BRB No. 13-0083 BLA

PATRICK JENKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARPENTERTOWN COAL AND COKE COMPANY	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY/BROADSPIRE	)	DATE ISSUED: 12/19/2013
	)	
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 of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Dianna Cannon (Cannon Disability Law, P.C.), Salt Lake City, Utah, for claimant.

Christopher L. Wildfire (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

DOLDER, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order on Remand (2005-BLA-05465) of Administrative Law Judge Jennifer Gee awarding benefits 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, involving a miner's claim filed on February 18, 2004,[1] is before the Board for the second time. Director's Exhibit 2.

In her initial Decision and Order, the administrative law judge credited claimant with ten and three-quarter years of coal mine employment,[2] and found that claimant had a smoking history of forty to eighty-six pack years. The administrative law judge further determined that the medical opinion evidence established the existence of legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.201(a)(2). Employer conceded total disability pursuant to 20 C.F.R. §718.204(b)(2), and the administrative law judge found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge failed to consider evidence which, if credited, could indicate a more extensive smoking history than the one she found established. *P.J.* [*Jenkins*] *v. Carpentertown Coal & Coke Co.*, BRB No. 07-0958 BLA, slip op. at 5-6 (Aug. 25, 2008)(unpub.). Because the extent of claimant's smoking history was relevant to the credibility of the physicians' opinions regarding whether claimant's disabling COPD arose out of his coal mine employment, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R.

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim because it was filed before January 1, 2005. The relevant version of all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[2] The record indicates that claimant's last coal mine employment was in Pennsylvania. Director's Exhibits 3, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[3] "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). "Arising out of coal mine employment" refers to "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).

§§718.202(a)(4) and 718.204(c). *Jenkins*, slip op. at 6. The Board remanded the case for the administrative law judge to consider all of the relevant evidence and determine claimant's smoking history, then reassess the medical opinion evidence in light of her determination, if it changed. *Jenkins*, slip op. at 6-7. The Board further instructed the administrative law judge to reconsider the documentation and reasoning of the medical opinions and the weight to be accorded the opinions of Drs. Gagon, Farney, Goodman, and Shockey.[4] *Jenkins*, slip op. at 6.

On remand, the administrative law judge found that claimant's testimony and the medical evidence established that he had "nearly a 43 pack year smoking history ending around 2000 or 2001." Decision and Order on Remand at 6. Relying primarily on the medical opinion of Dr. Shockey, the administrative law judge found that claimant suffers from legal pneumoconiosis, in the form of COPD due, in part, to coal mine dust exposure pursuant to 20 C.F.R. §§718.202(a)(4), 718.201(a)(2), and that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in her determination of the extent of claimant's smoking history. Employer further asserts that the administrative law judge erred in her analysis of the medical opinion evidence when she found that claimant established the existence of legal pneumoconiosis and that he is totally disabled due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in referring to the preamble to the 2000 regulatory revisions when assessing the credibility of the medical opinions.

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).

In order to establish entitlement to benefits under Part 718 in a 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.

[4] The Board affirmed, as unchallenged, that administrative law judge's findings of ten and three-quarter years of coal mine employment, and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *P.J.* [*Jenkins*] *v. Carpentertown Coal & Coke Co.*, BRB No. 07-0958 BLA, slip op. at 3 n.3 (Aug. 25, 2008)(unpub.).

§§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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).

Claimant's Smoking History

Employer challenges the administrative law judge's finding, on remand, that claimant had a smoking history of approximately forty-three pack years. Initially, the administrative law judge found that claimant smoked forty to eighty-six pack years, ending around 2000. The Board vacated that finding because the administrative law judge's decision did not reflect that she considered evidence "which, if credited, may indicate that the upper limit of claimant's smoking history was considerably higher. . . ."[5] *Jenkins*, slip op. at 6.

On remand, the administrative law judge summarized the smoking history evidence of record, including claimant's testimony and the notations in medical reports and in claimant's medical treatment records. Decision and Order on Remand at 3-6; Director's Exhibits 12, 28, 32; Claimant's Exhibits 1, 4, 6; Employer's Exhibits 1, 3; Hearing Transcript at 31-33. After considering this evidence "in greater detail" than she had in her initial decision, the administrative law judge found that claimant's testimony was credible and more detailed than any smoking history recorded by a physician, and that it indicated that claimant's smoking habit varied in intensity:

> By his own testimony at the hearing, the miner's smoking history spanned 44 years from around 1957 until around September 2000. Importantly, his testimony was credible and revealed a significantly variable history over time, starting with one cigarette per week and ending with one pack of cigarettes per day during the week and two to three packs per day on the weekends.

Decision and Order on Remand at 5. The administrative law judge further found that claimant's testimony was supported by the physicians' notations, in their medical reports, that claimant smoked for forty to forty-five years, and quit in 2000 or 2001. *Id*.

Additionally, the administrative law judge determined that the notations suggesting a more extensive smoking history were not persuasive, given the record evidence indicating that claimant varied the amount he smoked over a period of forty-four years:

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[5] The Board summarized smoking history notations contained in Dr. Gagon's treatment records that were not specifically discussed by the administrative law judge, including one entry noting "Pk Yrs: 135." *Jenkins*, slip op. at 5.

> [The] entry of "135 pack years" [is] an anomaly and inconsistent with the totality of the evidence on this issue in this record. The record does not give any indication who gave the history or how it was obtained. . . . More importantly, the entry would require me to find that the Claimant had been smoking 3 packs every day for 45 years. The record is clear that the Claimant started smoking only one cigarette per week when he started, and was a light smoker when he finally quit. It is inconceivable that anyone would smoke the same amount every day for 45 years. It is more likely as the Claimant testified that he smoked less during the week while he was working and more on the weekends. As a result, this entry has little, if any, persuasive value, and I assign little or no weight to it than those made by the physicians in this case.

Decision and Order on Remand at 5. The administrative law judge therefore explained that "having reviewed the miner's testimony and medical evidence more closely, I conclude that the miner had nearly a 43 pack year smoking history ending around 2000 or 2001."[6] Decision and Order on Remand at 6.

After consideration of employer's arguments, the administrative law judge's findings, and the evidence of record, we hold that the administrative law judge acted within her discretion as the finder of fact in determining that claimant's smoking history was approximately forty-three pack years. The administrative law judge considered all of the relevant evidence, and reasonably relied upon claimant's testimony, which she found to be detailed and credible, to determine that the amount that claimant smoked varied over time. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). The Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Accordingly, we affirm the administrative law judge's finding that claimant had a smoking history of approximately forty-three pack years, as it is supported by substantial evidence.

[6] Based on claimant's testimony describing the varying amounts he smoked per day during different time periods, the administrative law judge more specifically calculated claimant's smoking history as totaling 42.94 pack years. Decision and Order on Remand at 3.

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in crediting the opinions of Drs. Shockey and Gagon,[7] and in discounting the opinions of Drs. Farney and Goodman,[8] to find the existence of legal pneumoconiosis established. The administrative law judge found that Dr. Shockey's opinion was a documented and reasoned diagnosis of "legal coal workers' pneumoconiosis," and found that he relied on a coal mine employment history "similar to that found by [the administrative law judge] on this record." Decision and Order on Remand at 17. The administrative law judge found that Dr. Gagon's opinion was documented, but discounted it because Dr. Gagon "relied on smoking and coal mine employment histories that are significantly higher than the histories established on this record." *Id*. at 19. The administrative law judge found that

[7] Dr. Shockey, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant, and reported that his chest x-ray revealed "COPD, CWP," and that his pulmonary function study revealed "severe obstruction." Director's Exhibit 12 at 3. Dr. Shockey diagnosed claimant with chronic bronchitis, based on "smoking history, PFTs, ABG, [and] CXR," and with "CWP," based on "work history, PFTs, ABG [and] CXR." Director's Exhibit 12 at 4. Dr. Shockey indicated that claimant's chronic bronchitis is due to smoking, and that his "CWP" is due to "coal mining exposure." *Id*. Dr. Shockey opined that chronic bronchitis caused 75% of claimant's impairment, and that coal workers' pneumoconiosis caused 25% of his impairment. *Id*. Dr. Gagon, who is Board-certified in Family Medicine and who had been treating claimant for three to four years, diagnosed "coal miner's pneumoconiosis and COPD." Claimant's Exhibit 1. Noting that claimant was exposed to coal dust for nineteen years and "was a 2 PPD smoker from 1958 until 2001," Dr. Gagon opined that claimant's "lung disease is . . . about 75% caused by smoking and 25% caused by coal dust with the coal dust exacerbating his COPD." *Id*.

[8] Dr. Farney, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed Dr. Shockey's report and claimant's medical treatment records. Dr. Farney diagnosed severe COPD due to "chronic tobacco exposure," and reported that he found no evidence of pneumoconiosis. Employer's Exhibit 1 at 4. Dr. Farney stated that although "COPD can be associated with coal dust exposure," in this case claimant's coal dust exposure history did not account for "the degree of respiratory impairment and symptoms noted." *Id*. Dr. Farney determined that "[i]n comparison of his occupational and exposure histories the overwhelming risk factor is tobacco smoke." Employer's Exhibit 1 at 4. Finally, Dr. Goodman, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and diagnosed claimant with severe COPD due to "heavy tobacco smoking over many years." Employer's Exhibit 3 at 3.

the opinions of Drs. Farney and Goodman, that claimant's COPD is due solely to smoking, merited less weight, because the physicians did not adequately explain why they concluded that claimant's coal mine dust exposure did not contribute to, or aggravate, his COPD. In weighing all of the evidence relating to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that "the conclusions of the better reasoned and documented medical opinion of Dr. Shockey, as supported by the opinion and testing by Dr. Gagon, establishes the existence of legal pneumoconiosis . . . ." *Id.* at 21.

Employer contends that the administrative law judge erred in finding that Dr. Shockey's opinion was documented and reasoned, when she discounted his opinion in her first decision. Employer's Brief at 14-16. We disagree. In our prior decision, we vacated the administrative law judge's findings regarding the existence of legal pneumoconiosis and total disability due to pneumoconiosis, the effect of which was to return the parties to the status quo ante the administrative law judge's decision on those issues. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985). Further, we specifically instructed the administrative law judge to reconsider the documentation and reasoning of the medical opinions, on remand. *Jenkins*, slip op. at 6. Therefore, we reject employer's allegation of error.

Substantial evidence supports the administrative law judge's determination that Dr. Shockey's opinion constitutes a documented and reasoned diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); Director's Exhibit 12. Dr. Shockey specified that his diagnosis of "CWP" was based, in part, on claimant's pulmonary function study, which indicated "severe obstruction," and his chest x-ray, which indicated both "COPD" and "CWP."[9] Further, Dr. Shockey opined that claimant's "CWP" due to "coal mining exposure" contributed 25% to claimant's obstructive impairment. Director's Exhibit 12 at 4. We reject employer's assertion that the administrative law judge erred in finding that Dr. Shockey's opinion is reasoned when, employer asserts, Dr. Shockey relied on a coal mine employment history that was greater than the 10.75 years that the administrative law judge found established.[10] The administrative law judge

[9] Dr. Shockey classified claimant's x-ray as "0/1," a negative reading for the fibrotic lung disease encompassed within the more narrow definition of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1).

[10] Employer notes that Dr. Shockey did not set forth a specific coal mine employment history on his Department of Labor medical report form, but instead indicated that claimant's CM-911a coal mine employment history form was attached. Employer argues that the way in which the years of alleged coal mine employment were listed on that form may have suggested that claimant worked continuously in coal mine

found that claimant's 10.75 years of coal mine employment constituted a "significant" exposure to coal mine dust, a finding that employer has not challenged and which is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge reasonably considered the coal mine employment history that was reviewed by Dr. Shockey to be similarly significant.[11] *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

We also reject employer's contention that the administrative law judge erred by relying on Dr. Gagon's opinion. Contrary to employer's characterization of the administrative law judge's decision, the administrative law judge did not accord greater weight to Dr. Gagon's opinion because he treated claimant. The administrative law judge found that "if Dr. Gagon's opinion is credible, [it] would be entitled to special consideration under the treating physician rule" of 20 C.F.R. §718.104(d). Decision and Order on Remand at 18. The administrative law judge, however, discounted Dr. Gagon's opinion, and chose to rely primarily on the opinion of Dr. Shockey. Because the administrative law judge accorded only limited weight to Dr. Gagon's opinion, we find it unnecessary to address employer's multiple arguments challenging the documentation and reasoning underlying Dr. Gagnon's opinion. Employer's Brief at 21-31.

Employer asserts that the opinions of Drs. Farney and Goodman should have been credited, as they "are more compelling, competent, reliable, and persuasive" than the contrary evidence. Employer's Brief at 31. This argument is tantamount to a request to reweigh the evidence, which the Board is not empowered to do. *Anderson*, 12 BLR at 1-113. The administrative law judge, as the fact finder, acted within her discretion in finding that Drs. Farney and Goodman did not adequately explain their bases for concluding that claimant's significant coal mine dust exposure did not contribute, along with smoking, to his COPD. *See* 20 C.F.R. §718.201(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. We also reject employer's assertion that the administrative law judge erred in referring to the preamble to the 2000 revisions to the regulations when she considered the opinions of Drs. Farney and Goodman. Employer's Brief at 32-38. The administrative law judge has the discretion to consult the preamble to the regulations as a statement of the medical principles accepted by the Department of Labor when it revised

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employment from 1968 through 1980, and from 1983 through 1989, a total, employer asserts, of twenty years. Employer's Brief at 17.

[11] Moreover, the record reflects that Dr. Shockey attributed claimant's impairment, in part, to coal mine dust exposure even though he believed that claimant had a greater smoking history than the administrative law judge found established. Director's Exhibit 12 at 2.

the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *see also A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Therefore, we reject employer's allegations of error, and affirm the administrative law judge's determination that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Total Disability due to Pneumoconiosis

Employer challenges the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge found that Dr. Shockey's opinion, that 25% of claimant's impairment is due to pneumoconiosis, was reasoned and documented and entitled to greater weight. The administrative law judge accorded less weight to the opinions of Drs. Farney and Goodman, that claimant's disability is due solely to smoking, because they concluded that legal pneumoconiosis was not present.

We affirm the administrative law judge's permissible determination that Dr. Shockey's opinion was the most probative of record. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. The administrative law judge reasonably discounted the contrary opinions of Drs. Farney and Goodman, because the physicians did not diagnose claimant with legal pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004). Therefore, we affirm the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's determination that the administrative law judge reasonably determined claimant's smoking history, and permissibly interpreted Dr. Shockey's opinion as diagnosing claimant with legal pneumoconiosis. Further, I concur with the majority that the administrative law judge permissibly discounted the opinions of Drs. Farney and Goodman in her analysis of legal pneumoconiosis.

However, I respectfully dissent from the determination that the administrative law judge adequately considered whether Dr. Shockey relied on an accurate coal mine employment history. The administrative law judge found that claimant had 10.75 years of coal mine employment. As was noted above, Dr. Shockey did not record a specific coal mine employment history in his medical report, but indicated that claimant's CM-911a employment history form was attached. Director's Exhibit 12 at 1. That form sets forth two periods of coal mine employment, one from 1968 to 1980, and one from 1983 to 1989, with six different employers. Director's Exhibit 3. As completed, the form does not indicate any gaps in employment in the years listed, suggesting a total coal mine employment history of between eighteen and twenty years. *Id.*

The administrative law judge found that Dr. Shockey relied on a coal mine employment history that was "similar" to her finding, but she did not explain that statement. Decision and Order on Remand at 17. The administrative law judge's failure to explain her determination is troubling, given her decision to discount Dr. Gagon's opinion because it was based on a history of nineteen years of coal mine employment,

which the administrative law judge found to be "significantly higher" than the coal mine employment history she found established. Decision and Order on Remand at 19.

Because the administrative law judge did not adequately address whether there was a discrepancy between her coal mine employment finding and the coal mine employment history considered by Dr. Shockey, and whether any such discrepancy affected the credibility of Dr. Shockey's opinion, I would remand this case to the administrative law judge for further consideration. *See Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986). Therefore, I would vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c), and remand this case for the administrative law judge to reconsider Dr. Shockey's opinion, and determine whether claimant has met his burden to establish the existence of pneumoconiosis and that he is totally disabled due to pneumoconiosis. I concur in all other respects with the majority's opinion.

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JUDITH S. BOGGS
Administrative Appeals Judge