BRB No. 02-0411 BLA

BARRY KENT SULLIVAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROAD FORK DEVELOPMENT COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
A.T. MASSEY	)	
	)	DATE ISSUED:
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Natalie D. Brown (Jackson & Kelly, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (99-BLA-0992) of Administrative Law Judge Thomas F. Phalen, Jr., 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).[1] This case has been before the Board

[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

previously. In the original decision, the parties stipulated to, and the administrative law judge found, eleven years of coal mine employment. Decision and Order dated December 28, 1999 at 3. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that claimant[2] established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). Decision and Order dated December 28, 1999 at 10-12. The administrative law judge further found that the record evidence was sufficient to establish that claimant suffered from a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order dated December 28, 1999 at 12-15. Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), but in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the Board vacated the administrative law judge's finding that pneumoconiosis was established and remanded this case for the administrative law judge to weigh all types of relevant evidence together to determine whether claimant suffers from the disease.[3] The Board also affirmed the administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iii), but vacated his findings pursuant to Sections 718.203 and 718.204(b)(2)(iv), (c), for further consideration of the relevant evidence of

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January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant, Barry Kent Sullivan, filed his claim for benefits on June 24, 1998. Director's Exhibit 1.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See* Director's Exhibit 2; Employer's Exhibit 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

record on remand. *Sullivan v. Road Fork Development Co., Inc.*, BRB No. 00-0426 BLA (January 11, 2001)(unpublished).

On remand, the administrative law judge considered the evidence pursuant to *Compton* and determined that it was sufficient to establish the existence of pneumoconiosis. Decision and Order on Remand at 10-13. The administrative law judge further concluded that the medical opinions of record were sufficient to establish that the pneumoconiosis arose out of coal mine employment and that claimant was totally disabled and that the disability was due to pneumoconiosis. Decision and Order on Remand at 13-16. Accordingly, benefits were awarded. In this appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a), that the pneumoconiosis arose out of coal mine employment pursuant to Section 718.203, that claimant established total respiratory disability pursuant to Section 718.204(b)(2)(iv) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[4]

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

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge awarding benefits must be vacated and the case remanded to the administrative law judge for further consideration. Employer contends that the administrative law judge did not properly weigh the evidence pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203 and 718.204 as he did not properly analyze the medical opinion evidence of record as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).[5] We agree.

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[4]The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as

With respect to the administrative law judge's consideration of the medical evidence relevant to 20 C.F.R. §718.202(a)(2), employer asserts that the administrative law judge erred in according less weight to Dr. Caffrey's opinion, that the biopsy evidence did not support a finding of pulmonary fibrosis or coal workers' pneumoconiosis. Employer states specifically that the administrative law judge erred in basing his finding upon the fact that Dr. Caffrey reviewed only one biopsy report and that the original pathologist, Dr. Arrendell, noted that there was insufficient material for an evaluation. This contention has merit. Although credibility determinations are for the administrative law judge, in this case, the administrative law judge did not reconcile his decision to accord less weight to Dr. Caffrey's opinion, in part, because the doctor did not review the biopsy obtained four months later, with the fact that the second biopsy produced results similar to those reviewed by Dr. Caffrey. Decision and Order on Remand at 11; Director's Exhibits 30, 32; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Further, the administrative law judge did not explain why he relied upon the opinion of Dr. Arrendell, the pathologist who originally reviewed the biopsy slides, whose credentials are not in the record, to call into question the opinion of Dr. Caffrey, a Board-certified pathologist. Decision and Order on Remand at 11; Director's Exhibits 30, 32; *Wojtowicz, supra*. Hence, we vacate the administrative law judge's finding with respect to Dr. Caffrey's opinion under Section 718.202(a)(2) and the case is remanded to the administrative law judge for reconsideration of his opinion.

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incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

With respect to the biopsy reports in which Dr. Arrendell indicated that pulmonary fibrosis was not present, the administrative law judge determined that they were "internally inconsistent" on the ground that both reports reflected pulmonary fibrosis as a "clinical diagnosis," while the "comment" section contained statements that the respective lung biopsies did not reveal the presence of fibrosis. Decision and Order on Remand at 11; Director's Exhibit 27. Employer argues that the reports were not internally inconsistent, as the clinical diagnoses were provided by another doctor.[6] In his report dated January 17, 1998, Dr. Arrendell identified pulmonary fibrosis as the clinical diagnosis. In a section of his report labeled "comment," Dr. Arrendell stated that "[t]he stroma available for study...does not indicate fibrosis. Clinical correlation with open lung biopsy is recommended if clinically indicated." Director's Exhibit 27. Dr. Arrendell's report dated May 7, 1998 also identifies pulmonary fibrosis in the clinical diagnosis section and includes a statement that "[p]ulmonary fibrosis is not present in the materials studied. Clinical correlation is recommended." *Id*. In light of employer's contention that the clinical diagnoses came from a source other than Dr. Arrendell, we vacate the administrative law judge's finding. On remand, the administrative law judge should specifically address whether the diagnosis of pulmonary fibrosis was made by another physician and, thus, whether these statements reveal an inconsistency in Dr. Arrendell's diagnoses.

With respect to the weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), employer contends that the administrative law judge erred in according greater weight to the opinions of Drs. Hussain, Baker and Ranavaya and less weight to the opinions of Drs. Dahhan, Castle and Lockey. Initially, we reject employer's assertion that the administrative law judge mechanically accorded greater weight to the opinion of Dr. Hussain based on his status as claimant's treating physician. Contrary to employer's contention, the administrative law judge properly considered Dr. Hussain's qualifications, as well as the extent to which his report reflects a thorough knowledge of claimant's occupational, medical, social and smoking histories, and the extent to which his conclusions are supported by the underlying documentation. *See BethEnergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fetterman v.*

[6]Both of the lung biopsies to which Dr. Arrendell's reports refer were performed when claimant was hospitalized due to an exacerbation of his pulmonary problems. Director's Exhibit 27. Dr. Hussain, claimant's treating and attending physician, prepared the admission report in both instances and identified pulmonary fibrosis as a preexisting condition. *Id*.

Director, OWCP, 7 BLR 1-688 (1985); Decision and Order on Remand at 12, 14; Director's Exhibit 32; Claimant's Exhibit 2.

Employer's remaining contentions with respect to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4) have merit. The administrative law judge accorded less weight to the opinions of Drs. Dahhan, Castle and Lockey on the ground that they were not supported by the weight of the objective medical evidence. Decision and Order on Remand at 12-13. However, as employer asserts, the administrative law judge did not identify the objective evidence to which he referred and its identity is not apparent on the face of the record. *See Wojtowicz, supra*; Decision and Order on Remand at 12-13; Director's Exhibit 28; Employer's Exhibits 2, 7, 9, 13.

Employer's contention regarding the administrative law judge's determination that the opinion of Dr. Castle was equivocal also has merit. The administrative law judge based his finding upon the fact that Dr. Castle initially acknowledged that the radiographic changes were consistent with pneumoconiosis, but later concluded that claimant did not suffer from coal workers' pneumoconiosis in view of the sudden onset, rapid evolution, and type of radiographic changes seen on the film. Decision and Order on Remand at 12. If a physician acknowledges radiographic changes consistent with a finding of pneumoconiosis, but also asserts that the disease process manifested is not coal workers' pneumoconiosis, the physician's opinion is not inconsistent or equivocal as the physician is addressing the source of the diagnosed pneumoconiosis. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *see also Cranor v. Peabody Coal Co.*, 21 BLR 1-201 (1999).

The administrative law judge also found that Dr. Lockey's opinion was equivocal because the physician refused to state that claimant did not have pneumoconiosis but instead said that "further testing" was necessary. Decision and Order on Remand at 13; Employer's Exhibit 2. Contrary to employer's argument, the administrative law judge considered the deposition testimony in which Dr. Lockey clearly stated that claimant does not have coal workers' pneumoconiosis and in which the physician referred to the "additional information" that claimant's counsel provided to him. Decision and Order on Remand at 8-10, 13; Employer's Exhibits 2, 11 at 24. The administrative law judge did not, however, address the significance of the fact that at his deposition, Dr. Lockey received the benefit of the "further testing" to which he referred in his initial opinion, and rendered an unequivocal opinion that claimant does not have pneumoconiosis. *See Wojtowicz, supra*; Decision and Order on Remand at 13; Employer's Exhibits 2, 11 at 24.

Finally, employer contends that the administrative law judge erred in according greater weight to the opinions of Drs. Baker and Ranavaya, as the administrative law judge failed to set forth the basis for finding their opinions reasoned and documented and did not consider the fact that their credentials are not in the record. Employer maintains that Drs.

Baker and Ranavaya did not render documented and reasoned opinions because they based their conclusions on claimant's work history and chest x-rays and, unlike the other physicians of record, they reviewed information only from their own examinations of claimant. These contentions have merit, in part. Although the administrative law judge may consider the factors identified by employer in assigning weight to the opinions of Drs. Baker and Ranavaya, he is not *required* to find them undocumented or unreasoned on these bases. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998). The administrative law judge accorded weight to the opinion of Dr. Baker, in part, because he is a "highly qualified physician" and to Dr. Ranavaya's opinion on the ground that he is a "qualified physician." Decision and Order on Remand at 12. The record contains no evidence regarding the physician's qualifications, however. In addition, the administrative law judge did not provide his specific rationale for finding these opinions *better* reasoned and documented than the contrary opinions of record. *See Wojtowicz, supra*; Director's Exhibits 13, 32.

We therefore vacate the administrative law judge's credibility determinations with respect to the weighing of the medical opinion evidence under Section 718.202(a)(4) and remand this case to the administrative law judge for further consideration. In light of the fact that the administrative law judge relied upon his weighing of the medical opinion evidence in rendering his findings under Sections 718.203 and 718.204, we must also vacate his findings thereunder. In addition, as employer asserts, contrary to the administrative law judge's findings, Dr. Lockey offered an opinion with regard to the extent of claimant's disability. Decision and Order on Remand at 15; Employer's Exhibit 11 at 22-23. Furthermore, Dr. Castle stated unequivocally that claimant did not suffer from a disabling impairment. *See* Employer's Exhibits 9, 13 at 29-30. Accordingly, the administrative law judge must reconsider his findings pursuant to Sections 718.202(a)(2), (a)(4), 718.203, and 718.204 on remand. *Fetterman, supra*; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984).

In weighing the medical opinion evidence on remand, the administrative law judge must first specifically determine if the opinions of record are reasoned and documented and specifically review the medical opinions in the context of their objective evidence which may provide a basis for determining the credibility of the opinions.[7] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993)*; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987);

[7]Contrary to employer's assertion, an administrative law judge may, within a reasonable exercise of his discretion, accord less weight to a medical opinion if it fails to adequately address the possibility of coal dust exposure contributing to claimant's respiratory disability. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

Lucostic, supra; Decision and Order on Remand at 12-13. The administrative law judge should also consider the qualifications of the physicians. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Akers, supra*; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

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

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge