

BRB No. 99-0565 BLA

EDGAR JUSTICE)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
ITMANN COAL COMPANY)	
)	
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-0940) of Administrative Law Judge Stuart A. Levin awarding benefits 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). In the initial Decision and Order, the administrative law judge, after crediting claimant with at least thirty-two years of coal mine employment, found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The

administrative law judge, however, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated March 13, 1998, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(c) as unchallenged on appeal. *Justice v. Itmann Coal Co.*, BRB No. 97-0973 BLA (Mar. 13, 1998) (unpublished). The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis arising out of his coal mine employment. Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant was totally disabled due to pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The administrative law judge, on remand, did not render separate findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b). Instead, the administrative law judge combined his consideration of these two issues, ultimately finding that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis. See Decision and Order on Remand at 2-10.

In finding the evidence sufficient to establish that claimant was totally disabled due to pneumoconiosis, the administrative law judge credited Dr. Rasmussen's

opinion over the contrary opinions of Drs. Zaldivar, Jarboe and Fino. Decision and Order on Remand at 9-10. Based upon Dr. Rasmussen's opinion, the administrative law judge found that claimant was totally disabled due to pneumoconiosis arising out of his coal mine employment. *Id.* at 10.

Employer contends that the administrative law judge erred in crediting Dr. Rasmussen's opinion over the contrary opinions of Drs. Zaldivar, Jarboe and Fino. The administrative law judge's consideration of each of these opinions will be addressed in turn.

Dr. Rasmussen's diagnosed coal workers' pneumoconiosis and "COPD - emphysema." Director's Exhibit 7. Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis was based in part upon Dr. Patel's positive interpretation of an October 2, 1995 x-ray. *Id.* However, inasmuch as the best qualified physicians of record interpreted claimant's October 2, 1995 x-ray as negative for pneumoconiosis, the administrative law judge permissibly found that their interpretations called into question the reliability of the x-ray interpretation relied upon by Dr. Rasmussen. *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); see also *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order on Remand at 9. The administrative law judge, therefore, properly accorded less weight to Dr. Rasmussen's finding of clinical pneumoconiosis.

Dr. Rasmussen, however, also opined that claimant suffered from "COPD - emphysema" attributable to both coal dust exposure and smoking, a finding sufficient to constitute a diagnosis of legal pneumoconiosis under 20 C.F.R. §718.201. Director's Exhibit 7. Dr. Rasmussen further opined that:

The two risk factors for his disabling respiratory insufficiency are his cigarette smoking and his coal mine dust exposure. The latter must be considered at least a significant contributing factor.

Director's Exhibit 7.

Employer contends that the administrative law judge failed to adequately address whether Dr. Rasmussen's opinions were sufficiently reasoned. We agree. 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). In the instant case, the administrative law judge found that "of all the flawed opinions," Dr. Rasmussen's opinion was the "most persuasive." Decision and Order on Remand

at 9. Despite recognizing that Dr. Rasmussen's opinion was flawed, the administrative law judge subsequently summarily concluded that Dr. Rasmussen's opinion was "well-reasoned and documented." *Id.* at 10. Inasmuch as the administrative law judge failed to provide a basis for his finding that Dr. Rasmussen's opinions were sufficiently reasoned, we vacate the administrative law judge's implicit findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b) and remand the case to the administrative law judge for further consideration. On remand, the administrative law judge should specifically address whether Dr. Rasmussen's opinion regarding the etiology of claimant's "COPD - emphysema" and his opinion regarding the etiology of claimant's total disability are sufficiently reasoned.

Employer contends that the administrative law judge erred in discrediting Dr. Zaldivar's opinion. Dr. Zaldivar opined that claimant did not suffer from coal workers' pneumoconiosis or any pulmonary impairment significantly related to, or substantially aggravated by, his coal dust exposure. Employer's Exhibits 3, 11. Dr. Zaldivar opined that claimant suffered from emphysema due to his cigarette smoking. *Id.*

During his October 1, 1996 deposition, Dr. Zaldivar explained that, in the case of emphysema, the capillary beds are destroyed to whichever degree emphysema has destroyed the lungs. Employer's Exhibit 11 at 15. Dr. Zaldivar opined that inasmuch as claimant's diffusing capacity was reduced to sixty-four percent of predicted, there was lung destruction by emphysema. *Id.* Dr. Zaldivar further explained that:

Emphysema is characterized by obstruction of the lungs. It destroys the alveoli which is where air exchange occurs. This is due to chronic inflammation of the lungs by the white cells which accumulate in the airways of smokers. The white cells die, and when they do so, they release enzymes which attack the lungs. And smokers cannot get rid of particles in the lungs or infections very readily because they paralyze the cilia which is the normal mechanism of the lungs to get rid of particles. And so eventually there is a destruction of the tissue. And as the tissue is destroyed, the capillary beds that are within those tissues are destroyed as well.

Employer's Exhibit 11 at 16.

Dr. Zaldivar explained that because nonsmokers have intact ciliary and mucus mechanisms, they are "able to get rid of particles in the normal fashion."

Employer's Exhibit 11 at 16. Dr. Zaldivar further stated that:

If they do inhale sufficient dust that is taken up by the white cells in the lungs and they develop macules, then the macule is going to cause a mechanical obstruction at the respiratory bronchiole which is proximal to the alveoli. The macule may in fact interfere with the clearance. And if that happens, then the alveoli distal to that macule may be destroyed, and so you get the focal emphysema.

Employer's Exhibit 11 at 16-17.

Dr. Zaldivar explained that focal emphysema is different from smokers' emphysema in that there is no mechanical obstruction in smokers' emphysema. Employer's Exhibit 11 at 17. Dr. Zaldivar also stated that:

Smoking is an independent factor causing obstruction by itself. There is no synergy with smoking and coal mine work insofar as production of airway obstruction. So in this case smoking has caused the obstruction, and this is not related to his mining nor is it aggravated by mining.

Employer's Exhibit 11 at 20.

The administrative law judge found that Dr. Zaldivar's opinions were neither sufficiently reasoned nor sufficiently explained to outweigh Dr. Rasmussen's contrary opinion "especially in light of the fact that as a smoker, [c]laimant's lung cilia were paralyzed as Dr. Zaldivar described when coal dust was being deposited in the lungs." Decision and Order on Remand at 10. We agree with employer that the administrative law judge improperly substituted his opinion for that of Dr. Zaldivar in regard to the effect of claimant's coal dust exposure on his pulmonary impairment. See *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986) (*en banc*); see also *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). The administrative law judge improperly assumed that claimant's coal dust exposure must have had a negative effect upon claimant's lungs which were already compromised by claimant's smoking history. Dr. Zaldivar, however, clearly opined that claimant's coal dust exposure did not contribute to his emphysema. Employer's Exhibit 11.

Employer next contends that the administrative law judge erred in discrediting Dr. Jarboe's opinion. Although Dr. Jarboe opined that claimant suffered from a severe pulmonary impairment in the form of severe airways obstruction, he opined that claimant's airways obstruction was not caused by the inhalation of coal dust.

Employer's Exhibit 10. Dr. Jarboe explained that while coal workers' pneumoconiosis can cause airways obstruction, it rarely, in the absence of cigarette smoking, would cause the degree of claimant's airway obstruction. *Id.* Dr. Jarboe also noted that coal worker's disease usually is associated with a concomitant reduction in FVC along with FEV1, a situation that he noted was not present in the instant case. *Id.* Finally, Dr. Jarboe explained that claimant's airways obstruction showed a reversible component which was not characteristic of coal workers' pneumoconiosis. *Id.* Dr. Jarboe, therefore, opined that claimant's airways obstruction was the result of cigarette smoking which in turn caused chronic bronchitis and pulmonary emphysema. *Id.*

Dr. Jarboe also explained that his opinion regarding the degree and cause of any respiratory impairment or disability present would not change if claimant were found to have pneumoconiosis. Employer's Exhibit 10. Dr. Jarboe explained that the physiological derangements present were characteristic of those resulting from cigarette smoking and not coal mine dust inhalation. *Id.* Dr. Jarboe opined that the "cause and degree of impairment in [claimant's] case is clearly related to smoking and not the inhalation of coal dust or the presence of coal workers' pneumoconiosis." *Id.*

In his consideration of Dr. Jarboe's opinion, the administrative law judge stated that:

Dr. Jarboe's argument proceeds as follows: Claimant has a severe obstructive impairment. Pneumoconiosis can cause obstructive impairments, but "rarely," as severe as Claimant's. Therefore, Claimant's impairment is too severe to be caused by pneumoconiosis. Claimant, of course, may be the "rare" case, but, more important, the Courts have held that pneumoconiosis need not be the sole cause of Claimant's impairment. The question then is whether pneumoconiosis can contribute to an obstructive impairment this severe.

Furthermore, whether or not pneumoconiosis in a non-smoker would cause an obstructive impairment as severe as Claimant's impairment is not the issue. Claimant is a smoker. For diagnostic and etiology purposes, then Dr. Jarboe postulated facts [that] are not in evidence. The severity of Claimant's impairment occurs in the presence of both cigarette smoking and coal dust exposure, and Dr. Jarboe's analysis does not state that pneumoconiosis rarely causes obstruction of this severity in the presence of both. In these respects, his analysis is flawed in the context of this record

and applicable precedents.

Decision and Order on Remand at 5.

Contrary to the administrative law judge's characterization, Dr. Jarboe did not postulate facts that were not in evidence. Dr. Jarboe was clearly aware of the extent of claimant's smoking and coal mine employment histories. Moreover, Dr. Jarboe clearly delineated the reasons for his opinion that claimant's impairment was attributable to his smoking history and not his coal dust exposure. We, therefore, hold that the administrative law judge erred in discrediting Dr. Jarboe's opinion.

Employer next argues that the administrative law judge erred in discrediting Dr. Fino's opinion. Dr. Fino, based upon his interpretation of claimant's pulmonary function studies, concluded that claimant's small airway flow was more reduced than his large airway flow, a finding which Dr. Fino characterized as inconsistent with a coal dust related condition. Employer's Exhibit 9. Dr. Fino further noted that an impairment in oxygen transfer was the classic abnormality seen in a coal mine dust related pulmonary condition. *Id.* Dr. Fino opined that claimant's "normal" blood gases both at rest and with exercise effectively ruled out an impairment in oxygen transfer and were consistent with emphysema due to smoking. *Id.* Dr. Fino, therefore, concluded that:

1. There is insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis.
2. It is my opinion that [claimant] does not suffer from an occupationally acquired pulmonary condition.
3. There is a disabling respiratory impairment present due to cigarette smoking.
4. Coal mine employment and coal mine dust exposure did not cause or contribute to his impairment and disability.
5. Even if [claimant] were found to have radiographic pneumoconiosis, it is my opinion that his impairment and disability would be unrelated to coal mine dust inhalation. They are related to smoking.

Employer's Exhibit 9.

The administrative law judge questioned Dr. Fino's opinion in part because

claimant's April 10, 1996 pulmonary function study produced qualifying values. Decision and Order on Remand at 6. The administrative law judge also found that, contrary to Dr. Fino's characterization, claimant's resting arterial blood gas study on April 10, 1996 was not "normal." *Id.* at 8.

The Board has long held that the interpretation of the objective data is a medical determination for which an administrative law judge cannot substitute his own opinion. See *Casella, supra*. Although the administrative law judge noted that Dr. Zaldivar interpreted claimant's April 10, 1996 arterial blood gas study as showing hypoxemia, Dr. Zaldivar's interpretation does not contradict Dr. Fino's conclusion that claimant's arterial blood gas studies did not demonstrate an impairment in oxygen transfer.ⁱ We, therefore, hold that the administrative law judge erred in his consideration of Dr. Fino's opinion.

Employer finally argues that the administrative law judge, in weighing the medical opinion evidence, erred in failing to consider the respective qualifications of the physicians. We agree. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arise, has stated that the experts' respective qualifications are important indicators of the reliability of their opinions.ⁱⁱ See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

In light of the above-referenced errors, we remand the case to the administrative law judge to reconsider whether the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)ⁱⁱⁱ and that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).^{iv}

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

i. Dr. Fino interpreted claimant's October 2, 1995 arterial blood gas study as follows:

There was no hypoxia with exercise and no abnormal widening of the alveolar-arterial oxygen gradient. There was no impairment in oxygen transfer. This is a normal exercise study indicating no pulmonary limitation to exercise.

Employer's Exhibit 9.

Dr. Fino interpreted claimant's resting April 10, 1996 arterial blood gas study as revealing "mild hypoxia." Employer's Exhibit 9.

ii. Drs. Zaldivar, Jarboe and Fino are Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibits 3, 9, 10. Dr. Rasmussen's qualifications are not found in the record.

iii. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); see also *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Consequently, on remand, the administrative law judge must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1) and (a)(4) together in determining whether the miner suffers from pneumoconiosis.

Since the record does not contain any biopsy or autopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. See 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. See 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. See 20 C.F.R. §718.306.

iv. The Fourth Circuit has held that, pursuant to 20 C.F.R. §718.204(b), a claimant must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. See *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).