

BRB No. 06-0976 BLA

P.P.)
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 Claimant-Respondent)
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 v.)
)
 MANNING COAL CORPORATION) DATE ISSUED: 09/24/2007
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 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2003-BLA-05600) of Administrative Law Judge Joseph E. Kane with respect to 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 is the second time that this case has been before the Board. In our prior Decision and Order, we vacated the administrative law judge's finding that the x-ray evidence of record was sufficient to

establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), as the administrative law judge neglected to weigh Dr. Baker's negative reading of the film dated November 17, 2000. [*P.P*] v. *Manning Coal Corp.*, BRB No. 05-0124 BLA (Jan. 30, 2006)(unpub.), slip op. at 5. We also vacated the administrative law judge's decision to exclude Dr. Broudy's medical opinion from consideration pursuant to 20 C.F.R. §718.202(a)(4) on the ground that Dr. Broudy relied upon inadmissible evidence in concluding that claimant does not have pneumoconiosis. *Id.* at 4-5. We remanded the case to the administrative law judge with instructions to reconsider the x-ray evidence under Section 718.202(a)(1). We also instructed the administrative law judge to clarify his reasons for admitting Dr. Alexander's positive reading of the film dated November 17, 2000, over employer's objections. *Id.* at 5-6. We further directed the administrative law judge to consider whether it was appropriate to exclude Dr. Broudy's opinion, in its entirety, from his weighing of the evidence under Section 718.202(a)(4) based upon the physician's reference to inadmissible evidence. *Id.* at 5.

On remand, the administrative law judge determined that Dr. Alexander's interpretation of the November 17, 2000 film was properly admitted into the record. The administrative law judge considered this reading, and Dr. Baker's interpretation of the same x-ray with the other readings of record, and found that the existence of pneumoconiosis was established at Section 718.202(a)(1). Pursuant to Section 718.202(a)(4), the administrative law judge determined that because the conclusions expressed in Dr. Broudy's reports were not dependent upon the inadmissible evidence, his opinion could be considered. The administrative law judge found that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis. Based upon this determination, the administrative law judge declined to reconsider his prior finding that claimant is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Section 718.202(a)(1) and (a)(4).¹ Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter in which he indicates that he will not file a response brief in this appeal. Employer has filed a Reply Brief in which it essentially reiterates the arguments raised in its Brief in Support of Petition for Review.²

¹ Employer has preserved for future appeal its objection to the Board's holding that the administrative law judge properly found that claimant's application for benefits was timely filed pursuant to 20 C.F.R. §725.308.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. Director's Exhibits 3, 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The medical opinions relevant to the issue of the existence of pneumoconiosis are those submitted by Drs. Alam, Baker, and Caudill, who diagnosed legal pneumoconiosis, and Drs. Rosenberg and Broudy, who indicated that claimant does not have either clinical or legal pneumoconiosis. Dr. Alam examined claimant on July 13, 2001, at the request of the Department of Labor. On Form CM-988, Dr. Alam set forth a diagnosis of coal workers' pneumoconiosis caused by coal dust exposure and cigarette smoking. Dr. Alam also indicated that claimant is suffering from a moderate respiratory impairment and does not retain the respiratory capacity to perform his usual coal mine employment or comparable and gainful employment. Dr. Alam attributed 40-50 percent of claimant's impairment to coal workers' pneumoconiosis. In response to a questionnaire appended to this form, however, Dr. Alam indicated that claimant's pulmonary impairment was caused by "coal dust." Director's Exhibit 9. Dr. Baker examined claimant on November 17, 2000, and diagnosed chronic obstructive pulmonary disease (COPD) and a moderate respiratory impairment caused by cigarette smoking and coal dust exposure. Dr. Baker further indicated that claimant is totally disabled by his respiratory impairment. Claimant's Exhibit 1. Dr. Baker testified at his deposition that there is no way to distinguish between smoking and coal dust exposure when assessing the source of claimant's impairment. Claimant's Exhibit 8 at 8-9. Dr. Caudill, claimant's treating physician, stated that claimant has COPD caused by coal dust exposure. Claimant's Exhibit 2 at 9. Dr. Caudill indicated that smoking may have been a contributing factor, but that there is no method for definitively distinguishing between the effects of coal dust exposure and cigarette smoking. *Id.* at 14-15.

Dr. Rosenberg examined claimant on July 28, 2003 and diagnosed a mild impairment caused by hypoventilation that Dr. Rosenberg indicated is most likely related to claimant's obesity. Employer's Exhibits 1, 7. Dr. Broudy examined claimant on October 4, 2001 and prepared a report in which he referred to the results of two additional examinations of claimant that he had performed in conjunction with a claim for state workers' compensation benefits. Director's Exhibit 28. Dr. Broudy also prepared a report dated August 25, 2003, in which he reviewed Dr. Baker's examination report and records from Dr. Caudill. Employer's Exhibit 4. Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis or any other dust related lung disease. Director's Exhibit 28 at 13.

In his initial Decision and Order, the administrative law judge considered the opinions of Drs. Alam, Baker, Caudill, and Rosenberg and determined that each was

well-documented and well-reasoned. After setting forth the factors identified in 20 C.F.R. §718.104(d), the administrative law judge “grant[ed] probative weight to Dr. Caudill’s opinion as claimant’s treating physician.” Decision and Order at 16. The administrative law judge concluded that “the report of Dr. Caudill, along with the reports of Drs. Alam and Baker, outweigh[ed] the contrary report of Dr. Rosenberg” and were sufficient to establish the existence of legal pneumoconiosis under Section 718.202(a)(4). *Id.* In his Decision and Order on Remand, the administrative law judge reconsidered his exclusion of Dr. Broudy’s opinion and determined that because Dr. Broudy’s conclusions did not rest upon inadmissible evidence, he would admit the opinion into the record. Decision and Order on Remand at 6. The administrative law judge determined that Dr. Broudy’s opinion was well-reasoned and well-documented. *Id.* The administrative law judge then stated that:

After considering all the medical opinion evidence under Section 718.202(a)(4), I continue to find the preponderance of the evidence supports a finding that [c]laimant suffers from legal pneumoconiosis. The record includes three opinions finding legal pneumoconiosis and two opinions finding no pneumoconiosis. As indicated in my prior Decision and Order, I gave Dr. Caudill’s report a little more weight due to the strength of his opinion and the fact that he is [c]laimant’s treating physician. I found all the other physicians, including Dr. Broudy, equally well-reasoned and well-documented and I gave them all equal probative weight. Accordingly, I find that [c]laimant has established, by a preponderance of the evidence, the existence of legal pneumoconiosis.

Decision and Order on Remand at 6-7.

Employer argues that the administrative law judge erred in finding that the opinions of Drs. Alam, Caudill, and Baker are well-reasoned with respect to their diagnoses of legal pneumoconiosis.³ Employer specifically contends that Dr. Alam did not indicate that claimant’s lung disease was caused by coal dust exposure, while Drs.

³ The regulations provide separate definitions of clinical and legal pneumoconiosis. Clinical pneumoconiosis is defined as “those diseases recognized by the medical community as pneumoconioses, 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.” 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

Baker and Caudill merely relied upon an assumption that claimant's coal dust exposure played a role in causing his COPD. Employer further maintains that the administrative law judge did not provide an adequate rationale for finding that Dr. Caudill's role as claimant's treating physician made his opinion regarding the cause of claimant's lung disease more probative than the other opinions of record. These contentions have merit, in part.

Contrary to employer's allegation, on Form CM-988, Dr. Alam diagnosed "coal workers' pneumoconiosis" caused by "coal dust exposure" and a "prior history of tobacco abuse which is not contributing to signs/symptoms now." Director's Exhibit 9. Dr. Alam also diagnosed a moderate respiratory impairment to which "coal workers' pneumoconiosis" contributed 40-50 percent. *Id.* As employer notes, however, Dr. Alam did not provide any rationale for his opinion regarding the causes of claimant's lung conditions on either Form CM-988 or the attached questionnaire. *Id.* In addition, employer is correct in asserting that Dr. Baker expressed his opinion regarding the cause of claimant's COPD and impairment in equivocal terms. At his deposition, Dr. Baker indicated that he "thought that [claimant's] coal dust exposure probably contributed" to his COPD. Claimant's Exhibit 8 at 8. Dr. Baker further stated that there is no method for precisely identifying the portion of an impairment caused by coal dust exposure, "but it's felt that cigarette smoking and coal dust exposure are probably about equal in a susceptible individual." *Id.* at 8-9. Similarly, Dr. Caudill acknowledged that there is "no way of sorting out" the cause of COPD when a person has smoked and has been exposed to coal dust. Claimant's Exhibit 2 at 14-15. Dr. Caudill also stated that he was not aware of "medical proof of either conclusion" in this case. *Id.*

Because the administrative law judge did not address these aspects of the opinions of Drs. Alam, Baker, and Caudill when determining that they were well-reasoned and well-documented on the issue of the existence of legal pneumoconiosis, the administrative law judge's Decision and Order on Remand does not comport with the Administrative Procedure Act (APA), 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), which requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We must, therefore, vacate the administrative law judge's decision to credit the opinions of Drs. Alam, Baker, and Caudill and his finding that these opinions were sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

On remand, the administrative law judge must reconsider whether these opinions are reasoned and documented with respect to their diagnoses of legal pneumoconiosis and must explain his findings, including the underlying rationale. If the administrative law judge determines that Dr. Caudill's diagnosis of legal pneumoconiosis is reasoned and

documented, he may again apply Section 718.104(d). The administrative law judge must, however, set forth the rationale supporting his determination that the nature and duration of Dr. Caudill's relationship with claimant, and the frequency and extent of his treatment of claimant, entitle his opinion to controlling weight in this case on the issue of the cause of claimant's COPD.

Finally, in light of our decision to vacate the administrative law judge's weighing of the medical opinions of Drs. Alam, Baker, and Caudill under Section 718.202(a)(4), we also vacate the administrative law judge's finding that these opinions were sufficient to establish that claimant's totally disabling impairment was caused by pneumoconiosis pursuant to Section 718.204(c). The administrative law judge should also reconsider this issue if he determines that claimant has established the existence of pneumoconiosis on remand.⁴

⁴ We decline to address employer's allegations of error regarding the administrative law judge's finding at 20 C.F.R. §718.202(a)(1), as employer concedes that the issue of whether the x-ray evidence establishes the existence of clinical pneumoconiosis is irrelevant "because none of the doctors believed that clinical pneumoconiosis had any impact on [claimant's] respiratory condition." Employer's Brief in Support of Petition for Review at 12. Moreover, the physicians of record who determined that claimant has legal pneumoconiosis indicated that their diagnoses were rendered in light of the absence of x-ray findings of clinical pneumoconiosis. Director's Exhibit 9; Claimant's Exhibits 2 at 9, 8 at 7 and 11-12. Thus, error, if any, in the administrative law judge's weighing of the x-ray evidence under Section 718.202(a)(1) is harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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 further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge