BRB No. 03-0618 BLA

ROBERT D. OPP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABBODY COAL COMPANY	)	DATE ISSUED: 05/27/2004
	)	
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 Denying Benefits of Donald B. Jarvis, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-BLA-0564) of Administrative Law Judge Donald B. Jarvis on a claim[1] 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).[2] The administrative law judge credited employer's stipulation to

[1] Claimant, Robert D. Opp, filed his application for benefits on January 11, 2000. Director's Exhibit 1.

[2] 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All

thirty-nine years of qualifying coal mine employment and that claimant established a totally disabling respiratory impairment, Decision and Order at 3, 18, but the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4)[3] or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the existence of pneumoconiosis and disability causation were not established. Specifically, claimant contends that the administrative law judge erred in failing to consider the medical opinion of Dr. Anderson, claimant's treating physician, and in according less weight to the opinion of Dr. James. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), 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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first argues that the administrative law judge erred in failing to consider the report of Dr. Anderson, claimant's treating physician, which had been admitted into the record during the formal hearing. Claimant contends that since Dr. Anderson rendered an opinion sufficient to establish the existence of pneumoconiosis as defined by the Act, the administrative law judge erred when he concluded that Dr. James was the only physician who diagnosed the presence of pneumoconiosis or its equivalent. Claimant additionally argues that Dr. Anderson's status as a treating physician entitles his opinion to preferential weight pursuant to Section 718.104(d).[5] In response, employer contends that a denial of this claim is

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The administrative law judge further found that, assuming the existence of pneumoconiosis had been established, the record was sufficient to establish that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 17.

[4] We affirm the administrative law judge's determinations pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), and 718.204(b) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 15, 17-18.

[5] Section 718.104(d) provides, in pertinent part, "In weighing the medical evidence of

compelled as a matter of law because the evidence is undisputed that claimant's back injury, not pneumoconiosis disabled him. Employer agrees, however, that if the administrative law judge's denial is not upheld on the grounds claimant failed to establish disability causation, then the case must be remanded because the administrative law judge erred in overlooking the opinion of Dr. Anderson. But employer contends that consideration of Dr. Anderson's opinion would not have affected the outcome of the case because it is not sufficiently reasoned and documented, *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

In considering the medical opinions, the administrative law judge stated that Dr. James was the only physician of record to have diagnosed the existence of coal workers' pneumoconiosis or its equivalent. He stated that "a thorough review of the record failed to find any report by a Dr. Anderson." Decision and Order at 16 n.6. A review of the record, however, reveals that Dr. Anderson, who was claimant's treating physician, issued two reports dated May 18, 2001 and March 18, 2002, in which he opined that claimant suffered from severe chronic obstructive pulmonary disease related to pneumoconiosis, Claimant's Exhibits 1, 2. During the formal hearing held on April 23, 2002, the administrative law judge admitted Claimant's Exhibits 1-6, which included the reports of Dr. Anderson into the record. Hearing Transcript at 6-7. The administrative law judge erred, therefore, in failing to address Dr. Anderson's reports, which, if fully credited, may be sufficient to establish the existence of pneumoconiosis as defined by the Act. 20 C.F.R. §§718.201, 718.202(a)(4); *see* 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Accordingly, we vacate the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4) and remand the case to him to consider the opinion of Dr. Anderson along with the other medical opinions. Moreover, because claimant alleges that Dr. Anderson was his treating physician, the administrative law judge must determine whether Dr. Anderson's opinion should be accorded greater weight in light of the factors set forth at Section 718.104(d)(1)-(4) and the administrative law judge must also determine whether it is a reasoned opinion. 20 C.F.R.

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record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis…, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician: (1) nature of relationship…; (2) duration of relationship…; (3) frequency of treatment…; and (4) extent of treatment…." 20 C.F.R. §718.104(d)(1)-(4).

§718.104(d)(5); *see Williams*, 338 F.3d 501, 22 BLR 2-625; *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003) (deference given to opinion of treating physician is based on physician's power to persuade); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326-327 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Claimant next contends that the administrative law judge acted irrationally in according less weight to the opinion of Dr. James on the grounds that 1) he relied on "medical articles" criticized by Drs. Repsher and Renn, and 2) his clinical findings did not reveal evidence of rales and rhonchi (clinical findings typical of pneumoconiosis). Claimant argues that the administrative law judge erred in rejecting the opinion of Dr. James because Drs. Repsher and Renn, physicians whose opinions the administrative law judge credited, criticized Dr. James's reliance on medical journal articles that supported his opinion that claimant's pulmonary function studies were demonstrative of the existence of pneumoconiosis. Claimant contends, however, that the administrative law judge erred in finding the opinions of Drs. Repsher and Renn to be more persuasive because the administrative law judge failed to identify the articles on which Dr. James had relied and failed to discuss the exact nature of the criticism. Claimant contends, therefore, that the administrative law judge's reasons for finding the opinions of Drs. Repsher and Renn more credible than that of Dr. James, without sufficient discussion, is not reasonable. We agree.

The administrative law judge concluded that Dr. James's reliance on certain medical articles to support his opinion that claimant's pulmonary function studies were supportive of the existence of pneumoconiosis was "roundly criticized" by both Drs. Repsher and Renn, who questioned whether Dr. James had critically read the papers. The administrative law judge was persuaded that the shared opinion of Drs. Repsher and Renn undermined the credibility of Dr. James's opinion. Decision and Order at 16. As claimant points out, however, this reasoning is insufficient because it does not explain, other than that they agreed, why the administrative law judge found the criticisms of Dr. Renn and Repsher to be more credible than the opinions of Dr. James. The administrative law judge must, therefore, reconsider Dr. James's opinion, in light of the criticisms by Drs. Repsher and Renn, and provide adequate explanation for his crediting of the evidence. *See* 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); *Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984) (Administrative Procedure Act requires remanding cases where administrative law judge's conclusion is lacking; more complete analysis is crucial were inconsistencies and wide disparities abound).

Likewise, we agree that the administrative law judge's other reason for according little weight to the opinion of Dr. James cannot be affirmed. The administrative law judge found that the opinion of Dr. James, that claimant suffered from a chronic respiratory disease consistent with coal workers' pneumoconiosis, to be well documented, based upon a

thorough examination and review of additional medical data, and entitled to great weight due to Dr. James's superior medical credentials. The administrative law judge, nevertheless, accorded it little weight because he found that Dr. James's reliance on the miner's symptoms of a chronic cough and shortness of breath were "easily explainable by [claimant's] smoking history" and that his clinical findings "did not reveal physical signs consistent with pneumoconiosis such as rales and rhonchi." Decision and Order at 16. This was improper as the administrative law judge was substituting his opinion for that of a medical expert, which he cannot do. *See Amax Coal Co. v. Director, OWCP* [*Rehmel*], 993 F.2d 600, 17 BLR 2-91 (7th Cir. 1993); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); Decision and Order at 16.

Consistent with claimant's assertion, the administrative law judge did not cite any medical foundation in the record to support his determination that claimant did not have pneumoconiosis because Dr. James's clinical findings did not shows rales and rhonchi. Moreover, the administrative law judge erred in finding that Dr. James "readily admitted" that the x-ray and CT scan evidence did not support a finding of pneumoconiosis when the record showed that Dr. James opined that claimant's clinical findings, x-ray evidence, and diagnostic tests were, in fact, consistent with a finding of pneumoconiosis. Although the administrative law judge determined that Dr. James opined that claimant's chest x-ray did not reveal evidence of fibrotic disease, Dr. James emphasized that fibrotic disease was merely one form of pneumoconiosis and that "[c]hronic coal mine dust exposure can cause clinically significant airways disease even in the setting of a chest x-ray without obvious fibrotic disease," such as in the instant case. Director's Exhibit 12; *see also* Employer's Exhibit 10 at 5-7; *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999) (Section 718.201 provides legal definition of pneumoconiosis, which encompasses wide variety of conditions, "among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nonetheless been made worse by coal dust exposure."); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-66 (4th Cir. 1995); *Pershina v. Consolidation Coal Co.*,14 BLR 1-55 , 1-57 (1990) (*en banc*) (definition of pneumoconiosis contained in Act and regulations is broad).

Recognizing that coal mine dust exposure can cause significant obstructive airways disease as demonstrated by claimant's pulmonary function testing, notwithstanding the lack of x-ray evidence demonstrating fibrotic changes, Dr. James diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to coal mine dust exposure and cigarette smoking. Additionally, as claimant points out, Dr. James's examination of claimant on April 6, 2000 reported symptoms consistent with pneumoconiosis such as cough dyspnea, increased chest AP diameter with percussion, hyperresonance, and auscultation. Accordingly, we vacate the administrative law judge's accordance of little weight to the opinion of Dr. James and remand the case for the administrative law judge to reconsider Dr.

James's opinion. *Id.*; *see* Director's Exhibit 12; Hearing Transcript at 46-84; Employer's Exhibit 10.

The administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4) is, therefore, vacated and the case is remanded for the administrative law judge to reconsider the medical opinion evidence. If the administrative law judge finds the existence of pneumoconiosis established at Section 718.202(a)(4), he must reconsider his finding on disability causation at Section 718.204(c) since that finding rests, in part, on his finding that the existence of pneumoconiosis was not established and his accordance of little weight to the opinion of Dr. James. We reject employer's contention that the holdings in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994) *cert. denied*, 514 U.S. 1035 (1995) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994) govern this case, which arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, because claimant's last coal mine employment occurred in Montana. 20 C.F.R. §718.204(a); 62 Fed. Reg. 3,338, 3,345 (1997), 65 Fed. Reg. 79,920, 79,948 (Dec. 20 2000); *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3; *see Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004)(causation is established if pneumoconiosis is by itself totally disabling, even if miner also suffers from non-pulmonary and non-respiratory disabilities which render him unable to work).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge