BRB No. 05-0414 BLA

BILL HOLBROOK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY	)	DATE ISSUED: 03/30/2006
	)	
and	)	
	)	
UNDERWRITER SAFETY & CLAIMS	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision on Motion for Reconsideration of Joseph H. Kane, Administrative Law Judge, United States Department of Labor.

Timothy J. Wilson (Wilson, Polites & McQueen), Lexington, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision on Motion for Reconsideration (98-BLA-0678) of Administrative Law Judge Joseph H. Kane 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 is before the Board for a third time.[1] The Board previously affirmed the administrative law judge's finding that claimant suffered from a totally disabling respiratory or pulmonary impairment. *Holbrook v. Golden Oak Mining Co.*, BRB No. 99-1263 BLA (Nov. 30, 2000) (unpub.). Most recently, the Board remanded the case for the administrative law judge to discuss the relevant evidence, make credibility determinations, and render appropriate findings regarding the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203, and the cause of claimant's disability pursuant to 20 C.F.R. §718.204(c). *Holbrook v. Golden Oak Mining Company*, BRB No. 02-0137 BLA (Oct. 31, 2002) (unpub.). On remand, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), based on the opinions of Drs. Caudill, Baker, and Myers, who opined that claimant suffered from interstitial fibrosis due in part to his coal dust exposure. Pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that claimant was entitled to invoke the presumption, based on ten years of coal mine employment, that his pneumoconiosis arose out of coal mine employment, and that employer had failed to rebut this presumption.[2] The administrative law judge further found that claimant's total respiratory disability was due

[1] The procedural history of the claim is set forth in the Board's prior decisions, which are incorporated by reference herein. *See Holbrook v. Golden Oak Mining Co.*, BRB No. 02-0137 BLA (Oct. 31, 2002) (unpub.); *Holbrook v. Golden Oak Mining Co.*, BRB No. 99-1263 BLA (Nov. 30, 2000) (unpub.). The parties stipulated that claimant has twenty four years of coal mine employment.

[2] Following the Decision and Order on Remand – Awarding Benefits issued on February 27, 2004, employer filed an appeal with the Board, which was assigned BRB Docket Number, 04-0511 BLA. In the interim the Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration requesting that the administrative law judge reissue his decision and direct the responsible operator to reimburse the Black Lung Disability Trust Fund for benefits paid to claimant on employer's behalf. At employer's request, and in light of the Director's pending motion, the Board dismissed employer's appeal as premature. *Holbrook v. Golden Oak Coal Co.*, BRB No. 04-511 BLA (Jun. 28, 2004) (unpub. Order). The administrative law judge subsequently issued a Decision on Motion for Reconsideration dated January 12, 2005, which is the subject of this appeal. The Decision on Motion for Reconsideration again awarded benefits and directed employer to reimburse the Trust Fund in full, with interest, for all benefits paid to claimant. We note that the administrative law judge's Decision and Order on Remand – Awarding Benefits and his Decision on Motion for Reconsideration are identical except that the latter decision has an additional section entitled "Trust Fund."

to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge's finding of pneumoconiosis under Section 718.202(a)(4) is based on "an impermissible preference" for claimant's treating physician. Employer's Petition for Review and Brief at 14-17. Employer also asserts the administrative law judge's findings relevant to rebuttal at Section 718.203(b), and his determination that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c), fail to comport with the Board's remand instructions. Employer's Petition for Review and Brief at 22-23. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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.[3] 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).

After consideration of the administrative law judge's Decision on Motion for Reconsideration, the briefs of the parties, and issues on appeal, we must vacate the award of benefits and remand this case for further consideration. We note that the crux of the medical debate before the administrative law judge concerned the etiology of claimant's interstitial fibrosis, a condition which had been confirmed by biopsy. The Board previously remanded the case for the administrative law judge to render credibility determinations and to adequately explain his preference for Dr. Caudill's opinion. *Holbrook*, BRB No. 02-0137 BLA, slip op. at 5-6. Under Section 718.202(a)(4), the administrative law judge determined that claimant carried his burden of establishing the existence of legal pneumoconiosis based on Dr. Caudill's opinion that the claimant's interstitial fibrosis "was very consistent with pneumoconiosis." Decision on Motion for

[3] 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 arising out of coal mine employment, and total respiratory or pulmonary disability due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Since the miner's last coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Reconsideration at 45. Although the administrative law judge referenced several of the contrary opinions of employer's experts as being reasoned and documented, the administrative law judge found Dr. Caudill's opinion entitled to the greatest probative weight based on his finding that Dr. Caudill had treated claimant for over twenty years and, thus, had the opportunity to observe claimant's symptoms and respiratory decline.

Employer argues that administrative law judge erred by automatically crediting Dr. Caudill's opinion that claimant suffered from both clinical and legal pneumoconiosis based on Dr. Caudill's status as claimant's treating physician. Employer's Petition for Review and Brief at 14-17. Employer asserts that the administrative law judge improperly assigned controlling weight to Dr. Caudill's opinion without first examining whether Dr. Caudill's opinion was reasoned and documented, or whether Dr Caudill had any advantage in rendering his opinion as compared to employer's experts. *Id*. Employer maintains that the administrative law judge provided invalid reasons for discrediting the opinions of Drs. Branscomb, Kleinerman, Dineen and Lockey, who opined that claimant did not have clinical or legal pneumoconiosis. Employer's Petition for Review and Brief at 17-19.

Employer's arguments have merit. The United States Court of Appeals for the Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims and indicated that, rather, "the opinion of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). It is the administrative law judge's duty, as trier of fact, to evaluate the credibility of the treating physician's opinion in relation to all of the medical opinion evidence. *See Williams*, 338 F.3d at 501, 22 BLR at 2-625.[4]

[4] Although the revised regulations are inapplicable to claims such as this one, which were pending on January 19, 2001, the revised regulation at Section 718.104(d) is instructive, *see Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002). Section 718.104(d) provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of a treating physician: 1) Nature of relationship; 2) Duration of relationship; 3) Frequency of treatment; 4) Extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation also requires, however, that the administrative law judge consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

In weighing the conflicting medical opinion relevant to whether claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge failed to adequately explain his preference for Dr. Caudill's opinion, that claimant's interstitial fibrosis was due to coal dust exposure, over the contrary opinions of record. After acknowledging that the biopsy evidence showed that claimant had interstitial lung disease, the administrative law judge specifically noted that a number of physicians, including Dr. Caudill, had "not seen the tissue" and therefore "[could not] confirm or deny the contents of the biopsy reports." Decision on Motion for Reconsideration at 35. The administrative law judge further noted that those same physicians, including Dr. Caudill, had simply reiterated and considered the findings of the pathologists, who reviewed lung tissue comprising less than [one percent] of claimant's lungs." *See* Decision on Motion for Reconsideration at 35. Although the administrative law judge recognized that Dr. Caudill had treated claimant for over twenty years, he did not consider whether Dr. Caudill had ever previously diagnosed claimant with coal workers' pneumoconiosis or a coal-dust related respiratory disorder. Instead, the administrative law judge noted that Dr. Caudill's opinion that claimant's interstitial fibrosis "was very consistent with pneumoconiosis" appeared to be based on Dr. Caudill's review of the biopsy report and the fact that "he relied on the objective test results of other physicians … to make his diagnosis." Decision on Motion for Reconsideration at 45. In light of the administrative law judge's statements, there is merit to employer's argument that Dr. Caudill was not in any better position to render an opinion as to the cause of claimant's interstitial fibrosis than the other doctors of record who reviewed the same medical information in formulating their opinions. Therefore, in accordance with *Williams*, the administrative law judge must present a plausible reason for preferring Dr. Caudill's opinion over the non-examining physicians' opinions. *See Williams*, 338 F.3d at 501, 22 BLR at 2-625. To the extent that Dr. Caudill based his opinion on a review of evidence that was equally available to the non-treating physicians, the administrative law judge's has not explained why Dr. Caudill's status as a treating physician gave him any advantage in diagnosing pneumoconiosis in this case.[5] *See Williams*, 338 F.3d at 501, 22 BLR at 2-625; Decision on Motion for Reconsideration at 35.

[5] The administrative law judge noted that the biopsy evidence showed interstitial lung disease but that it was "inconclusive as to the specifics and cause." Decision on Motion for Reconsideration at 35. He further noted that "Drs. Todd, Caudill, Myers, Dineen, Broudy, Lockey, Westerfield, and Branscomb, having not seen the tissue, cannot confirm or deny the contents of the biopsy reports. *Id*. As such, the administrative law judge acknowledged that "[t]heir reports simply reiterated and considered the findings of the pathologists, who reviewed tissue comprising less than [one] percent of claimant's lung." *Id*.

We also agree with employer that the administrative law judge's treatment of employer's experts does not withstand scrutiny. The administrative law judge found that Dr. Dineen provided a reasoned, documented and credible opinion that claimant's interstitial lung disease was not due to coal dust exposure. Decision on Motion for Reconsideration at 35, 44. The administrative law judge specifically noted that Dr. Dineen had superior qualifications (compared to Dr. Caudill, whose qualifications were not discussed), and that Dr. Dineen's "opinion was credible and worthy of probative weight against a finding of pneumoconiosis." Decision on Motion for Reconsideration at 44. Notwithstanding, the administrative law judge rejected Dr. Dineen's opinion in favor of Dr. Caudill's with no valid explanation discernible from his decision, other than Dr. Caudill's status as a treating physician.[6] Because the administrative law judge failed to provide an explanation as to why he accorded less weight to Dr. Dineen's opinion, his analysis at Section 718.202(a)(4) is in error.

We also agree with employer that the administrative law judge erred in considering Dr. Branscomb's opinion. In contrast to Dr. Dineen, the administrative law judge specifically found Dr. Branscomb's opinion as to the cause of claimant's interstitial fibrosis entitled to little weight because his diagnosis included a rare lung disease, which the administrative law judge considered to be out of line with the other physicians' opinions:

> I also note that Dr. Branscomb is the only physician of record who diagnosed the rare pulmonary diseases listed in his report. The treating physicians and hospital staff have not reached the same diagnoses nor have the other examining or consulting physicians. Consequently, I find that Dr. Branscomb's report is unsubstantiated by any other reports or findings. He fails to explain the basis for determining that coal dust exposure does not

[6] The administrative law judge stated that he accorded "Dr. Lockey's opinion only some weight against a finding of pneumoconiosis" because Dr. Lockey reported that claimant's breathing problems started in 1996 with a pneumonia incident, while Dr. Caudill's treatment records reflected that claimant had breathing problems prior to that date. Decision on Motion for Reconsideration at 19. The administrative law judge also found Dr. Lockey's opinion, that claimant does not have coal workers' pneumoconiosis, inconsistent with classified x-rays that "were almost entirely read as Category I pneumoconiosis." Decision on Motion for Reconsideration at 36-37. Since the administrative law judge specifically determined that the preponderance of the x-ray evidence was negative for the existence of coal worker's pneumoconiosis, the administrative law judge erred in rejecting Dr. Lockey's opinion because it was based in part on a negative x-ray. *See generally Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

> affect or aggravate [claimant's] condition in any fashion. I find this report provides some probative weight against a finding of pneumoconiosis, but do not accord it significant weight where it is not well documented or well reasoned.

Decision on Motion for Reconsideration at 48.

As noted by employer, however, the administrative law judge ignores the fact that Dr. Branscomb specifically opined that claimant's interstitial fibrosis was not due to coal dust exposure. This aspect of Dr. Branscomb's opinion is corroborated by employer's other medical experts, who agreed that claimant had no respiratory condition as a result of his coal mine employment. Consequently, we agree with employer that the administrative law judge erred by failing to give Dr. Branscomb's opinion proper consideration at Section 718.202(a)(4).

Finally, in weighing Dr. Kleinerman's opinion, the administrative law judge erred when he stated that Dr. Kleinerman's opinion was limited to an analysis of "clinical" pneumoconiosis, and that Dr. Kleinerman failed to specifically address the question of whether claimant's pulmonary fibrosis or chronic bronchitis was due to coal dust exposure, which would satisfy the legal definition of pneumoconiosis. Decision on Motion for Reconsideration at 49. We agree with employer that the administrative law judge has ignored Dr. Kleinerman's review of the medical record, and his conclusion in his May 30, 1998 report that claimant has no respiratory disease resulting from coal mine employment.[7] Employer's Exhibit 3. Under Section 718.202(a)(4), the administrative law judge must properly consider Dr. Kleinerman's opinion to be supportive of a finding that claimant does not have clinical or legal pneumoconiosis.

For the above-stated reasons, we conclude that the administrative law judge has not provided a sufficient analysis of the evidence as instructed by the Board, and that his findings fail to satisfy the Administrative Procedure Act, 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); *Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97, 1-101 (2000) (*en banc*).[8] We therefore vacate the administrative law judge's finding that claimant

[7] Employer correctly notes that the administrative law judge's analysis of the medical evidence overall fails to consider that while employer's expert may not agree on the etiology of claimant's interstitial fibrosis, they are in agreement that his respiratory condition was not due to coal dust exposure. Employer's Brief at 21.

[8] 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

established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). To the extent that the administrative law judge's finding at Section 718.202(a)(4) influenced his analysis of the medical opinion evidence relevant to the issues of causal relationship and disability causation, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.203 and 718.204(c). In the interest of judicial economy, we note our agreement with employer that the administrative law judge's discussion of the medical opinion evidence relevant to Section 718.203 rebuttal and disability causation was cursory, and that he failed to adequately explain the basis for the weight accorded the evidence. *See* Employer's Petition for Review and Brief at 22; Decision on Motion for Reconsideration at 53.

On remand the administrative law judge must follow our prior directive to explain the weight accorded the conflicting medical opinion evidence on all the relevant issues of entitlement pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and 718.204(c). The administrative law judge must discuss and weigh all of the record evidence and make findings of fact and conclusions of law in compliance with the APA to determine whether the evidence satisfies claimant's burden of proof and the applicable case law. *See Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998).

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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).

Accordingly, the Decision on Motion for Reconsideration of the administrative law judge is vacated, and the case is remanded for further consideration consistent with this opinion.

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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JUDITH S. BOGGS
Administrative Appeals Judge