

BRB No. 09-0150 BLA

C.H.)
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 Claimant-Respondent)
)
 v.) DATE ISSUED: 09/23/2009
)
 BLAZING SADDLES COAL)
 CORPORATION)
)
 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 – Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens’ Law Center), Whitesburg, Kentucky, 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:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-6594) of Administrative Law Judge Donald W. Mosser 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). Claimant filed his claim for benefits on August 13, 2003. Director's Exhibit 2. The administrative law judge credited claimant with at least twenty-nine years of coal mine employment,¹ and found that claimant established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) that arose out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(4).² The administrative law judge further found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that his total disability is due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(c).³ Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer filed a reply brief, reiterating its allegations of error.

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 the miner 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.

¹ The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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*).

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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

³ We affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b), as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Alam, Cohen, Dahhan, Fino, and Wicker.⁴ Dr. Alam, who is claimant's treating physician, and Dr. Cohen, diagnosed claimant with COPD due to both coal dust exposure and smoking. Claimant's Exhibit 3 at 11; Employer's Exhibit 9 at 31. Drs. Dahhan, Fino, and Wicker opined that claimant's pulmonary impairment is due solely to smoking. Director's Exhibit 11; Employer's Exhibits 1 at 3; 5 at 12; 6 at 11; 8 at 15; 12 at 5; 13 at 13.

The administrative law judge accorded little weight to Dr. Wicker's opinion that claimant does not have pneumoconiosis because the physician provided no rationale for his opinion.⁵ Further, the administrative law judge found that the opinions of Drs. Dahhan and Fino were not persuasive, because neither physician adequately explained why coal mine dust did not contribute to claimant's COPD. Decision and Order at 15. Regarding Dr. Fino's opinion that claimant's impairment is unrelated to coal dust exposure, the administrative law judge stated that "[i]t appears . . . that Dr. Fino . . . has difficulty in distinguishing between clinical and legal pneumoconiosis." *Id.* The administrative law judge discredited Dr. Dahhan's opinion on the grounds that the physician relied on an inflated smoking history, based his opinion largely on negative chest x-rays, and relied on the fact that claimant is being treated with bronchodilators yet "d[id] not opine that the use of bronchodilators rules out coal dust as a factor in causing claimant's impairment." *Id.*

After discrediting the opinions of employer's physicians, the administrative law judge assigned "controlling weight" to Dr. Alam's opinion that claimant has legal pneumoconiosis, finding that Dr. Alam's opinion met the criteria of Section 718.104(d). Specifically, the administrative law judge found that Dr. Alam treated claimant for his respiratory condition, saw claimant on a consistent basis, and conducted relevant medical tests. *See* 20 C.F.R. §718.104(d)(1)-(4). The administrative law judge further determined that Dr. Alam's medical report and deposition testimony were reasoned and documented. Additionally, the administrative law judge accorded greater weight to Dr. Alam's opinion because of his Board-certification in Pulmonary Disease.

⁴ The record reflects that Drs. Alam, Cohen, Dahhan, and Fino are Board-certified in Internal Medicine and Pulmonary Disease.

⁵ We affirm the administrative law judge's decision to discredit Dr. Wicker's opinion, as that determination has not been challenged on appeal. *See Skrack*, 6 BLR at 1-711.

Finally, the administrative law judge noted that Dr. Cohen was highly qualified and reviewed all of the medical evidence of record. The administrative law judge assigned “great probative weight” to Dr. Cohen’s opinion. Decision and Order at 16. Based on the foregoing findings, the administrative law judge concluded that “the weight of the acceptable medical evidence” met claimant’s burden to establish that he has legal pneumoconiosis. *Id.*

Employer initially contends that the administrative law judge applied an improper legal standard and shifted the burden of proof by requiring employer’s physicians to rule out legal pneumoconiosis, rather than requiring claimant’s physicians to rule it in.⁶ Employer’s Brief at 2, 15-16. We reject employer’s contention. Review of the administrative law judge’s decision reflects that he recognized it is claimant’s burden to establish the existence of legal pneumoconiosis by a preponderance of the evidence. Decision and Order at 11, 13, 16. Contrary to employer’s contention, the administrative law judge did not shift the burden of proof by noting that, as the fact-finder, he had the discretion to discount a medical opinion that claimant’s lung impairment is unrelated to coal dust exposure, if the physician did not adequately explain his reasoning for excluding coal dust as a factor. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *accord Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-104-05 (7th Cir. 2008).

However, there is merit in employer’s contention that the administrative law judge mischaracterized the opinions of Drs. Dahhan and Fino, and did not adequately explain his basis for discounting them. The administrative law judge discredited the opinions of Drs. Dahhan and Fino because they did not adequately explain why claimant’s coal dust exposure did not aggravate his totally disabling respiratory impairment. However, the administrative law judge selectively analyzed the doctors’ opinions to discredit them,

⁶ Specifically, employer takes issue with the administrative law judge’s discussion of factors he could consider in determining whether the medical opinions of record were reasoned and documented. Decision and Order at 13-14. The administrative law judge prefaced his analysis of the medical opinions by setting forth the definition of pneumoconiosis and discussing the criteria for determining whether a medical opinion is documented and reasoned. Noting that “physicians must provide adequate rationale for their opinions,” the administrative law judge stated that, “[i]n ruling out a diagnosis of legal pneumoconiosis, the physician must adequately explain how the miner’s coal dust exposure can be eliminated as a possible cause of his respiratory illness.” Decision and Order at 13-14, *citing Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Additionally, the administrative law judge set forth the regulatory criteria for analyzing the opinion of a treating physician, at 20 C.F.R. §718.104(d).

when each doctor provided several reasons for his opinion that claimant's COPD is unrelated to coal mine dust exposure.⁷ See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-93 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984). Although the administrative law judge stated that Dr. Fino "still has difficulty in distinguishing between clinical and legal pneumoconiosis," the administrative law judge did not set forth the basis for this finding, contrary to 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). Additionally, although the administrative law judge found that Dr. Dahhan relied on an overstated smoking history, a review of the administrative law judge's decision does not reveal a specific finding by the administrative law judge as to the extent of claimant's smoking history. Further, contrary to the administrative law judge's finding, Dr. Dahhan did not exclude legal pneumoconiosis based on negative x-ray readings. Employer's Exhibit 6 at 11-12; Employer's Exhibit 1 at 3. Thus, the administrative law judge's finding that Drs. Dahhan and Fino did not explain why coal dust exposure is not a contributor to claimant's COPD is not supported by substantial evidence.

Employer next contends that the administrative law judge erred in determining that Dr. Alam's opinion was entitled to controlling weight pursuant to Section

⁷ Dr. Dahhan opined that claimant's pulmonary impairment was due to his smoking habit because claimant was being treated with multiple bronchodilator therapy, indicating that claimant's condition is responsive to such measures, which is inconsistent with the permanent adverse effects of coal dust. Employer's Exhibits 6 at 11; 14 at 4. Moreover, Dr. Dahhan testified that smoking was the cause of claimant's pulmonary problems because claimant has x-ray findings of bullous emphysema, and this would not explain his significant loss of lung function due to coal dust. Employer's Exhibit 6 at 11. Furthermore, Dr. Dahhan explained that claimant's impairment did not arise out of his coal mine employment based on the entirety of the medical data, including claimant's occupational and medical histories, negative chest x-ray, normal blood gas studies, and obstructive abnormalities seen on both physical examination and pulmonary function testing. Employer's Exhibit 6 at 11-12; Employer's Exhibit 1 at 3. Similarly, Dr. Fino testified that claimant's impairment was due to smoking and not coal dust exposure because of claimant's lack of a drop in the PO₂ with exercise, whereas a drop in PO₂ with exercise is common in coal dust-related disease. Employer's Exhibits 5 at 12; 8 at 25. Also, Dr. Fino based his opinion on claimant's significant reduction in diffusing capacity, which he testified is generally unusual in coal dust inhalation in the absence of a high profusion category on chest x-ray. Employer's Exhibits 8 at 25-26; 13 at 13. Moreover, Dr. Fino relied on claimant's significant loss in FEV₁ and obstruction with increased lung volumes to support his opinion. Employer's Exhibits 5 at 11-12; 8 at 25-26; 13 at 13-14.

718.104(d). This allegation of error has merit. The applicable regulation provides that “the weight given to the opinion of a miner’s treating physician shall also be based on the credibility of the 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); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003). Here, the administrative law judge did not weigh Dr. Alam’s opinion in light of the other relevant evidence in the record, because, as just discussed, he first discounted the contrary medical opinions for invalid reasons. Further, the administrative law judge did not consider Dr. Alam’s opinion fully, in light of its reasoning and documentation.⁸ We agree with employer that the administrative law judge did not explain the basis for his finding that Dr. Alam’s opportunity to see claimant regularly and to conduct tests put him in a better position to determine the etiology of claimant’s COPD. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647. Additionally, while Dr. Alam’s credentials in Pulmonary Medicine are relevant to the credibility of his opinion, the doctors whose opinions the administrative law judge improperly rejected possess the same qualification. Therefore, we must vacate the administrative law judge’s decision to accord controlling weight to Dr. Alam’s opinion on the issue of the existence of legal pneumoconiosis pursuant to Sections 718.104(d)(5) and 718.202(a)(4).

In light of the foregoing, we vacate the administrative law judge’s finding that legal pneumoconiosis was established pursuant to Section 718.202(a)(4), and we remand this case to the administrative law judge for reconsideration. In reweighing the medical opinions of record, the administrative law judge must take into account the physicians’ respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses.⁹ *See*

⁸ Employer notes, accurately, that the administrative law judge did not consider the bronchoscopy evidence upon which Dr. Alam relied to conclude that there was anthrasic dust deposition in claimant’s lungs, supporting a diagnosis of legal pneumoconiosis. Director’s Exhibit 13; Claimant’s Exhibit 8; Employer’s Exhibit 9. Dr. Caffrey, a pathologist, reviewed the bronchoscopy evidence and found no definite evidence of dust deposition. Employer’s Exhibit 4.

⁹ Employer correctly asserts that the administrative law judge summarized certain medical evidence, but did not weigh it in his decision. Decision and Order at 6. The administrative law judge should address this evidence on remand. The November 7, 2002 CT scan was read by Dr. Gabier as positive for chronic obstructive pulmonary disease, and Dr. Wiot reread it as negative for pneumoconiosis. Claimant’s Exhibit 4; Employer’s Exhibit 10 at 2. Dr. Bella reviewed the bronchoscopy performed by Dr. Alam on May 13, 2003, and found it negative for malignancy and fungal infection. Director’s Exhibit 13 at 14-16. Dr. Caffrey reviewed the slides from the bronchoscopy and found no definite anthracotic deposition. Employer’s Exhibit 4 at 2-3.

Director, OWCP v. Rowe, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). We note that the administrative law judge assigned probative weight to Dr. Cohen's opinion because it supported Dr. Alam's opinion. Decision and Order at 16, 18. Because we have vacated the administrative law judge's findings with respect to Dr. Alam's opinion, we also instruct the administrative law judge on remand, to reconsider the weight to assign Dr. Cohen's opinion.

Pursuant to Section 718.204(c), employer argues further that the administrative law judge's finding that total disability due to legal pneumoconiosis was established cannot be affirmed, as the administrative law judge repeated the errors that he committed when weighing the evidence relevant to Section 718.202(a)(4). Because the administrative law judge relied upon his findings rendered under Section 718.202(a)(4) that we have vacated, we also vacate his determination that the medical opinion of Dr. Alam, as supported by that of Dr. Cohen, establish total disability due to legal pneumoconiosis at Section 718.204(c). If reached on remand, the administrative law judge must reconsider this issue in light of the proper legal standard. *See* 20 C.F.R. §718.204(c)(1); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989). Contrary to employer's contention, if the administrative law judge, on remand, finds the existence of legal pneumoconiosis established, he has the discretion to accord less weight to the disability causation opinions of those physicians who did not diagnose legal pneumoconiosis. *See Smith*, 127 F.3d at 507, 21 BLR at 2-185-86; *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams*, 886 F.2d at 826, 13 BLR at 2-63-64.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge