

BRB No. 08-0622 BLA

R.T.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PEABODY COAL COMPANY)	
)	DATE ISSUED: 05/29/2009
Employer-Respondent)	
)	
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 - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits of Administrative Law Judge Michael P. Lesniak 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).¹ This case is before the Board for a second time. In his prior Decision and Order – Denying Benefits dated July 14, 2006, the administrative law judge accepted the parties’ stipulation that claimant is totally disabled

¹ Claimant filed his claim on June 13, 2002. Director’s Exhibit 2.

but found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Claimant appealed, and the Board vacated that decision.² [*R.T.*] v. *Peabody Coal Co.*, BRB No. 06-0843 BLA, slip. op at 10 (Aug. 24, 2007) (unpub.). The Board agreed with claimant that the administrative law judge erred in failing to explain why he found portions of Dr. Cohen’s second supplemental report to be inadmissible as rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii). *Id.* at 5; *see* Claimant’s Exhibit 7. In light of the administrative law judge’s failure to explain his evidentiary ruling, the Board vacated his finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4), and remanded the case for the administrative law judge to consider whether Dr. Cohen’s second supplemental report was admissible, in its entirety, as rehabilitative evidence.³ *Id.* at 8-9. If so, the administrative law judge was then to reconsider whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and whether claimant satisfied his burden of proving the existence of pneumoconiosis based on a weighing of all of the conflicting evidence together at Section 718.202(a). *Id.* at 9. Finally, the administrative law judge was instructed to determine, if necessary, whether claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 10 n. 13.

The administrative law judge issued his Decision and Order on Remand – Denying Benefits on April 22, 2008, which is the subject of this appeal. In accordance with the Board’s instructions, the administrative law judge reconsidered the admissibility of Dr. Cohen’s opinion. The administrative law judge determined that he erred previously in redacting portions of Dr. Cohen’s second supplemental report, since the entire report was admissible as one of claimant’s two affirmative medical reports pursuant to Section 725.414(a)(2)(i). The administrative law judge then reweighed the medical opinions of Drs. Cohen, Zaldivar, and Branscomb pursuant to Section 718.202(a)(4) and found that claimant failed to establish the existence of either clinical or legal pneumoconiosis

² The procedural history of the case is set forth in [*R.T.*] v. *Peabody Coal Co.*, BRB No. 06-0843 BLA, slip. op. at 3-4 (Aug. 24, 2007) (unpub.).

³ The Board has affirmed the administrative law judge’s finding of eighteen years of coal mine employment, as well as his determination that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). [*R.T.*], BRB No. 06-0843, slip. op. at 2 n.2. The Board has also affirmed the administrative law judge’s finding that claimant has a smoking history ranging from one-half a pack to over one pack of cigarettes per day from 1961 to 2002. *Id.* at 7. Additionally, the Board has affirmed the administrative law judge’s decision to accord no weight to Dr. Porterfield’s diagnosis of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 9 n.12.

pursuant to Section 718.202(a)(4).⁴ The administrative law judge also found that claimant was not totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in concluding that he did not establish the existence of legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response unless specifically requested to do so by the Board.

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.⁵ 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).

Citing both the administrative law judge's 2006 Decision and Order and the Decision and Order on Remand, claimant maintains that the administrative law judge erred in giving less weight to Dr. Cohen's opinion, that claimant suffers from legal pneumoconiosis, in comparison to the contrary opinions of Drs. Zaldivar and Branscomb,

⁴ Under 20 C.F.R. §718.201(a)(1):

Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

that claimant has no respiratory disease due to coal dust exposure. Claimant asserts that in discussing claimant's smoking history, the administrative law judge "fatally mischaracterized" Dr. Cohen's opinion. Claimant's Brief at 4. Claimant contends that the administrative law judge selectively analyzed the evidence as to the existence of legal pneumoconiosis and failed to explain the basis for his credibility findings with respect to Drs. Zaldivar and Branscomb, as required by the Administrative Procedure Act (APA).⁶ *Id.* Claimant's assertions of error have merit.

In his 2006 Decision and Order, the administrative law judge focused his analysis on whether claimant's respiratory condition was due entirely to smoking, as suggested by Drs. Zaldivar and Branscomb. The administrative law judge noted that claimant's medical treatment records [do] not include a diagnosis of pneumoconiosis but "make mention of [c]laimant's smoking and tobacco abuse as a primary area of concern." Decision and Order at 15. The administrative law judge determined that claimant smoked from one-half to one pack of cigarettes per day from 1961 to 2002. Decision and Order at 16. The administrative law judge then stated:

The smoking history I have found . . . is significantly more than "mimimal" as characterized by Dr. Cohen. Claimant's treatment records make that clear, not only in their recitation of the smoking history, but also in the indication that [c]laimant was being counseled to quit, and the listing of tobacco abuse as a diagnosis. While Dr. Cohen subsequently concedes that [c]laimant's smoking history was a contributing factor to [c]laimant's pulmonary impairment, I find, when comparing his opinion with that of Dr. Zaldivar, that the opinion of Dr. Cohen is not as persuasive as that of Dr. Zaldivar. In this respect, I find that Dr. Zaldivar detailed [c]laimant's pulmonary condition and the etiology thereof in the most comprehensive and persuasive manner. His explanation regarding the [c]laimant's bullous emphysema is well-reasoned and well-documented and appears to take into account the most accurate view of [c]laimant's work and smoking histories. His findings are also supported by the opinion of Dr. Branscomb, who finds [c]laimant's smoking history to be the cause of his significant pulmonary disease. It is a finding which is also supported by the treatment records which repeatedly refer to [c]laimant's tobacco abuse and yet fail to

⁶ 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

diagnose coal workers' pneumoconiosis. It is also supported by the findings rendered by Dr. Scott in his reading of the CT scan.

2006 Decision and Order at 16. The administrative law judge further concluded that Dr. Zaldivar provided "full and compelling explanations why [claimant's] pulmonary impairment is the result of tobacco abuse as opposed to coal mine dust inhalation." *Id.* Thus, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Id.*

In his Decision and Order on Remand, the administrative law judge summarized the portions of the second supplemental report by Dr. Cohen, which had been previously redacted. The administrative law judge determined that the redacted portions of Dr. Cohen's supplemental report "[did] not render his opinion more persuasive" and that "the report in its entirety does not change the fact that [Dr. Cohen] characterized [c]laimant's smoking history as minimal, nor does it lend greater credence to his findings regarding the etiology of [c]laimant's pulmonary impairment." Decision and Order on Remand at 4.

Claimant argues that the administrative law judge erred in discrediting Dr. Cohen's entire opinion regarding the existence of legal pneumoconiosis based solely on the doctor's use of the word "minimal." Claimant's Brief at 5. Claimant asserts that it is evident from the totality of Dr. Cohen's opinion that he does not consider claimant's smoking history to be minimal since the doctor repeatedly diagnosed that claimant's chronic obstructive pulmonary disease (COPD) was due to both smoking and coal dust exposure. Furthermore, claimant contends that the administrative law judge erred when he depicted Dr. Cohen as having "subsequently conceded" that smoking was a contributing factor" to [claimant's] respiratory condition." Claimant's Brief at 5 n.1, *citing* 2006 Decision and Order at 3. We agree.

Dr. Cohen submitted a report dated March 10, 2005, based on his review of medical records and claimant's work history. Dr. Cohen noted that claimant had signs of chronic lung disease including productive cough and shortness of breath since 1985. Claimant's Exhibit 5. He noted that while there were varying smoking histories in the record, it appeared that claimant smoked up to one pack of cigarettes a day for thirty-two years and that claimant had a coal mine employment history of twenty years. *Id.* Dr. Cohen indicated that three pulmonary function tests confirmed the presence of severe obstruction and diffusion impairment, and that arterial blood gas testing showed abnormal gas exchange. *Id.* Dr. Cohen diagnosed COPD and opined that coal dust exposure was a significant contributing factor to claimant's respiratory condition. *Id.* Dr. Cohen also noted that "[claimant's] only other significant exposure was his minimal exposure to tobacco smoke." *Id.* at 7 (emphasis added). Dr. Cohen cited several medical studies indicating that coal dust exposure, like smoking, can cause obstructive lung

disease. *Id.* at 7-12. Dr. Cohen ruled out a diagnosis of asthma and opined that claimant was totally disabled by COPD due to a combination of coal dust exposure and smoking. *Id.* at 14.

In a supplemental report dated August 3, 2005, Dr. Cohen indicated that he had reviewed additional treatment records, which did not alter his opinion that claimant's twenty years of coal dust exposure was a significant contributing cause of his COPD. Claimant's Exhibit 6. In a second supplemental report dated October 17, 2005, Dr. Cohen reviewed Dr. Branscomb's deposition transcript and discounted Dr. Branscomb's diagnosis of asthma and emphysema due entirely to smoking.⁷ Claimant's Exhibit 7. Citing certain medical studies, Dr. Cohen reiterated that "the effects of smoking are quite comparable to those of coal mine dust exposure." *Id.* at 5. He repeatedly stated that claimant's COPD was due to both coal mine dust exposure and smoking. Claimant's Exhibit 7 at 3, 4, 5.

Despite any reference to a minimal smoking history, Dr. Cohen specifically agreed with Drs. Zaldivar and Branscomb that claimant has emphysema due to smoking. Claimant's Exhibit 5. Dr. Cohen accurately reported all of claimant's varying smoking histories in the record, and opined that claimant's smoking history of one pack of cigarettes a day for seventeen to thirty-four years was a contributing factor to claimant's COPD, along with claimant's twenty years of coal dust exposure. *Id.* Because the administrative law judge has failed to adequately explain how Dr. Cohen's reference to a "minimal" smoking history undermines his opinion that claimant has COPD caused by both smoking and coal dust exposure, the administrative law judge's analysis is insufficient under the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Furthermore, in assigning less weight to Dr. Cohen opinion, the administrative law judge stated that "it is unclear what obstructive disease Dr. Cohen is referring to when he states that [c]laimant has COPD with a reversible component." Decision and Order On

⁷ In a report dated July 19, 2004, Dr. Branscomb diagnosed that claimant suffered from moderately severe asthma. Employer's Exhibit 5. Dr. Branscomb further opined that coal dust exposure played no role in the development of claimant's respiratory disease. *Id.* In his deposition, Dr. Branscomb expanded his diagnosis to include severe emphysema, bronchitis and asthma, based on his review of other medical evidence, including Dr. Zaldivar's opinion. Employer's Exhibit 11. Dr. Branscomb opined that claimant's respiratory condition was caused by a combination of smoking and asthma, and that coal dust exposure did not contribute to claimant's lung disease. *Id.*

Remand at 5, *citing* Claimant's Exhibit 5 at 12. Contrary to the administrative law judge's finding, Dr. Cohen acknowledged that there was a reversible component associated with claimant's COPD in response to Dr. Branscomb's diagnosis of asthma. Claimant's Exhibit 5. In his March 10, 2005 report, Dr. Cohen disagreed with Dr. Branscomb's opinion that claimant's respiratory condition was the result of asthma and not coal dust exposure because claimant demonstrated some reversibility on pulmonary function testing after bronchodilator treatment. *Id.* Dr. Cohen explained why he attributed claimant's COPD to coal dust exposure despite the reversible component of claimant's COPD as follows:

Bronchodilators are administered precisely to reduce obstruction and improve lung function. . . . [b]ut this in no way rules out coal mine dust inducted lung disease. If [claimant] has asthma, his obstruction would reverse to the normal range. Instead his spirometry shows only partial reversibility and even then he is still left with severe impairment of the FEV1. There is no reliable historical documentation . . . to support a diagnosis of asthma, no diagnosis by any treating physician, nor treatment of that condition.

Id. at 13. Dr. Cohen also specifically stated in his second supplemental report that he agreed with Drs. Branscomb and Zaldivar that claimant suffers from chronic bronchitis and emphysema, but that, "these diseases are not caused by asthma, but are caused by exposure to tobacco smoke and coal mine dust." Claimant's Exhibit 7 at 3. To the extent that Dr. Cohen specifically diagnosed chronic bronchitis and emphysema due, in part, to coal dust exposure, the administrative law judge erred in failing to properly weigh Dr. Cohen's diagnosis of legal pneumoconiosis pursuant to Section 718.202(a)(4). *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

There is also merit to claimant's argument that administrative law judge erred in failing to explain, in accordance with the APA, why he considered the opinions of Drs. Zaldivar and Branscomb to be reasoned and documented, and ultimately more persuasive than the opinion of Dr. Cohen, as to whether claimant suffers from legal pneumoconiosis. Dr. Zaldivar examined claimant on May 12, 2004 and found radiographic evidence of severe emphysema, which he referred to as bullous emphysema, by CT scan of the chest. Dr. Zaldivar opined that claimant's bullous emphysema was disabling and due entirely to smoking. When asked during his deposition, why he excluded coal dust exposure as a cause for claimant's respiratory condition, Dr. Zaldivar explained that bullous emphysema "has never been linked with coal mining." Employer's Exhibit 12 at 29. Dr. Zaldivar further noted that claimant has the smoking history to explain the development

of bullous emphysema and cited to claimant's negative x-ray evidence for pneumoconiosis. *Id.* at 33-35.

In his 2006 Decision and Order, the administrative law judge generally stated that Dr. Zaldivar's opinion was entitled to controlling weight because "his explanation regarding [claimant's] bullous emphysema is well-reasoned and well-documented" and [i]t is also supported by the findings rendered by Dr. Scott in his reading of the CT scan." Decision and Order at 16. The administrative law judge also found that Dr. Zaldivar's opinion was buttressed by the opinion of Dr. Branscomb. *Id.*

Claimant correctly contends that the administrative law judge erred in failing to address the fact that Dr. Zaldivar diagnosed bullous emphysema based on his own interpretation of a May 12, 2004 CT scan, which was excluded from the record by the administrative law judge as being in excess of the evidentiary limitations. The administrative law judge has failed to make any findings as to whether Dr. Zaldivar's opinion is tainted by his consideration of excluded evidence. *Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-17 n.1 (2007) (*en banc recon.*) (McGranery and Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting).

Furthermore, although the administrative law judge indicated that Dr. Scott's interpretation of the May 12, 2004 CT scan was supportive of Dr. Zaldivar's opinion, the administrative law judge has not addressed the significance, if any, of the fact that Dr. Scott did not specifically diagnose bullous emphysema. Because the sole basis for Dr. Zaldivar's opinion that claimant's respiratory disease is unrelated to coal dust exposure is the presence of bullous emphysema, the administrative law judge must specifically consider whether there is documentation in the record to support Dr. Zaldivar's diagnosis, other than Dr. Zaldivar's excluded CT scan reading. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). The administrative law judge must also consider the rationale underlying Dr. Zaldivar's opinion that claimant's bullous emphysema is unrelated to coal dust exposure, and determine whether Dr. Zaldivar provided a reasoned and documented opinion that claimant does not have a respiratory condition that would satisfy the legal definition of pneumoconiosis.⁸ *Clark*, 12 BLR at 153.

⁸ Claimant maintains that in order to fully consider whether Dr. Zaldivar's opinion is reasoned and documented, the administrative law judge "must address Dr. Zaldivar's narrow definition of legal pneumoconiosis" as requiring a positive x-ray for pneumoconiosis or pathology evidence of the disease. Claimant's Brief at 6, *citing* Employer's Exhibit 12, pp. 48-49, 83, 85, 103. In light of our decision to remand this

Additionally, because the administrative law judge failed to explain the basis for his finding that “Dr. Branscomb’s opinions [are] better supported by [the] medical evidence and social histories,” we conclude that the administrative law judge’s Decision and Order on Remand fails to comply with the requirements of the APA. *Wojtowicz*, 12 BLR at 1-162. Decision and Order at 5. Thus, we vacate the administrative law judge’s determination that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and remand this case for further consideration.

On remand, the administrative law judge is instructed to reconsider whether the opinions of Drs. Cohen, Zaldivar and Branscomb are reasoned and documented, and the relative weight to accord their opinions. The administrative law judge must consider “the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.” *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76 (4th Cir. 1997). The administrative law judge must also comply with the APA by resolving all conflicts in the evidence and setting forth the rationale underlying his findings. *Wojtowicz*, 12 BLR at 1-162. If the administrative law judge’s finds that claimant established the existence of pneumoconiosis, the administrative law judge must also consider whether the evidence is sufficient to establish that claimant is totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge’s Decision and Order on Remand – Denying Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

case, we instruct the administrative law judge to address claimant’s assertion that Dr. Zaldivar’s opinion is contrary to the Act.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge