

BRB No. 12-0633 BLA

JOHNNY K. COLEMAN)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 08/19/2013
)	
COMANCHE COAL CORPORATION)	
)	
and)	
)	
KNOX CREEK COAL CORPORATION)	
)	
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 Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Subsequent Claim (10-BLA-5471) of Administrative Law Judge Christine L. Kirby rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a subsequent claim filed on June 10, 2009.¹ Director's Exhibit 3.

The administrative law judge credited claimant with at least 10.74 years of coal mine employment,² and accepted employer's stipulations that the biopsy evidence established the existence of simple, clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis, and therefore failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304. The administrative law judge further found that claimant established the existence of simple, clinical pneumoconiosis,³ but failed to establish the existence of legal pneumoconiosis,⁴ pursuant to 20 C.F.R. §718.202(a). Additionally, the administrative law judge found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and determined that employer did not rebut that presumption. The administrative law judge also found that claimant established that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and that he is

¹ Claimant's initial claim, filed on September 29, 1986, was denied by Administrative Law Judge Giles J. McCarthy on July 18, 1990, because claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 8. Because claimant did not establish at least fifteen years of qualifying coal mine employment, a recent amendment to the Black Lung Benefits Act, which became effective on March 23, 2010, does not affect this case. *See* 30 U.S.C. §921(c)(4), *amended* by Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

³ 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).

⁴ "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).

totally disabled due to 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 finding that the x-ray evidence of record establishes simple, clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer also challenges the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).⁵ Claimant did not file a response brief, and the Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Clinical Pneumoconiosis

As noted above, employer stipulated to the existence of simple, clinical pneumoconiosis based upon the biopsy evidence, and the administrative law judge accepted employer's stipulation. The administrative law judge went on to find that a preponderance of the x-ray evidence also established the existence of simple, clinical pneumoconiosis. Decision and Order at 3, 8-9. Employer takes issue with that determination, arguing that the administrative law judge's analysis of the conflicting x-ray readings was inadequately explained. Employer's Brief at 6-11. We decline to address employer's argument, as employer has not explained how it was prejudiced by

⁵ Employer does not challenge the administrative law judge's findings of at least 10.74 years of coal mine employment, that claimant established the existence of simple, clinical pneumoconiosis based on biopsy evidence and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the administrative law judge's finding, given its stipulation to the existence of simple, clinical pneumoconiosis, which was accepted by the administrative law judge.⁶ See *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10, 11.

Total Disability Due to Pneumoconiosis

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered the medical opinions of Drs. Forehand, Smiddy, Fino, and Tuteur. Dr. Forehand diagnosed claimant with "complicated coal workers' pneumoconiosis"⁷ due to "silica exposure as a drill operator," and with "cigarette smoker's lung disease." Director's Exhibit 14 at 4. Addressing the cause of claimant's total disability, Dr. Forehand opined that:

Based on the claimant's work history, appearance of the chest x-ray, pattern of disability and the fact that cigarette smoking does not cause conglomerate masses, coal dust exposure is a primary cause of claimant's respiratory impairment. Cigarette smoking has contributed to abnormal vent[ilatory] study. Other causes of bilateral upper lobe masses to be ruled out. Had claimant not worked in coal mining, he would not be as disabled, and short of breath.

Id.

⁶ Employer does not argue that the x-ray evidence undermines the positive biopsy evidence, based upon which, it stipulated to the existence of simple, clinical pneumoconiosis. Employer's Brief to the Administrative Law Judge, Mar. 30, 2012, at 2-3. Employer states only that "the contrary opinions of the physicians may warrant greater or lesser weight in a disability causation analysis based on the findings of simple or complicated pneumoconiosis or other diseases." Employer's Brief at 11. As noted above, however, the administrative law judge found that claimant did not establish the existence of either complicated pneumoconiosis or legal pneumoconiosis. Consequently, the analysis of disability causation under 20 C.F.R. §718.204(c) in this case is limited to whether claimant has established that simple, clinical pneumoconiosis is a substantially contributing cause of his total disability.

⁷ Dr. Forehand, a B reader, interpreted an August 13, 2009 x-ray as positive for simple pneumoconiosis and Category A large opacities of complicated pneumoconiosis. Director's Exhibit 14. The administrative law judge found that x-ray to be negative for complicated pneumoconiosis, based on the negative readings by two more highly-qualified readers. Decision and Order at 8-9. The administrative law judge determined that the record contains no other evidence to support a finding of complicated pneumoconiosis. Decision and Order at 9 n.5.

Dr. Smiddy diagnosed claimant with “chronic obstructive pulmonary disease with coal workers’ pneumoconiosis and chronic bronchitis,” but did not address the cause of claimant’s total disability. Claimant’s Exhibit 2. Dr. Fino opined that claimant has disabling obstructive lung disease, but stated that, based on the medical information before him, it was “difficult to rule in or rule out both the smoking and/or a coal mine dust related pulmonary condition in this case.” Director’s Exhibit 15 at 11.

Dr. Tuteur diagnosed claimant with “simple coal workers’ pneumoconiosis” that is “of insufficient severity . . . to cause clinical symptoms, physical examination abnormalities, or impairment of pulmonary function.” Employer’s Exhibit 2 at 9. Further, Dr. Tuteur opined that claimant has a moderately severe obstructive impairment due solely to smoking. *Id.* In a later report, after review of additional medical data, Dr. Tuteur opined that claimant has chronic obstructive pulmonary disease due to smoking, which causes him only mild impairment, and is not disabling. Employer’s Exhibit 7. Dr. Tuteur reiterated that claimant has “mild, simple coal workers’ pneumoconiosis” that is insufficient to produce symptoms or any impairment of pulmonary function. Employer’s Exhibit 7 at 6.

The administrative law judge summarized Dr. Forehand’s opinion, and found it to be “sufficiently documented and reasoned.” Decision and Order at 15. She further found that the opinions of Drs. Smiddy and Fino were “not helpful on the issue of disability causation.” *Id.* The administrative law judge discounted Dr. Tuteur’s opinion. First, the administrative law judge found that Dr. Tuteur’s opinion that claimant is not totally disabled was contrary to her finding that claimant is totally disabled. Second, the administrative law judge found that Dr. Tuteur relied on an inaccurate and exaggerated smoking history in reaching his conclusion that claimant’s respiratory impairment is due to smoking. Third, the administrative law judge found that Dr. Tuteur did not adequately explain how he concluded that coal mine dust exposure did not also contribute to claimant’s respiratory impairment. The administrative law judge therefore determined that a preponderance of the well-reasoned medical opinion evidence established that “coal workers’ pneumoconiosis is a substantially contributing cause of claimant’s total disability.” *Id.*

Employer contends that the administrative law judge erred in relying on Dr. Forehand’s opinion without considering that Dr. Forehand “based his disability assessment to some extent” on his erroneous belief that claimant has complicated pneumoconiosis. Employer’s Brief at 16. Employer’s contention has merit. The record reflects Dr. Forehand’s x-ray-based diagnosis of complicated pneumoconiosis, and his reasoning that, “[b]ased on the claimant’s work history, *appearance of the chest x-ray*, pattern of disability *and the fact that cigarette smoking does not cause conglomerate masses*, coal dust exposure is a primary cause of claimant’s respiratory impairment.” Director’s Exhibit 14 at 4 (emphasis added). As was discussed above, the administrative

law judge found that the medical evidence does not establish the existence of complicated pneumoconiosis. Therefore, the administrative law judge erred in crediting Dr. Forehand's disability causation opinion without considering whether it is based on a diagnosis of complicated pneumoconiosis that is inconsistent with the administrative law judge's factual findings. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761-62, 21 BLR 2-587, 2-602-03 (4th Cir. 1999). Accordingly, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), and remand this case to her for further consideration of Dr. Forehand's opinion.

On remand, the administrative law judge must determine whether Dr. Forehand's opinion meets claimant's burden to establish that simple, clinical pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c), and explain her findings. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372-73 (4th Cir. 2006); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990). In considering that issue, the administrative law judge must address whether, and to what extent, she finds that Dr. Forehand's disability causation opinion is based on a discredited diagnosis of complicated pneumoconiosis, and must explain her determination of the weight she accords Dr. Forehand's opinion in light of that analysis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Further, for the reasons set forth below, the administrative law judge, on remand, must consider Dr. Forehand's opinion along with Dr. Tuteur's opinion, that claimant's simple, clinical pneumoconiosis is insufficient to cause any impairment, and explain her resolution of the conflicting opinions.

Employer argues that the administrative law judge erred in discrediting Dr. Tuteur's disability causation opinion because he did not diagnose claimant with a totally disabling respiratory impairment. Employer's Brief at 17-18. Employer notes that Dr. Tuteur diagnosed claimant with a respiratory impairment, and opined that claimant's simple, clinical pneumoconiosis is too mild to cause any impairment. *Id.* Employer's contention has merit. The issue before the administrative law judge was the cause of claimant's total respiratory disability, not its existence, and Dr. Tuteur addressed whether claimant's simple, clinical pneumoconiosis contributes to his impairment. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-71, 1-75 (2004). The administrative law judge therefore erred in discrediting Dr. Tuteur's opinion on the basis that he did not agree that claimant's obstructive respiratory impairment is severe enough to disable claimant. *See Smith*, 23 BLR at 1-75.

Additionally, we agree with employer that the administrative law judge did not consider all of the relevant evidence when she discounted Dr. Tuteur's opinion as based on an exaggerated smoking history of forty pack-years, compared to her finding that

claimant smoked between “7 pack years and a maximum of 12.5 pack years.” Decision and Order at 7; Employer’s Brief at 13-14. The administrative law judge found that Dr. Tuteur’s calculation of forty-pack years was unexplained and unsupported by evidence in the record. In so finding, the administrative law judge did not address Dr. Tuteur’s observation that, despite notations in the record that claimant quit smoking in 1998 and smoked only one-half of a pack of cigarettes a day, carboxyhemoglobin testing conducted by Dr. Forehand on August 13, 2009, indicated “markedly elevated” levels, “indicative of exposure to products of combustion at a level typical of a person smoking one package per day.” Employer’s Exhibit 2 at 2. We must therefore vacate the administrative law judge’s finding as to the extent of claimant’s smoking history, and instruct her to consider all the relevant evidence on that issue,⁸ and to explain her finding in light of all the relevant evidence. *See* 30 U.S.C. §923(b). In view of our holding, we also vacate the administrative law judge’s decision to discount Dr. Tuteur’s opinion as based on an exaggerated smoking history, and her determination that Dr. Tuteur did not adequately explain his opinion that claimant is totally disabled due to smoking. We instruct the administrative law judge, on remand, to reconsider the disability causation opinions of both Drs. Tuteur and Forehand in light of her findings regarding the extent of claimant’s smoking history.

⁸ On remand, the administrative law judge should include in her consideration any smoking histories contained in the record of claimant’s prior claim. Director’s Exhibit 1.

Accordingly, the administrative law judge's Decision and Order Awarding Subsequent Claim 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.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge