

BRB No. 10-0595 BLA

HELEN SILVESTER<sup>1</sup> )  
(o/b/o VINCENT F. SILVESTER) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
AGIPCOAL USA, INCORPORATED )  
 )  
and )  
 ) DATE ISSUED: 06/15/2011  
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 Adele Higgins Odegard,  
Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for  
employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and  
HALL, Administrative Appeals Judges.

PER CURIAM:

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<sup>1</sup> Claimant is the miner's widow. The miner died on November 2, 2009, and claimant is pursuing his claim. Decision and Order on Remand at 2.

Employer appeals the Decision and Order On Remand (05-BLA-5582) of Administrative Law Judge Adele Higgins Odegard rendered on a subsequent claim<sup>2</sup> 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). This is the third time this case is before the Board.<sup>3</sup> In the most recent appeal, the Board vacated the administrative law judge's finding that the evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remanded the case for reconsideration. Specifically, the Board instructed the administrative law judge to explain her finding that Dr. Ghamande's opinion diagnosing silicosis was well-reasoned, in light of his reliance on x-ray, biopsy, and pulmonary function study evidence which did not establish the presence of silicosis; to reconsider the probative value of Dr. Renn's opinion that the record does not support a diagnosis of silicosis; and to address both the previously submitted and newly submitted opinions of Dr. Bellotte in conjunction with the newly submitted opinions of Drs. Ghamande, Fino, and Renn, and explain her credibility determinations, in determining whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4). *V.S. [Silvester] v. Agipcoal USA, Inc.*, BRB No. 09-0143 BLA, slip op. at 5-6 (Oct. 26, 2009)(unpub.). The Board additionally instructed that, if, on remand, the administrative law judge again found that the evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4), she was to weigh together all of the relevant evidence to determine whether pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a). Further, if the administrative law judge again found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a), she was to consider whether the pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b). Finally, in light of the decision to vacate the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a), the Board vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20

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<sup>2</sup> The miner's initial claim, filed on January 31, 2001, was denied on January 17, 2002, by the district director for failure to establish total disability. Director's Exhibit 1. The record does not reflect that the miner took any further action until filing this claim for benefits on April 15, 2004. Director's Exhibit 3.

<sup>3</sup> The Board set forth the complete procedural history of this case in its last decision, *V.S. [Silvester] v. Agipcoal USA, Inc.*, BRB No. 09-0143, slip op. at 2-3 (Oct. 26, 2009)(unpub.). Our prior discussion of the procedural history is incorporated by reference. For purposes of this appeal, we note that we have affirmed, as unchallenged, the administrative law judge's findings that the evidence developed since the prior denial established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *V.S. [Silvester] v. Agipcoal USA, Inc.*, BRB No. 07-0274 BLA, slip op. at 2 (Dec. 21, 2007)(unpub.).

C.F.R. §718.204(c), and directed the administrative law judge to consider all of the relevant evidence on that issue, if reached, on remand. *Id.* at 6-7.

On remand, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and that the miner's totally disabling respiratory impairment was due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence establishes that the miner's totally disabling respiratory impairment was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).<sup>4</sup> Additionally, employer asks that this case be remanded to a different administrative law judge, because the case has reached the point of administrative gridlock. Claimant, and the Director, Office of Workers' Compensation Programs, did not file briefs in this appeal.<sup>5</sup>

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>6</sup> 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

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<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established the existence of clinical pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>5</sup> The administrative law judge, on remand, correctly found that a recent amendment to the Act, which became effective on March 23, 2010, and which applies to claims filed after January 1, 2005, does not apply to this claim, filed on April 15, 2004. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

<sup>6</sup> The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 1, 5. 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, 1-202 (1989)(*en banc*).

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

Relevant to 20 C.F.R. §718.204(c), the administrative law judge considered whether the medical opinion evidence established that pneumoconiosis was a substantially contributing cause of the miner's totally disabling respiratory impairment. See 20 C.F.R. §718.204(c)(1)(i), (ii). Dr. Bellotte opined that the miner had "minimal, if any impairment related to pneumoconiosis," Dr. Ghamande opined that the miner's disability was due to a combination of factors, including pneumoconiosis and adult respiratory distress syndrome (ARDS), Dr. Fino opined that the miner was disabled due to ARDS, with no contribution from his pneumoconiosis, and Dr. Renn opined that the miner did not have pneumoconiosis, and thus was disabled solely due to ARDS. Director's Exhibit 18 at 8; Claimant's Exhibits 1, 2 at 32, 36, 41, 43-44; Employer's Exhibits 1, 8 at 16-17, 3, 6 at 12, 19, 20.

Considering this evidence, the administrative law judge permissibly discredited Dr. Renn's opinion because he did not diagnose pneumoconiosis, contrary to the administrative law judge's finding. See *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order on Remand at 15. The administrative law judge also permissibly discounted the opinion of Dr. Bellotte, because he reviewed a "lesser quantum of medical evidence" than the other physicians, and thus, had a less complete picture of the miner's health. See *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); Decision and Order on Remand at 15. As these permissible credibility determinations are supported by substantial evidence and are unchallenged on appeal, they are affirmed. See *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984).

By contrast, the administrative law judge found the opinions of Drs. Ghamande and Fino to be well-reasoned. Decision and Order on Remand at 16. The administrative law judge accorded greater weight to the opinion of Dr. Ghamande, however, finding that his status as the miner's treating physician afforded him the opportunity to obtain superior information about the miner's condition. See 718.104(d). Further, the administrative law judge found Dr. Ghamande to be more highly qualified than Dr. Fino. Decision and Order on Remand at 16-17. The administrative law judge further found that Dr. Fino's opinion was undermined by his belief that the miner's condition was "normal" in 2001, before he developed ARDS, a conclusion the administrative law judge found was unsupported by the record. Decision and Order on Remand at 16-17.

Employer initially asserts that the administrative law judge irrationally credited Dr. Ghamande's disability causation opinion because Dr. Ghamande's "belief that the miner had restrictive lung disease prior to ARDS, [is] based upon nonconforming [pulmonary function] studies," in violation of 20 C.F.R. §718.103(b). Employer's Brief at 10, 12. Contrary to employer's contention, as the administrative law judge noted, non-conforming pulmonary function studies are not necessarily unreliable.<sup>7</sup> See *Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-478-79 (1983); *Silvester*, BRB No. 09-0143 BLA, slip op. at 4-5. We, therefore, reject employer's argument that the administrative law judge was required to discredit Dr. Ghamande's conclusions regarding the presence of restriction as based, in part, on non-conforming pulmonary function studies. See *Crapp*, 6 BLR at 1-478-79; *Silvester*, BRB No. 09-0143 BLA, slip op. at 4-5; see *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

Employer additionally argues that Dr. Ghamande's opinion regarding the cause of the miner's respiratory impairment is too equivocal to constitute substantial evidence in support of claimant's burden of proof.<sup>8</sup> Employer's Brief at 12-13. We disagree.

The administrative law judge specifically noted that, during a May 3, 2006 deposition, when asked whether his opinion as to "the effect of pre-existing silicosis on the Miner's impairment was speculative 'to some degree,'" Dr. Ghamande answered, "yes. I mean - - you can never be sure of that." Decision and Order on Remand at 17, quoting Claimant's Exhibit 2 at 44. However, Dr. Ghamande also opined that, "with a reasonable degree of medical certainty, I think he had silicosis contributing to his restriction," Claimant's Exhibit 2 at 33, that "the silicosis has contributed to the patient's respiratory impairment," and that the miner had "a significant component of lung disease coming from pneumoconiosis." Claimant's Exhibit 1 at 4; Director's Exhibit 24. In addition, the administrative law judge found that Dr. Ghamande explained how the pulmonary function testing, showing a pattern of incomplete recovery from ARDS, supported his conclusion that pneumoconiosis contributed to the miner's impairment. Decision and Order on Remand at 17.

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<sup>7</sup> We further note that the report of the June 16, 2003 pulmonary function study states that the spirometry data is acceptable and reproducible and that claimant's effort was "good" "on all manuverrs [sic]," Director's Exhibit 13, and the report of the August 14, 2003 pulmonary function study states that claimant's cooperation and comprehension were good, Director's Exhibit 17. See *Silvester*, BRB No. 09-0143 BLA, slip op. at 5-6.

<sup>8</sup> Employer acknowledges that the Board previously held that the administrative law judge acted within her discretion in finding that Dr. Ghamande's opinion was not equivocal as to the existence of pneumoconiosis. *Silvester*, BRB No. 07-0274 BLA, slip op. at 6-7; Employer's Brief at 12 n.3.

Having considered the entirety of Dr. Ghamande's deposition testimony and written reports, the administrative law judge concluded that Dr. Ghamande's statement, that he could "never be sure" that silicosis contributed to the miner's impairment, was not equivocal, but was "an acknowledgement of 'the uncertainty inherent in medical opinions, while nevertheless offering a positive opinion' about the cause of the Miner's impairment." Decision and Order on Remand at 17, quoting *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); Claimant's Exhibits 1, 2; Director's Exhibit 24. Based on the foregoing, the administrative law judge could properly find that Dr. Ghamande's overall opinion was not equivocal as to the contribution by silicosis to the miner's totally disabling respiratory impairment. See *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374, 2-386 (4th Cir. 2006)(recognizing that a doctor's refusal to express a diagnosis in categorical terms is not necessarily equivocation); *Mays*, 176 F.3d at 763, 21 BLR at 2-605. We therefore reject employer's assertion that Dr. Ghamande's opinion is too equivocal to constitute substantial evidence that pneumoconiosis was a substantially contributing cause of the miner's total disability.

Employer next argues that the administrative law judge erred in according greater weight to the opinion of Dr. Ghamande, that both silicosis and ARDS contributed to the miner's impairment, than to the opinion of Dr. Fino, that the miner's impairment was due solely to ARDS, based, in part, on the physicians' relative qualifications.<sup>9</sup> Employer's Brief at 13. We disagree. The administrative law judge noted that, while both physicians offered well-reasoned opinions, Dr. Fino had simply reviewed the miner's medical records, while Dr. Ghamande had treated the miner for respiratory conditions since 2003, and had attended him while he was critically ill with ARDS, which developed as a complication of coronary bypass surgery. Decision and Order on Remand at 4. The administrative law judge rationally concluded that, under the facts of this case, where the miner suffered from both pneumoconiosis and ARDS, Dr. Ghamande's additional Board-certification in Critical Care Medicine, together with his close involvement with the miner during his slow recovery from ARDS, and his continued subsequent treatment of the miner, rendered Dr. Ghamande's opinion more persuasive than Dr. Fino's, regarding

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<sup>9</sup> Employer also asserts that the administrative law judge erred in finding Dr. Ghamande's qualifications superior to those of Drs. Bellotte and Renn. Employer's Brief at 13. Contrary to employer's arguments, the administrative law judge did not credit the opinion of Dr. Ghamande over those of Drs. Bellotte and Renn based on the physicians' relative credentials. Rather, as we have discussed, the administrative law judge permissibly discredited the opinions of Drs. Bellotte and Renn on other valid grounds.

the causes of the miner's disabling respiratory impairment.<sup>10</sup> See 20 C.F.R. §718.104(d); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order on Remand at 4. The administrative law judge further permissibly discounted Dr. Fino's opinion, that pneumoconiosis did not contribute to the miner's impairment, because it was based, in part, on Dr. Fino's conclusion that the miner's pulmonary function was "normal" in 2001, before the miner developed ARDS, a conclusion that the administrative law judge found was not supported by the record.<sup>11</sup> See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order on Remand at 16-17; Director's Exhibit 1; Employer's Exhibits 3, 6 at 12.

The administrative law judge has exclusive power to make credibility determinations and resolve inconsistencies in the evidence, *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993), and the Board is not empowered to reweigh the evidence. *Mays*, 176 F.3d at 756, 21 BLR at 2-591. As the administrative law judge properly considered the comparative credentials of the respective physicians, the explanations for their

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<sup>10</sup> As employer asserts, the record reflects that Dr. Fino is Board-certified in Internal Medicine with a subspecialty in Pulmonary Disease, and testified that as "a medical director of the critical care unit" at St. Clair Hospital in Pittsburgh, he treats all the patients admitted to the intensive care unit, and the very sick patients admitted to the coronary care unit, almost all of whom have some pulmonary issue. Employer's Exhibit 6 at 4-5. However, the record reflects that, not only is Dr. Ghamande Board-certified in Internal Medicine with a subspecialty in Pulmonary Disease, he is additionally Board-certified in Critical Care Medicine and Sleep Medicine. Moreover, Dr. Ghamande testified that most of his outpatient practice involves pulmonary patients, and his inpatient practice is split between critical care and pulmonary patients. In addition, he practices with Morgantown Pulmonary Associates, where approximately fifteen to twenty percent of his pulmonary patients have worked as coal miners. Claimant's Exhibit 2 at 4-6. Thus, substantial evidence supports the administrative law judge's permissible finding that Dr. Ghamande's qualifications were superior to those of Dr. Fino.

<sup>11</sup> The administrative law judge correctly noted that Dr. Bellotte's 2001 evaluation, upon which Dr. Fino relied, revealed x-ray evidence of pneumoconiosis, mild rales, and a borderline minimal restrictive impairment with no bronchodilator response. The administrative law judge reasonably determined that, although Dr. Bellotte's 2001 evaluation reflected that "the miner was not disabled at th[at] time, . . . Dr. Bellotte's examination d[id] not establish that his condition was 'normal.'" Decision and Order on Remand at 16-17; Director's Exhibit 1.

conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses, *see* 20 C.F.R. §718.104(d)(5); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274, we affirm the administrative law judge's finding that claimant established, through the well-reasoned opinion of Dr. Ghamande, that the miner's totally disabling respiratory impairment was due, in part, to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.<sup>12</sup>

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>12</sup> In light of our affirmance of the award of benefits, employer's request to remand this case to a different administrative law judge is moot.