

BRB No. 95-1893 BLA

KENNETH L. SUMMERLIN)

)
Claimant-Respondent)

)
v.)

)
JIM WALTER RESOURCES,)
INCORPORATED)

)
Employer-Petitioner)

DATE ISSUED:

)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Respondent)

DECISION and ORDER

Appeal of the Decision and Order of Sheldon R. Lipson, Administrative Law Judge, United States Department of Labor.

Samuel Maples, Birmingham, Alabama, for claimant.

J. Alan Truitt (Maynard, Cooper, Frierson & Gale), Birmingham, Alabama, for employer.

Elizabeth A. Goodman (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (94-BLA-1430) of Administrative Law Judge Sheldon R. Lipson awarding benefits 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). The administrative law judge found that claimant¹ established fifteen years of qualifying coal mine employment and total respiratory disability due to pneumoconiosis arising from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.204. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.204(b). Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's Decision and Order.²

¹Claimant is Kenneth L. Summerlin, the miner, who filed an application for benefits on January 20, 1993 and died on May 13, 1995. Director's Exhibit 1; Decision and Order at 1.

²We affirm the administrative law judge's findings regarding the length of claimant's coal mine employment and the entitlement date, and pursuant to Sections 718.202(a)(1), 718.203(b), and 718.204(c) as unchallenged on appeal. See *Skrack*

v. Island Creek Coal Co., 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer contends that the administrative law judge erred in relying on Dr. Hasson's deposition testimony that claimant was ten to twenty percent impaired by his pneumoconiosis because this statement was taken out of context and "entirely ignores the import of Dr. Hasson's overall expert conclusions. Employer's Brief at 9. Employer further contends that the administrative law judge should have credited Dr. Hasson's conclusion that pneumoconiosis was not a substantial contributing cause of claimant's total disability. Employer's Brief at 12.

The administrative law judge determined that Dr. Hasson's opinion was entitled to deference due to his superior credentials, noted that Dr. Hasson found that claimant's pneumoconiosis was ten to twenty percent the cause of his respiratory disability, and relied on Dr. Hasson's opinion to find causation established, citing *Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Decision and Order at 7-8; Employer's Exhibit 2. In *Lollar*, the United States Court of Appeals for the Eleventh Circuit, within whose appellate jurisdiction this claim arises, held that a claimant must establish that his

pneumoconiosis was a substantial contributing factor in the causation of his total pulmonary disability. *Lollar*, 893 F.2d at 1265, 13 BLR at 2-283.

In arriving at its standard, the court considered the opinions in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), and *Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989). In *Adams*, the Sixth Circuit court held that a claimant must affirmatively establish only that his totally disabling respiratory impairment was due at least in part to his pneumoconiosis. *Adams*, 886 F.2d at 825. In *Bonessa*, the Third Circuit court held that a miner must show that pneumoconiosis is a substantial contributor to the disability. *Bonessa*, 884 F.2d at 734. In *Mangus*, the Tenth Circuit held that the appropriate causation standard is whether pneumoconiosis is at least a contributing cause. *Mangus*, 882 F.2d at 1531. The Tenth Circuit stated that the burden of proof would be inappropriately heavy if claimant also had to prove that the causal nexus fit a description which is embodied in terms such as "significant" or "substantial." *Id.*

Upon considering these holdings, the court in *Lollar* stated that it agreed with the Tenth Circuit "that a more lenient standard of causation `is consistent with [the] congressional intent of liberal assistance to totally disabled coal miners.'" *Lollar*, 893 F.2d at 1265, 13 BLR at 2-283. The court further stated that "to the extent that *Mangus* declined to require a `significant' or `substantial' causal link, however, we find more persuasive the Third Circuit's analogy in *Bonessa* to the causation

standard of section 718.205(c), which explicitly defines 'due to' as requiring a 'substantially contributing cause.' *Id.* The Court noted that the standard in *Bonessa* addressed the concerns of the Sixth Circuit in *Adams* about whether a finding that pneumoconiosis played only an infinitesimal or *de minimis* part in the miner's totally disabling respiratory impairment would support a denial of benefits. *Id.*

In this case, the administrative law judge considered only Dr. Hasson's statement that claimant's pneumoconiosis was ten to twenty percent the cause of his respiratory disability and ignored Dr. Hasson's conclusion that pneumoconiosis was not a substantially contributing cause of claimant's totally disabling respiratory condition. Employer's Brief at 12; Decision and Order at 8; Employer's Exhibit 2. Because Dr. Hasson's statement that pneumoconiosis was not a substantially contributing cause of claimant's totally disabling respiratory condition was not discussed by the administrative law judge, we hold that the administrative law judge selectively analyzed this physician's opinion in finding that the *Lollar* standard had been met. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Therefore, while the administrative law judge may defer to the physician with superior credentials, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*), and need not accept the opinion of any particular expert, but must weigh all the evidence and draw his own conclusions and inferences, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), we vacate the administrative law judge's finding pursuant to Section 718.204(b) and remand the case for the administrative

law judge to provide further explanation for crediting Dr. Hasson's opinion that claimant was ten to twenty percent impaired by his pneumoconiosis in light of his conclusion that pneumoconiosis was not a substantial contributing factor in claimant's total disability pursuant to Section 718.204(b). See *Lollar, supra*; see also *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge: I concur.

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I would affirm the administrative law judge's Decision and Order awarding benefits. I disagree with my colleagues' determination that, when considering the evidence at Section 718.204(b), the administrative law judge committed reversible error in failing to discuss Dr. Hasson's statement that pneumoconiosis was not a substantially contributing cause of claimant's impairment.

The administrative law judge recognized that the determination of whether the evidence is sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's impairment must be made in light of the Eleventh Circuit's decision in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1265, 13 BLR 2-277, 2-283 (11th Cir. 1990). In summarizing the evidence, the administrative law judge stated that "Dr. Hasson found that Claimant's pneumoconiosis contributed to his impairment between 10-20 percent and that COPD from the Claimant's smoking habit made up the majority of his impairment." Decision and Order at 8.

The administrative law judge reasonably concluded that a 10 to 20 percent contribution from pneumoconiosis made pneumoconiosis a substantial contributor within the meaning of *Lollar*. "Substantial" here is a legal judgment. The fact that a doctor who finds that pneumoconiosis contributed 10 to 20 percent to an impairment does not consider pneumoconiosis' contribution substantial has no legal significance. Hence, the administrative law judge did not err in failing to discuss Dr. Hasson's statement that pneumoconiosis was not a substantially contributing cause

of claimant's impairment. Accordingly, I would affirm the Decision and Order awarding benefits.

REGINA C. McGRANERY

Administrative Appeals Judge