BRB No. 01-0751 BLA

JOSEPH E. ANGELILLI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED:	
	)	
Employer-Petitioner)		
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-BLA-110) of Administrative Law Judge Daniel L. Leland 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 is on appeal to the Board for the third time. The lengthy history of this case is set forth in the Board's prior Decision and Order, *Angelilli v. Consolidation Coal Co.*, BRB No. 00-0484 BLA (Jan. 12, 2001). The last 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.

this case was before the Board it affirmed the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000) and disability causation at 20 C.F.R. §718.204(b)(2000) by medical opinion evidence,[2] but nonetheless vacated the administrative law judge's finding that pneumoconiosis was established in light of the holding 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), within whose jurisdiction this case arises, which requires the administrative law judge to weigh all types of evidence delineated at 20 C.F.R. §718.202(a)(1)-(4) together before determining whether claimant has established the existence of pneumoconiosis. The Board, therefore, remanded the case for the administrative law judge to reconsider the medical opinion evidence along with the x-ray evidence before determining whether the existence of pneumoconiosis was established. *Angelilli*, *supra*.

On remand, the administrative law judge found that while the preponderance of the x-ray evidence read by better qualified physicians was negative, because negative x-ray readings do not preclude a finding of "legal pneumoconiosis," *i.e.*, a chronic lung disease arising out of coal mine employment, the opinion of Dr. Devabhaktuni, that claimant's chronic obstructive pulmonary disease was due, in part, to coal mine dust exposure, was sufficient to establish the existence of pneumoconiosis. The administrative law judge credited the opinion because it was based on the most thorough examination of claimant and was well explained. In contrast, he found the opinions of Drs. Renn and Fino, that claimant's respiratory conditions were not due to coal mine employment, not fully explained. Accordingly, the administrative law judge found that claimant established the existence of pneumoconiosis as defined by the Act and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis and disability causation established based on the medical opinion evidence before him. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), is participating 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2] The parties have stipulated to the existence of a totally disabling respiratory impairment.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

In finding the existence of pneumoconiosis established, the administrative law judge noted that the Board had affirmed his previous finding that the medical opinion evidence established the existence of pneumoconiosis, and had remanded the case only for reconsideration of that evidence together with the x-ray evidence in light of *Compton*, *supra*. Pursuant to *Compton*, the administrative law judge found that while the preponderance of the x-ray evidence was negative for the existence of pneumoconiosis, the medical opinion evidence, nonetheless, established the existence of pneumoconiosis as defined by the Act. Decision and Order at 4. Inasmuch as employer has only challenged the administrative law judge's analysis of the medical opinion evidence, which was previously affirmed by the Board, and has not challenged the administrative law judge's weighing of the medical opinion evidence against the x-ray evidence, we affirm the administrative law judge's finding that the existence of pneumoconiosis was established. *See* 20 C.F.R. §§718.201, 718.202(a)(1)-(4); *Compton*, *supra*; *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Likewise, inasmuch as the Board affirmed the administrative law judge's previous finding that the medical opinion evidence established disability causation, we will not consider employer's argument on that issue again. *Gillen*, *supra*; *Brinkley*, *supra*; *Bridges*, *supra*; *see* 20 C.F.R. §718.204(c).

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge