19 at 4-5. Dr. Naeye also stated, earlier in his report, that, “[p]ulmonary function studies in later years showed findings of ‘severe, obstructive lung disease with improvement after bronchodilator use.’” Director's Exhibit 19 at 4.

The administrative law judge found that:

Aside from the lack of clinical pneumoconiosis and the “sparse” amount of black pigment in [the] [m]iner’s lungs. Dr. Naeye provides no reasoning for his determination that [the] [m]iner’s bronchitis, emphysema, and COPD are due to his cigarette smoking alone. . . . Because Dr. Naeye offered no explanation for his opinion on the etiology of [the] [m]iner’s impairment, I find his opinion on the issue of legal pneumoconiosis poorly reasoned, and I give it less probative weight.

Decision and Order at 20.

We agree with employer that the administrative law judge mischaracterized Dr. Naeye’s opinion. The administrative law judge did not consider that Dr. Naeye provided two other reasons, besides the absence of clinical pneumoconiosis and the sparse amount of black pigment in the miner’s lungs, to exclude coal mine dust exposure as a cause of the miner’s COPD. Specifically, Dr. Naeye relied on the presence of “irreversible pulmonary and bronchial lesions caused by cigarette smoking,” and the reversibility shown upon bronchodilator pulmonary function testing, to exclude coal mine dust exposure as a cause of the miner’s COPD. Director’s Exhibit 19 at 4. Thus, we vacate the administrative law judge’s determination that Dr. Naeye’s opinion is poorly reasoned. On remand, the administrative law judge must consider Dr. Naeye’s opinion in its entirety.

Therefore, on remand, the administrative law judge must reconsider the opinions of Drs. Koura, Jarboe, and Naeye, taking into account the respective analyses and the quality of the physicians’ comparative reasoning, along with the physicians’ qualifications, and explain the weight he accords their conclusions in determining whether they establish legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Death Due to Legal Pneumoconiosis

Employer contends that no evidence supports the administrative law judge’s finding that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). Our review of the record reveals that Dr. Koura did not render an opinion on the cause of the miner’s death, but in a pulmonary consultation on the day the miner died, he diagnosed the miner with acute respiratory failure, pneumonia, COPD with acute

exacerbation, and septic shock, and stated that the miner “had a high risk for mortality.” Director’s Exhibit 12 at 4-6. Dr. Jarboe opined that the miner “died of pneumonia associated with sepsis and shock resulting in severe metabolic acidosis,” acknowledging that “individuals with COPD can have an increased incidence of lower respiratory tract infections and pneumonia,” but he attributed the miner’s COPD to smoking and asthma, not coal mine dust exposure. Director’s Exhibit 21 at 11. Dr. Naeye opined that the miner died due to pneumonia, with pulmonary and bronchial lesions caused by smoking leading to the miner’s death.⁹ Director’s Exhibit 19 at 4-5.

The administrative law judge found that the miner’s death was hastened by legal pneumoconiosis pursuant to Section 718.205(c), based on the opinions of Drs. Jarboe and Naeye, and Dr. Koura’s hospital record diagnosing an acute exacerbation of COPD and stating that the miner had a “high risk for mortality.” Decision and Order at 22-23. Specifically, the administrative law judge “inferred” that the miner’s COPD contributed to his death based on Dr. Koura’s diagnosis of legal pneumoconiosis, coupled with Dr. Koura’s hospitalization note on the day the miner died, and “the opinions of Drs. Naeye and Jarboe, who opined that [the] [m]iner’s pneumonia was brought on by his COPD, emphysema, and bronchitis.” *Id.* at 23.

Because we have vacated the administrative law judge’s finding of legal pneumoconiosis, we also vacate the administrative law judge’s finding that the miner’s death was due to pneumoconiosis. If, on remand, the administrative law judge finds the existence of legal pneumoconiosis established, he must reconsider whether the medical opinion evidence establishes that the miner’s death was hastened by legal pneumoconiosis pursuant to Section 718.205(c). On remand, the administrative law judge must specifically address whether there is credible evidence that legal pneumoconiosis hastened death “through a specifically defined process that reduce[d] the miner’s life by an estimable time,” in accordance with *Conley v. Nat’l Mines Corp.*, 595

⁹ The record also includes the death certificate identifying pneumonia as the immediate cause of death with coal workers’ pneumoconiosis as the underlying cause of death, Director’s Exhibit 9, and the autopsy report of Dr. Bella, identifying “possible pneumonia” as one of the “preliminary pathology diagnoses.” Director’s Exhibit 11. The administrative law judge found that Dr. Bella’s autopsy report is not well-documented or well-reasoned. Decision and Order at 15. As this finding is unchallenged, it is affirmed. See *Skrack*, 6 BLR at 1-711.

F.3d 297, 303, 24 BLR 2-255, 2-266-67 (6th Cir. 2010), and *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).¹⁰

Section 411(c)(4)

This claim was filed after January 1, 2005, and the miner was credited with seventeen years of coal mine employment. Therefore, the administrative law judge, on remand, must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge, on remand, finds that claimant is entitled to the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether employer has rebutted the presumption. The administrative law judge, on remand, should allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Thus, although employer requests a remand to the district director for the parties to develop additional evidence, we agree with the Director that a remand to the administrative law judge is appropriate. Further, as the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

¹⁰ The *Conley* court went on to explain that, "More precision may legitimately be expected when it comes to the relationship of legal pneumoconiosis to some primary illnesses than to others." *Conley*, 595 F.3d at 304, 24 BLR at 2-266.

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

REGINA C. McGRANERY
Administrative Appeals Judge