BRB No. 07-0705 BLA

P. W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 05/20/2008
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (03-BLA-5119) of Administrative Law Judge Alice M. Craft rendered 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 has been before the Board previously.

In its prior decision, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding of thirty-one years of coal mine employment[1] and her finding that claimant established that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). However, the Board vacated the administrative law judge's finding that the existence of pneumoconiosis was established by the x-ray evidence at 20 C.F.R. §718.202(a)(1), and remanded the case for the administrative law judge to admit employer's second rebuttal interpretation of a March 5, 2002 x-ray, and to reevaluate the x-ray evidence. [*P.W.*] *v. Consolidation Coal Co.*, 23 BLR 1-151, 1-155-56 (2006). Additionally, because the administrative law judge's finding that the existence of pneumoconiosis was established by the medical opinion evidence at 20 C.F.R. §718.202(a)(4) had been affected by her finding as to the weight of the x-ray evidence, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), and instructed her to reconsider the medical opinions, and to adequately explain the basis for her findings. [*P.W.*], 23 BLR at 1-156-57. Finally, because the Board vacated the administrative law judge's finding that the existence of pneumoconiosis was established, the Board also vacated her finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instructed her to revisit the issue, if reached, on remand.

On remand, the administrative law judge found that the x-ray evidence did not establish the existence of clinical pneumoconiosis, but that the medical opinion evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), in the form of emphysema due to both smoking and coal dust exposure. The administrative law judge further found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in her analysis of the medical opinion evidence when she found that claimant established the existence of legal pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Employer further contends that the administrative law judge misapplied *Scott v. Mason Coal Co*, 289 F.3d 263, 22 BLR 2-

[1] The record indicates that claimant's last coal mine employment occurred in Tennessee. Hearing Transcript at 14. 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*).

372 (4th Cir. 2002), when she discounted the opinions of Drs. Dahhan and Jarboe regarding the cause of claimant's total disability because neither physician diagnosed pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that employer has misinterpreted *Scott*. Claimant has not responded to this appeal.

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 be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge erred in her analysis of the medical opinions when she found that the evidence established the existence of legal pneumoconiosis.[2] The administrative law judge considered the opinions of Drs. Crater, Dahhan and Jarboe.

In a report dated August 28, 2001, Dr. Crater, who is Board-certified in Internal Medicine and Pulmonary Disease, based on physical examination, employment and medical histories, and objective tests, diagnosed mild emphysema due to "minimal smoking and occupational exposures" and moderate pneumoconiosis due to "coal dust/occupational exposure." Director's Exhibit 8 at 4. Dr. Crater opined that claimant has a severe impairment and that "emphysema and pneumoconiosis almost entirely cause the impairment." *Id*.

Dr. Dahhan, who is Board-certified in Internal Medicine and Pulmonary Disease, based on physical examination, medical and employment histories, objective tests, and a review of additional medical reports and claimant's medical records, opined that pneumoconiosis could not be diagnosed based on claimant's "variable airway obstruction on spirometry testing, variable response to bronchodilator therapy in his pulmonary functions," normal blood gas studies, and negative x-ray readings. Employer's Exhibit 1 at 3. Dr. Dahhan also opined that claimant's chronic obstructive airway disease, although disabling, was unrelated to coal mine dust exposure:

[2] "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).

> [Claimant's] obstructive airway disease was not caused by, related to, contributed to[,] or aggravated by[,] the inhalation of coal dust or coal workers' pneumoconiosis. It has significant waxing and waning from exam to exam [sic] as demonstrated by the various results of his pulmonary function studies, it demonstrates various response [sic] to bronchodilator therapy. Both findings are inconsistent with the permanent adverse affects [sic] of coal dust on the respiratory system.
>
> [Claimant's] obstructive airway disease has resulted from his previous smoking habit and [is] contributed to by hyperactive airway disease.

Id. at 4. Dr. Dahhan reiterated these findings in his deposition. Employer's Exhibit 7.

Dr. Jarboe, who is Board-certified in Internal Medicine and Pulmonary Disease, based on physical examination, employment and work histories and objective studies, found no evidence of coal workers' pneumoconiosis and diagnosed chronic bronchitis, pulmonary emphysema, and bronchial asthma. Employer's Exhibit 8. Dr. Jarboe opined that claimant's impairment was unrelated to coal mine dust exposure:

> [Claimant] does have a significant respiratory impairment. He has pulmonary emphysema which is causing a moderate degree of airflow obstruction. However[,] I feel this emphysema and moderate airflow obstruction is due primarily to cigarette smoking and also to bronchial asthma.

Id. at 6. Dr. Jarboe determined that claimant was totally and permanently disabled from performing the work of an underground coal miner and opined further that:

> I feel this disability has been caused by a combination of cigarette smoking (the primary cause) and bronchial asthma (the secondary cause). . . .
>
> In short, the reversible component to his airflow obstruction and the hyperinflation in the absence of any significant restriction argue strongly for asthma and cigarette smoking as causative agents for his pulmonary impairment/disability.

Id. at 6-7. Dr. Jarboe concluded that claimant "has no disabling condition of the respiratory system which has been caused by or substantially contributed to by the inhalation of coal dust or the presence of coal workers' pneumoconiosis." *Id.* at 7. Dr. Jarboe reiterated these findings in his deposition. Employer's Exhibit 8.

The administrative law judge noted that Dr. Crater had based his opinion on objective evidence and that his opinion was documented. The administrative law judge determined that, "[n]oting Dr. Crater's superior credentials,[3] I give his opinion great weight in support of both clinical and legal pneumoconiosis." Decision and Order at 4. By contrast, although the administrative law judge found that Dr. Dahhan's and Dr. Jarboe's diagnoses of emphysema were well-reasoned and supported, she concluded that their opinions as to the etiology of the emphysema were not well-reasoned, because neither physician adequately explained why claimant's coal dust exposure did not contribute to, or cause, claimant's emphysema. Specifically, the administrative law judge found that both physicians focused on the reversibility of claimant's obstructive impairment as a reason for concluding that the impairment was unrelated to coal dust, but they did not address the fact that even after the administration of bronchodilators, a disabling, residual impairment remained. The administrative law judge further found that Dr. Jarboe's opinion that clinical pneumoconiosis was absent merited little weight because it was merely a restatement of a negative x-ray, and that his diagnosis of chronic bronchitis was unsupported by objective evidence. Additionally, the administrative law judge determined that Dr. Jarboe stated that claimant's emphysema was due "primarily" to smoking and asthma, but "fail[ed] to list any other non-primary etiologies." Decision and Order at 6. According great weight to Dr. Crater's opinion, and little weight to the opinions from Drs. Dahhan and Jarboe, the administrative law judge found that claimant established the existence of legal pneumoconiosis.[4]

Employer contends that the administrative law judge selectively analyzed the evidence by "applying more rigorous scrutiny to the opinions of Drs. Dahhan and Jarboe," while "deferring to Dr. Crater's opinion with little to no scrutiny." Employer's Brief at 7. Employer argues that the administrative law judge's approach was tantamount to shifting the burden of proof to employer.

Employer's contentions have merit. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). However, in this case, the administrative law judge did not address whether Dr. Crater's opinion regarding the existence of legal pneumoconiosis was reasoned before she accepted it. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5

[3] The record does not support the finding that Dr. Crater possesses superior credentials. As noted, Drs. Crater, Dahhan, and Jarboe, are all Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 8; Employer's Exhibits 7, 8.

[4] The administrative law judge found that the medical opinion evidence failed to establish the existence of clinical pneumoconiosis. Decision and Order on Remand at 6.

BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. Moreover, while the administrative law judge found that Drs. Dahhan and Jarboe did not adequately explain the reasoning for their opinions as to the etiology of claimant's emphysema, employer correctly asserts that the administrative law judge did not subject Dr. Crater's contrary opinion to the same scrutiny.[5] *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999)(*en banc*); *Wright v. Director, OWCP*, 7 BLR 1-475, 1-477 (1984). Additionally, although the administrative law judge had the discretion to consider how well Drs. Dahhan and Jarboe had explained their opinions with respect to the reversibility of claimant's impairment, *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, employer validly maintains that these physicians based their opinions upon several factors, including a significant smoking history.[6] Further, we note that, contrary to the administrative law judge's statement that Dr. Jarboe identified no "non-primary" causes for claimant's impairment, Dr. Jarboe identified smoking as the primary cause of claimant's impairment, and asthma as the secondary cause. In light of the foregoing errors by the administrative law judge, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for the administrative law judge to reconsider the medical opinion evidence, maintaining the burden of proof on claimant to establish the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986).

Pursuant to 20 C.F.R. §718.204(c), employer contends that the administrative law judge erred in according little weight to the opinions of Drs. Dahhan and Fino, that

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[5] Moreover, although the administrative law judge ultimately found that the existence of clinical pneumoconiosis was not established by the medical opinions, employer correctly notes that the administrative law judge inconsistently accepted Dr. Crater's reliance on a positive x-ray to diagnose clinical pneumoconiosis, while faulting Dr. Jarboe's reliance on a negative x-ray to conclude that clinical pneumoconiosis was absent, because Dr. Jarboe had merely restated an x-ray reading. Decision and Order on Remand at 4, 5.

[6] In contrast to Dr. Crater's assessment of "minimal smoking," Drs. Dahhan and Jarboe characterized the smoking as significant, and sufficient to injure claimant's respiratory system. Employer's Exhibit 7 at 11; Employer's Exhibit 8 at 12. In the administrative law judge's prior decision, she found that claimant had "a 20-30 pack year smoking history." Decision and Order Granting Benefits at 4, dated March 28, 2005. We note further that, as employer contends, the administrative law judge did not address the full scope of the opinions of Drs. Dahhan and Jarboe, wherein they explained their conclusions with specific reference to claimant's pulmonary function studies, blood gas studies, x-rays, symptoms, and his smoking and coal dust exposure histories. Employer's Exhibits 1, 7, 8.

claimant's total disability is unrelated to pneumoconiosis, because these doctors did not diagnose pneumoconiosis. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instruct her to reconsider this issue, if reached, on remand. *See* 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 1-185-186 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-52 (6th Cir. 1989). In view of our disposition of this issue, we need not resolve the dispute between employer and the Director as to the proper interpretation of the Fourth Circuit court's opinion in *Scott*, regarding the weight to be accorded disability causation opinions in which a physician has not diagnosed pneumoconiosis. However, we note that, under the applicable law of the United States Court of Appeals for the Sixth Circuit, if on remand, the administrative law judge again finds that legal pneumoconiosis is established, she has the discretion to accord less weight to the disability causation opinions of physicians who do not diagnose pneumoconiosis. *See Adams*, 886 F.2d at 826, 13 BLR at 2-63-64; *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge