**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0428 BLA

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| CAROL SPATAFORE o/b/o JOHN SPATAFORE, SR. | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: 09/27/2018 |
| Employer-Respondent | ) | |
| 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 Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizen's Law Center) Whitesburg, Kentucky, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand Denying Benefits of Administrative Law Judge Drew A. Swank, rendered on a miner's claim filed on March 25, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time.

The Board previously vacated the administrative law judge's finding that claimant established 17.8 years of underground coal mine employment and invocation of the rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to Section 411(c)(4).[2] The Board held that the administrative law judge erred in crediting the 10.8 years the miner worked as a state mine safety trainer or instructor as coal mine employment under the Act.[3] *Spatafore v. Consolidation Coal Co.*, 25 BLR 1-179, 1-189 (2016). Consequently, the case was remanded for further consideration of whether claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718, without aid of the Section 411(c)(4) presumption. *Id*. at 1-192-93.

On remand, the administrative law judge determined that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant requests that the Board reconsider en banc its holding that the miner's work as a state mine safety trainer or instructor was not coal mine employment for purposes of invocation of the Section 411(c)(4) presumption. Claimant further argues that

[1] Claimant is the widow of the miner and is pursuing the miner's claim on his behalf.

[2] If a miner has fifteen or more years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and has a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) of the Act provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] The administrative law judge credited the miner with seven years of underground coal mine employment with employer and 10.8 years of underground coal mine employment as a mine safety trainer or instructor for West Virginia mine regulatory agencies. April 7, 2015 Decision and Order at 5, 7; Director's Exhibits 4, 5; Hearing Transcript at 41-42.

the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a brief urging the Board to again reject claimant's assertion that the miner's work as a state mine safety trainer or instructor was coal mine employment under the Act. Claimant filed a reply brief, reiterating her arguments.

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.[4] 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).

Claimant contends that the Board's prior decision did not consider all of the evidence relevant to whether the miner's work as a state mine safety trainer qualifies as coal mine employment under the Act.[5] Claimant resurrects arguments in this appeal that were thoroughly considered and rejected by the Board in the prior appeal.[6] The Board's holding on this issue constitutes the law of the case, and claimant has not shown that an exception to the doctrine applies. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting). We therefore decline claimant's request to reconsider whether the miner's work as a mine safety trainer or

[4] Because the miner's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 5.

[5] Claimant's request for en banc reconsideration of the Board's prior decision is denied as untimely. 20 C.F.R. §802.407.

[6] The Board previously rejected claimant's argument that because the miner "[t]rained mine rescue teams and did safety training for miners underground" his work was integral to the production and extraction of coal. *Spatafore v. Consolidation Coal Co.*, 25 BLR 1-179, 1-184 (2016). The Board also rejected claimant's contention that the miner became "a coal miner" under the Act upon his first day of underground coal mine work and that any subsequent work performed at an underground mine site, even if the work was performed as a state mine safety trainer or instructor, constitutes qualifying coal mine employment for purposes of invocation of the Section 411(c)(4) presumption. *Id*. at 1-188-89.

instructor for West Virginia state mine regulatory agencies constituted coal mine employment.

Claimant next argues that the administrative law judge erred in denying benefits by finding insufficient evidence to establish the existence of pneumoconiosis.[7] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge weighed eleven readings of four x-rays classified under the ILO classification system. Decision and Order on Remand at 8, *citing* 20 C.F.R. §718.102. He noted that all of the physicians who interpreted x-rays in this case were dually qualified as Board-certified radiologists and B readers. Decision and Order on Remand at 7-8.

Drs. Smith and Alexander read the April 25, 2011 x-ray as positive for pneumoconiosis, while Dr. Meyer read it as negative. Director's Exhibits 11, 25; Claimant's Exhibit 3. Dr. Smith read the March 14, 2012 x-ray as positive for pneumoconiosis and Dr. Tarver read it as negative. Claimant's Exhibit 1; Employer's Exhibit 15. Drs. Smith and Alexander read the May 7, 2012 x-ray as positive for pneumoconiosis, and Drs. Shipley and Seaman read it as negative. Claimant's Exhibits 4, 5; Employer's Exhibits 7, 10. Dr. Smith read the April 30, 2013 x-ray as positive for pneumoconiosis and Dr. Meyer read it as negative. Claimant's Exhibit 6; Employer's Exhibit 16.

In considering the weight to accord the conflicting x-ray evidence, the administrative law judge outlined what he considered to be relevant qualifications of the physicians and stated:

> Based on the credentials set forth above, including board-certification, B-reader status, radiological experience, academic publications, and affiliation with a sizeable teaching hospital, the undersigned finds that Drs. Meyer, Seaman, Shipley, and Tarver are the most highly qualified radiologists in this matter. *Doctors Alexander and Smith, neither of whom has published extensively, are found to be less qualified*.

[7] In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, without the benefit of the Section 411(c)(3) or Section 411(c)(4) presumption, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner was totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (en banc). 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).

Decision and Order on Remand at 8 (emphasis added). The administrative law judge then determined that the April 25, 2011 x-ray was positive for pneumoconiosis, based on the majority of positive readings of this x-ray by the dually qualified radiologists.[8] *Id*. at 10. He also determined that the March 14, 2012, May 7, 2012, and April 30, 2013 x-rays "were all numerically in equipoise," based on the equal number of positive and negative readings by the dually qualified radiologists who read each of those films. *Id*. at 10. The administrative law judge noted, however, that "in each instance the more highly-qualified radiologist read the film as negative." *Id*. Finding that the preponderance of the evidence, including the three most recent x-rays, was negative, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id*.

Claimant contends that the administrative law judge erred in ranking the physicians based on the determinative factor of whether they had "published extensively" without regard to whether the publications were related to the *radiological diagnosis* of coal workers' pneumoconiosis.[9] Claimant further asserts that the administrative law judge's use of "[t]he word 'extensively' is ambiguous and could either refer [to] the number of publications, or to the breadth of subject areas or journals that the reader published in." Claimant's Brief in Support of Petition for Review at 30. Moreover, claimant contends, the "fact that we do not know just what basis the [administrative law judge] was using means that [he] has not met his duty to sufficiently explain his decision" in accordance with the Administrative Procedure Act (APA).[10] *Id.* Even if publications could properly be taken into account, claimant asserts that the administrative law judge failed to explain why Dr. Seaman is better qualified "in light of her lack of tenure-track teaching position,

[8] The administrative law judge made a typographical error to the extent he initially described that a majority of the readings of this x-ray by the dually qualified radiologists and B readers was negative, when in fact the majority was positive.

[9] Claimant alleges that Dr. Tarver listed seventy publications, Dr. Meyer listed fifty-nine publications, and Dr. Shipley listed fourteen publications - but that none of these publications are related to coal workers' pneumoconiosis.

[10] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

equal number of publications as Dr. Alexander, and very limited experience as a radiologist." *Id*. at 36. Claimant's assertions of error have merit, in part.

We agree with claimant that the administrative law judge's weighing of the x-ray evidence is not adequately explained in accordance with the APA. The regulation at 20 C.F.R. §718.202(a)(1) specifically provides that "[a] chest X-ray . . . may form the basis for a finding of the existence of pneumoconiosis" and, in cases "where two or more X-ray reports are in conflict . . . consideration must be given to the *radiological* qualifications of the physicians interpreting [them]." 20 C.F.R. §718.202(a)(1) (emphasis added). In this case, the administrative law judge did not adequately explain the basis on which he found the publications relevant and how he determined which physicians were better qualified. *Id*; *see also* 65 Fed Reg. 79920, 79945 (Dec. 20, 2000) (The adjudicator should consider any relevant factor in assessing a physician's credibility, and each party may prove or refute the relevance of that factor) *citing Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993) (Relevant academic qualifications such as whether a physician is a professor of radiology may be considered by the administrative law judge in weighing the x-ray evidence). Thus, because the administrative law judge failed to adequately explain the bases for his credibility findings, we vacate his finding that claimant failed to establish the existence of clinical pneumoconiosis[11] pursuant to 20 C.F.R. §718.202(a)(1). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). On remand, the administrative law judge is instructed to reweigh that x-ray evidence, taking into consideration the relevant radiological qualifications of the physicians, and to explain in accordance with the APA, the relevance of the factors he applies in resolving the conflict in the x-ray evidence and in determining whether claimant has established clinical pneumoconiosis.[12]

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[11] Clinical pneumoconiosis consists of "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).

[12] Claimant asserts that while Dr. Shipley reported no opacities consistent with pneumoconiosis on the ILO form, Dr. Shipley's narrative statement attached to his ILO report states only that there are "no upper zone predominate small or large rounded opacities." Claimant's Brief in Support of Petition for Review at 26, *citing* Employer's Exhibit 7. The administrative law judge on remand should address the validity of claimant's argument that Dr. Shipley's negative reading is "silent" as to the presence of irregular opacities consistent with pneumoconiosis and therefore should not be credited. Claimant's Brief in Support of Petition for Review at 28.

Pursuant to 20 C.F.R. §718.202(a)(4),[13] claimant asserts that the administrative law judge further erred in finding that claimant failed to establish the existence of legal pneumoconiosis, based on the medical opinion evidence. In order to establish legal pneumoconiosis, claimant must prove that the miner had a chronic pulmonary disease or respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

The administrative law judge noted that claimant relied on the opinions of Drs. Celko,[14] Rasmussen and Sood. Dr. Rasmussen opined that the miner had chronic obstructive pulmonary disease (COPD) and identified three possible factors for that condition: a "47-year pack history of smoking;" "31 years of coal mine dust exposure;" and a history of childhood asthma. Claimant's Exhibit 2. Dr. Rasmussen stated that "[i]t is not possible to separate the effects of these three potential causes. All must be considered significant potential contributing causes including [the miner's] coal dust exposure." *Id*. In a deposition, Dr. Rasmussen stated that smoking was the primary cause of the miner's COPD with "some contribution from his coal dust exposure." *Id*. at 20. He also stated that because "coal mine dust causes the same type of abnormality that . . . smoking does," he was "not . . . able to exclude either one of those causative factors." *Id*. at 20-21.

Dr. Sood also diagnosed COPD and stated that the miner's exposure to coal mine dust was "a substantially contributory factor for the causation or aggravation of COPD" along with smoking. Claimant's Exhibit 7. Dr. Sood explained:

> Coal dust induced emphysema and smoke induced emphysema occurs through similar mechanisms – namely, the excess release of destructive enzymes from dust or smoke stimulated inflammatory cells in association

[13] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and the administrative law judge's rejection of Dr. Celko's opinion that the miner had clinical pneumoconiosis under 20 C.F.R. §718.202(a)(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). There are no other medical opinions diagnosing clinical pneumoconiosis relevant to 20 C.F.R. §718.202(a)(4).

[14] The administrative law judge gave diminished weight to Dr. Celko's diagnosis of legal pneumoconiosis on the ground that he provided no explanation for why coal dust exposure played any role in causing the miner's COPD. Decision and Order on Remand at 13. We affirm, as unchallenged by claimant in this appeal, the administrative law judge's findings with respect to Dr. Celko. *See Skrack*, 6 BLR at 1-711.

> with a decrease in protective enzymes in the lungs. Therefore, the clinical radiological, physiological and pathological presentation (other than presence of coal macules) of COPD in coal dust induced COPD is no different from that of tobacco smoke induced COPD. Therefore, it is not possible to scientifically apportion dust versus cigarette smoke in the causation of COPD in the case of [this miner].

*Id*.

The administrative law judge discredited the opinions of Drs. Rasmussen and Sood, based on the following rationale:

> [T]hese opinions contained the same fatal flaw; they were premised on the logical fallacy that just because coal dust *can* cause obstructive lung disease, it necessarily means that it *has* contributed [to the miner's] obstructive lung disease. Even if it is assumed that Drs. Rasmussen and Sood were correct in stating that the effects of coal dust exposure and cigarette smoking cannot be distinguished, this would actually support the conclusion that it is *impossible* to affirmatively state that coal dust contributed to the miner's obstructive lung disease. None of the opining physicians in this case provided a well-documented and reasoned explanation for why coal dust exposure was necessarily a contributing cause of the miner's lung disease. . . .

Decision and Order on Remand at 19. Thus, the administrative law judge found that claimant failed to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*.

Claimant asserts that the administrative law judge misstated the reasoning of Drs. Rasmussen and Sood as being that coal dust exposure "must" be a cause of claimant's respiratory disease when, in fact, "their reasoning was that coal-mine dust was a significant factor that could not be excluded," given the miner's lengthy history of smoking and coal dust exposure. Claimant's Brief in Support of Petition for Review at 38. Claimant argues that the administrative law judge "erred legally in his analysis of how a medical opinion could, as a matter of logic, prove legal pneumoconiosis in a smoking miner." Claimant's Reply Brief at 13. Claimant contends that while the administrative law judge "was not required to find their reasoning to be credible," he was required to recognize that Dr. Rasmussen's and Dr. Sood's rationales were "logically sufficient" under applicable law. Claimant's Brief in Support of Petition for Review at 39. Claimant's assertions of error have some merit.

A physician need not apportion a precise percentage of a miner's lung disease to cigarette smoking versus coal dust exposure in order to establish the existence of legal

pneumoconiosis, provided that the physician has credibly diagnosed a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2); *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Cornett v. Benham Coal*, Inc., 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be the sole cause of the miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them). The administrative law judge's "logical fallacy" analysis suggests that he improperly required Drs. Rasmussen and Sood to apportion the effects of smoking and coal dust exposure in order to credit their diagnoses of legal pneumoconiosis. *See Williams*, 453 F.3d at 622; *Cornett*, 227 F.3d at 576-77.

The administrative law judge also stated, however, that neither Dr. Rasmussen nor Dr. Sood "provided a well-documented or reasoned explanation for why coal dust exposure was necessarily a contributing cause of the miner's lung disease." Decision and Order on Remand at 19. It is not clear from the administrative law judge's decision whether he ultimately decided to discredit the opinions of Drs. Rasmussen and Sood for not apportioning the cause of the impairment or whether it was his conclusion that their opinions were not adequately explained, based on the specifics of this case. Because we are unable to discern the bases for the administrative law judge's credibility findings in accordance with the APA, we vacate his finding that claimant failed to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Wojtowicz*, 12 BLR at 1-165. We therefore vacate the denial of benefits and remand this case for further consideration of whether claimant established the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).[15]

[15] If the administrative law judge intended to suggest that the opinions of Drs. Rasmussen and Sood are facially insufficient to meet the standard for establishing legal pneumoconiosis, however, he committed an error of law. In order to establish the existence of legal pneumoconiosis, claimant must establish by a preponderance of the evidence that the miner suffered from an impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). Both physicians conducted all of the required testing and set forth opinions stating definitively that the miner had legal pneumoconiosis: they explained why they believed that the miner's exposure to coal dust more likely than not significantly caused or aggravated the miner's disabling COPD. *See, e.g.*, Claimant's Exhibit 2 at 4 (Rasmussen); Claimant's Exhibit 7 at 9 (Sood). To the extent the administrative law judge's decision can be interpreted to mean that coal dust "necessarily" or "must" have caused the impairment, he misstated claimant's burden of proof. The requirement is that claimant establish that it is more likely than not that coal dust exposure was a significant contributing cause or substantial

In considering the issue of legal pneumoconiosis, the administrative law judge should weigh the opinions of Drs. Rasmussen and Sood that claimant has legal pneumoconiosis against the contrary opinions of Drs. Basheda, Meyer and Bellotte pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge must evaluate the credibility of the medical opinions in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The proper analysis for legal pneumoconiosis is to consider whether the physician has provided a reasoned explanation, based on the specific facts of the case, as to why it is more likely than not that coal dust exposure significantly contributed to, or substantially aggravated, the miner's COPD. *See Williams*, 453 F.3d at 622; *Cornett*, 227 F.3d at 576-77. If claimant establishes the existence of clinical or legal pneumoconiosis, the administrative law judge must further determine whether claimant established that the miner was totally disabled due to either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c).[16] In rendering his decision on remand, the administrative law judge must explain the bases for all of his credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

aggravating factor in the miner's chronic pulmonary disease or respiratory impairment. 20 C.F.R. §718.201(a)(2), (b).

[16] The administrative law judge must follow the Board's prior remand instruction to consider the physicians' opinions on total disability "in light of the exertional requirements of the miner's usual coal mine work." *Spatafore*, 25 BLR at 1-191.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge