BRB No. 01-0537 BLA

GERALD H. TRIPLETT .	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:_______________
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

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

Helen H. Cox (Eugene Scalia, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0094) of Administrative Law Judge Gerald M. Tierney awarding benefits on a miner's 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).[1] This case is before the Board for the second time.

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments regarding the

Initially, Administrative Law Judge Gerald M. Tierney (hereinafter, the administrative law judge) credited claimant[2] with thirty-two years of coal mine employment pursuant to employer's stipulation. The administrative law judge acknowledged employer's concession that claimant suffers from a totally disabling respiratory impairment. Applying the regulations at 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) (2000). Additionally, the administrative law judge found that claimant's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were awarded, commencing April 1, 1998.

---

impact of the challenged regulations made by employer in its appellate brief, claimant in his response brief, and the Director, Office of Workers' Compensation Programs, in his letter to the Board.

[2]Claimant is Gerald H. Triplett, the miner, who filed his claim for benefits on April 1, 1998. Director's Exhibit 1.

Employer appealed to the Board. On appeal, the Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis and total respiratory disability due to pneumoconiosis.[3] *See Triplett v. Sewell Coal Co.*, BRB No. 00-0133 BLA (Oct. 6, 2000)(unpub.). Additionally, the Board instructed the administrative law judge on remand to render a specific finding regarding claimant's smoking history. *Id.* Finally, the Board instructed the administrative law judge that if, on remand, he again finds the medical opinion evidence sufficient to establish the existence of pneumoconiosis, he must weigh all the relevant evidence together to determine whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Id.*

On remand, the administrative law judge found that claimant established the existence of pneumoconiosis and total respiratory disability due to pneumoconiosis. Decision and Order on Remand at 3-5. Accordingly, benefits were awarded, commencing April 1, 1998. Decision and Order on Remand at 5.

In the current appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b) (2000). Employer's Brief at 3-13. Additionally, employer asserts that the administrative law judge erred in weighing all of the evidence together, in accordance with *Compton*, to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a) (2000). Employer's Brief at 13-14. Lastly, employer contends that the administrative law judge erred in finding that claimant had only an eighteen pack year smoking history. Employer's Brief at 14-18. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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'Keeffe*

---

[3]The Board affirmed, as unchallenged on appeal, the administrative law judge's finding regarding claimant's length of coal mine employment and those findings made pursuant to 20 C.F.R. §§718.202(a)(1)-(a)(3), 718.203(b), and 718.204(c) (2000). *See Triplett v. Sewell Coal Co.*, BRB No. 00-0133 BLA (Oct. 6, 2000)(unpub.).

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

Initially, we address employer's assertion that the administrative law judge erred in determining claimant's smoking history. The administrative law judge found claimant's smoking history to be eighteen pack years, ending in 1964.[4] Decision and Order at 2. The administrative law judge found that the weight of the evidence supports a finding of eighteen pack years because on four of seven occasions claimant reported such a smoking history.[5] Decision and Order on Remand at 2. The administrative law judge found the smoking histories noted in the records of Dr. Crook, Dr. Mossburg and the Cleveland Clinic, to be inflated compared to the histories recorded by other physicians and, therefore, entitled to less weight.[6]

---

[4]The administrative law judge, in fact, found an "18 pack per year cigarette smoking habit." Decision and Order at 2. However, as employer asserts, it is clear from the context of the administrative law judge's discussion that his Decision and Order contains an obvious typographical error inasmuch as he did not mean to find an "18 pack per year history," but rather an eighteen pack year smoking history.

[5]The administrative law judge found eighteen pack years based on claimant's direct testimony and the smoking histories noted in the reports of Drs. Durham, Bellotte, and Rasmussen.

[6]Dr. Crook noted a fifty pack smoking history, Dr. Mossburg indicated that claimant has smoked from twenty-seven to twenty-eight years, and claimant's records from the Cleveland Clinic revealed a thirty pack year smoking history, ending in 1964. Employer's Exhibits 1, 2, 4.

Employer asserts that the administrative law judge erred in failing to consider claimant's cross-examination testimony at the hearing.[7] Employer's Brief at 16-18. Employer reasons that claimant's cross-examination testimony renders irrational the administrative law judge's finding that those smoking histories were inflated which were noted in the reports of Drs. Crook and Mossburg and the records of the Cleveland Clinic. Claimant's direct testimony was that he smoked a pack or a little over a pack a day for eighteen years, ending in 1964. Hearing Transcript at 20. On cross-examination, claimant acknowledged that he could have had a smoking history of about a pack and one-half a day for eighteen years. Hearing Transcript at 22. While the administrative law judge considered claimant's direct testimony in rendering his decision, he did not consider claimant's cross-examination testimony. Claimant's cross-examination testimony could, if credited, affect the administrative law judge's credibility determinations on this issue and his ultimate finding of an eighteen pack year smoking history. Accordingly, we vacate the administrative law judge's finding regarding claimant's smoking history because the administrative law judge failed to consider all the relevant evidence as required by the Administrative Procedure Act, *see* 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); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984), and we remand this case for him to do so.

Considering the medical opinion evidence, the administrative law judge found the opinions of Drs. Rasmussen and Durham to be more credible than the reports of Drs. Bellotte and Branscomb and, therefore, concluded that claimant established legal pneumoconiosis and total respiratory disability due to pneumoconiosis. Decision and Order on Remand at 3-4. With regard to these findings, employer first contends that the administrative law judge erred in discrediting Dr. Bellotte's opinion, based on *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), and second, that the administrative law judge's findings regarding Dr. Branscomb's opinion are irrational.[8] Employer's Brief at 3-8. The

[7]We reject employer's contention that the administrative law judge erred in considering the smoking history noted by Dr. Rasmussen in his consulting opinion, inasmuch as hearsay evidence is freely admissible in administrative proceedings. *See* 20 C.F.R. §725.455(b); *Richardson v. Perales*, 402 U.S. 389, 410 (1971); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986).

[8]Employer requests that the Board require that this case be reassigned to a new administrative law judge on remand because the administrative law judge assigned to this case is biased. Employer's Brief at 8. We deny employer's request inasmuch as employer has failed to provide factual support for his allegation of bias. *See Cochran v. Consolidation*

administrative law judge considered the opinions of Drs. Bellotte and Branscomb, who both found no evidence of pneumoconiosis or total respiratory disability due to pneumoconiosis. The administrative law judge, citing *Cornett*, *supra*, accorded less weight to Dr. Bellotte's report, inasmuch as the administrative law judge found that Dr. Bellotte had used claimant's pulmonary function study results which demonstrated a reversible obstructive impairment, to substantiate his opinion. Decision and Order on Remand at 2-3. The administrative law judge gave less weight to Dr. Branscomb's report because he found it to be based on the discredited opinion of Dr. Bellotte and a thirty-five year smoking history. Decision and Order on Remand at 3.

Coal Co., 16 BLR 1-101, 1-108 (1992); *Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568, 1-572 (1984)(Board rejected claimant's suggestion of administrative law judge's bias as lacking factual support); *cf. Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

It is unclear from the administrative law judge's discussion of Dr. Bellotte's report why he has accorded this physician's opinion less weight based on the decision of the United States Court of Appeals for the Sixth in *Cornett*. From the text of *Cornett*, we are unable to ascertain the relevance of this decision to the administrative law judge's findings regarding Dr. Bellotte's report. Accordingly, we vacate the administrative law judge's findings regarding the existence of pneumoconiosis and the cause of claimant's disability and instruct the administrative law judge on remand to clarify his explanation for giving less weight to Dr. Bellotte's opinion and the relevance of *Cornett*. *See Wojtowicz*, *supra*; *Tenney*, *supra*. Moreover, since the administrative law judge's discrediting of Dr. Bellotte's opinion cannot be affirmed, and since one of the administrative law judge's reasons for according less weight to Dr. Branscomb's opinion is that it was based on Dr. Bellotte's opinion, the administrative law judge's discrediting of Dr. Branscomb's opinion cannot be affirmed.[9] Additionally, in light of the Board's decision to instruct the administrative law judge on remand to reconsider the extent of claimant's smoking history, the administrative law judge's second reason for according less weight to Dr. Branscomb's report, namely, that it was based on a thirty-five year smoking history, must also be reconsidered on remand.[10]

Employer next contends that the administrative law judge has failed to provide adequate grounds for crediting the opinions of Drs. Durham and Rasmussen. Employer's Brief at 8-13. The administrative law judge noted that Dr. Durham is claimant's treating physician and a Board-certified pulmonary specialist, and that he found claimant to have a

[9]Employer contends that Dr. Rasmussen's consulting opinion also should be discredited because he considered Dr. Bellotte's report in rendering his conclusions. However, in his 1999 opinion, Dr. Branscomb specifically stated that "Dr. Bellotte's records strengthen my conclusion." Employer's Exhibit 8.

[10]Contrary to employer's assertion, the administrative law judge did not err in stating that Dr. Branscomb relied on a thirty-five year smoking history. Dr. Branscomb specifically noted a smoking history of thirty-five years in his later opinion, even though he did not rely on a specific history in his earlier report. Employer's Exhibits 7, 8.

respiratory impairment which is due, in significant part, to his coal workers' pneumoconiosis. Decision and Order on Remand at 3. After noting that Dr. Rasmussen correctly stated claimant's smoking history, the administrative law judge found Dr. Rasmussen's opinion, that claimant's coal workers' pneumoconiosis contributes to his total respiratory disability, to be "well-reasoned and documented," consistent with claimant's complaints of shortness of breath, his abnormal pulmonary function study results, his thirty-two years of coal mine employment, and buttressed by the opinion of Dr. Durham. *Id.* In light of the Board's decision to vacate the administrative law judge's finding regarding claimant's smoking history, the administrative law judge on remand must reconsider Dr. Durham's opinion and Dr. Rasmussen's opinion because the administrative law judge premised his crediting of these two opinions on his smoking history finding. In reconsidering the opinions of Drs. Durham and Rasmussen on remand, the administrative law judge should fully explain his rationale for crediting or discrediting this medical opinion evidence. *See Wojtowicz*, *supra*; *Tenney*, *supra*.

Moreover, with regard to Dr. Durham's opinion, employer specifically asserts that the administrative law judge erred in crediting Dr. Durham's report because his opinions are equivocal regarding the existence of pneumoconiosis and the cause of claimant's total respiratory disability.[11] Employer's Brief at 9-11. The administrative law judge found that in Dr. Durham's written reports, he "clearly and unequivocally" stated that claimant's total respiratory disability was due, in part, to his coal workers' pneumoconiosis and only after the doctor was advised at his deposition that claimant may have a thirty pack year smoking history did his opinion become "more ambiguous and equivocal." Because we have vacated the administrative law judge's smoking history finding, we also instruct the administrative law judge on remand to reconsider Dr. Durham's written reports and testimony to determine whether they are sufficient to establish total respiratory disability due to pneumoconiosis.[12]

---

[11]Employer asserts that the administrative law judge erred in finding that Dr. Durham's opinion is sufficient to establish the existence of pneumoconiosis. Employer's Brief at 10-11. The Board addressed this issue in its Decision and Order in claimant's previous appeal and held that the administrative law judge properly found that Dr. Durham's opinion is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.201 (2000). *See Triplett v. Sewell Coal Co.*, BRB No. 00-0133 BLA , *slip op.* at 3-4 (Oct. 6, 2000)(unpub.). Because employer has not set forth any valid exception to the law of the case doctrine, we adhere to our previous holding regarding this issue. *Id*; *see U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting).

[12]The disability causation standard established by the revised regulation at 20 C.F.R. §718.204(c) is as follows:

See 20 C.F.R. §718.204(c).

Finally, employer asserts that the administrative law judge erred in considering the evidence pursuant to 718.202(a) (2000). Employer's Brief at 13-14. In light of our decision to vacate the administrative law judge's weighing of the medical opinion evidence, we also vacate the administrative law judge's Section 718.202(a) (2000) finding and instruct him on remand to consider all the relevant evidence pursuant to this section and to explain the rationale for his conclusions. *See Compton*, *supra*; *Wojtowicz*, *supra*; *Tenney*, *supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, 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

REGINA C. McGRANERY
Administrative Appeals Judge

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c).

BETTY JEAN HALL
Administrative Appeals Judge