

BRB No. 08-0640 BLA

L.L.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LANCASHIRE COAL COMPANY	)	DATE ISSUED: 06/18/2009
	)	
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 on Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose LLC), Johnstown, Pennsylvania, for employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (2005-BLA-5455) of Administrative Law Judge Michael P. Lesniak rendered on a miner'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). This case is before the Board for the second time. In his original Decision and Order, the administrative law judge, upon stipulation of the parties, credited claimant with eighteen years of coal mine employment, and adjudicated this claim, filed on March 24, 2003, pursuant to the regulations at 20 C.F.R. Part 718. After accepting the parties' stipulation to the existence

of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), and that the miner's totally disabling respiratory impairment was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, the Board vacated the administrative law judge's findings of legal pneumoconiosis and disability causation pursuant to Sections 718.202(a)(4), 718.204(c).<sup>1</sup> The case was remanded for the administrative law judge to reevaluate Dr. Fino's opinion, *in toto*, weighing his conclusion that the miner's chronic obstructive pulmonary disease (COPD) and emphysema were not due to coal dust exposure but were due to claimant's smoking history, with the opinion of Dr. Schaaf, that claimant suffers from legal pneumoconiosis, and then determine whether claimant has proven the existence of pneumoconiosis pursuant to Section 718.202(a)(4). If, on remand, the administrative law judge found that claimant met his burden under Section 718.202(a)(4), he was instructed to weigh all of the evidence relevant to the existence of pneumoconiosis together to determine whether the presence of the disease had been established at Section 718.202(a), and to further determine whether claimant had proven that pneumoconiosis is a substantially contributing cause of his total disability pursuant to Section 718.204(c). [*L.L.L.*] *v. Inland Steel Co.*, BRB No. 06-0864 BLA (Aug. 28, 2007)(unpub.).

On remand, the administrative law judge reviewed Dr. Fino's opinion and found that, while it was not contrary to the regulations, it was not as well-reasoned as the contrary opinion of Dr. Schaaf. Thus, the administrative law judge found that claimant had established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In accordance with the Board's instructions, the administrative law judge reevaluated all of the evidence relevant to the existence of pneumoconiosis, and determined that clinical and legal pneumoconiosis had been established at Section 718.202(a).<sup>2</sup> The

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<sup>1</sup> The Board affirmed the administrative law judge's findings regarding the length of claimant's coal mine employment, and his findings pursuant to Sections 718.202(a)(1)-(3), 718.203(b), and 718.204(b)(2), as well as his credibility determinations and discrediting of the medical opinions of Drs. Malhotra and Zlupko, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>2</sup> Upon review of the x-ray evidence on remand, the administrative law judge determined that errors had been committed in his previous weighing of the x-ray evidence of record pursuant to Section 718.202(a)(1). In reassessing the evidence, the administrative law judge found that the February 27, 2003 x-ray was in equipoise; the May 13, 2003, x-ray was positive for pneumoconiosis; the June 12, 2003 x-ray was positive; and the April 26, 2004 x-ray was positive. Decision and Order on Remand at 4-5.

administrative law judge further found that the weight of the evidence was sufficient to establish disability causation pursuant to Section 718.204(c). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's findings of legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding Section 718.202(a)(4), employer challenges the administrative law judge's weighing of the medical opinions, contending that the administrative law judge applied an irrebuttable presumption that has no authority in the Act, the regulations, or the Administrative Procedure Act (APA), 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). Employer alleges that the administrative law judge's erroneous interpretation of the definition of pneumoconiosis at 20 C.F.R. §718.201<sup>4</sup> assumes "a presumption that all obstructive pulmonary disease in a coal miner is caused by coal dust exposure." Employer's Brief at 4. In this regard, employer argues that the administrative law judge erred in crediting the opinion of Dr. Schaaf over the opinion of Dr. Fino. Employer's Brief at 3-7. Employer's arguments lack merit.

Dr. Schaaf diagnosed claimant with COPD due to emphysema, pneumoconiosis, and chronic bronchitis, based on claimant's reduced FEV<sub>1</sub> value. Claimant's Exhibit 5 at 25. He opined that the pneumoconiosis diagnosed on x-ray plays a significant role in claimant's obstructive impairment, but that the primary impact is through his chronic bronchitis. Dr. Schaaf attributed claimant's chronic bronchitis to coal dust exposure and

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<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Third Circuit, as the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

<sup>4</sup> Section 718.201 defines legal pneumoconiosis as including any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

smoking, as both exposures were substantial and significant. Claimant's Exhibit 5 at 17, 26, 42-44. Dr. Schaaf stated that there is no objective evidence that would permit a physician to exclude coal dust exposure as a substantial contributing factor to claimant's pulmonary disability. Claimant's Exhibit 5 at 28. By contrast, Dr. Fino diagnosed severe, disabling chronic obstructive lung disease with both obstructive bronchitis and emphysema related solely to cigarette smoking. Dr. Fino opined that claimant's work in the mines would have had a negligible effect on his significant obstructive defect. Employer's Exhibit 3, Director's Exhibit 15. Dr. Fino explained that, while both smoking and coal dust can cause chronic obstructive bronchitis as well as emphysema, the only type of emphysema not caused by coal dust is bullous emphysema, which is the type that claimant has. Employer's Exhibit 2. Dr. Fino stated that coal dust in the absence of clinical fibrosis or clinical pneumoconiosis can cause emphysema, but in published studies, when it was correlated with the loss in FEV<sub>1</sub>, it was of no clinical significance. Employer's Exhibit 2 at 13-14. Dr. Fino indicated that he found no evidence of clinical pneumoconiosis, but even assuming a positive x-ray finding of 1/0, studies indicate that that would correlate to ten percent of the miner's emphysema due to coal dust, leaving ninety percent related to smoking, so it would not be a clinically significant factor to the overall disability. Employer's Exhibit 2 at 13, 19. Dr. Fino further opined that,

Based on all of the information available to me, and even assuming the coal mine dust played some role in his obstruction, he is disabled due to smoking and would be disabled had he not been exposed to coal mine dust. [Claimant's] work in the mines would have had a negligible effect on the significant obstructive defect. It is his cigarette smoking that resulted in the chronic obstructive bronchitis and emphysema.

Employer's Exhibit 3, Director's Exhibit 15.

In evaluating the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge found that Dr. Fino confused the issue of establishing pneumoconiosis with the issue of disability causation in stating that "even assuming the coal mine dust played some role in his obstruction, he is disabled due to smoking . . ." Decision and Order on Remand at 3. Additionally, the administrative law judge accorded less weight to Dr. Fino's opinion because he determined that, while the doctor offered some explanation as to why claimant's emphysema was better attributable to smoking, he failed to explain why claimant's chronic bronchitis was unrelated to coal mine dust exposure. Decision and Order on Remand at 3. Consequently, after considering the entirety of the medical opinion evidence, the administrative law judge acted within his discretion in according greater weight to Dr. Schaaf's opinion, as he found that it was better reasoned and documented than the opinion of Dr. Fino. Decision and Order on Remand at 3; *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997);

*Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

Regarding the issue of disability causation at Section 718.204(c), the administrative law judge permissibly accorded little weight to Dr. Fino's opinion, that coal dust contributed only negligibly, if at all, to claimant's disability, because the administrative law judge found that the opinion was based largely on Dr. Fino's conclusion that the x-ray evidence was negative for pneumoconiosis, contrary to the administrative law judge's finding on remand of the existence of clinical pneumoconiosis on x-ray. Decision and Order on Remand at 6.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts. *See Groves*, 277 F.3d 829, 22 BLR 2-320; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984). It is also within the administrative law judge's discretion to determine whether an opinion is documented and reasoned. *See Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Because the administrative law judge addressed all relevant evidence, assigned the evidence appropriate weight, and provided valid reasons for crediting the opinion of Dr. Schaaf over the opinion of Dr. Fino, his Decision and Order on Remand comports with the requirements of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As we find no evidence that the administrative law judge applied an impermissible presumption, we affirm the administrative law judge's finding that the weight of the evidence of record was sufficient to establish the existence of pneumoconiosis at Section 718.202(a), and disability causation at Section 718.204(c), as supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge