BRB No. 02-0856 BLA

JIMMY LUCAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WILLIAMS MOUNTAIN COAL COMPANY	)	DATE ISSUED: 08/28/2003
	)	
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-Awarding Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Legal Clinic, Washington & Lee University School of Law), Lexington, Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, HALL and GABAUER, Administrative Law Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (99-BLA-0881) of Administrative Law Judge Robert J. Lesnick 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] When this claim was first before the administrative law

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended

judge, he found that claimant established a coal mine employment history of twenty-eight years, the existence of pneumoconiosis arising out of coal mine employment, and total disability due to pneumoconiosis. Accordingly, benefits were awarded.

On appeal, the Board vacated the award of benefits, holding that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis and remanded the case for further consideration of the medical opinion evidence. The Board further held that, on remand, the administrative law judge must weigh all the evidence relevant to the existence of pneumoconiosis in a manner consistent with the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The Board also instructed the administrative law judge to reconsider all the evidence relevant to disability causation, if reached. *Lucas v. Williams Mountain Coal Co.*, BRB No. 01-0300 BLA (Nov. 30, 2001)(unpub.).

On remand, the administrative law judge again awarded benefits, finding that, although the x-ray evidence of record was Anot conclusive@ on the existence of pneumoconiosis, the weight of the medical opinion evidence supported a finding of pneumoconiosis and that, considering all the relevant evidence together pursuant to *Compton*, the existence of pneumoconiosis was established. The administrative law judge further found that the evidence established that pneumoconiosis was a substantially contributing cause of claimant=s totally disabling respiratory impairment.

On appeal, employer contends that the administrative law judge failed to comply with the Board=s directive to resolve the conflicting evidence of claimant=s smoking history; failed to consider the evidence in compliance with *Compton*; and failed to address all the relevant evidence in determining that disability causation was established. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers= Compensation Programs (the Director), has not filed a brief.[2]

The Board=s scope of review is defined by statute. If the administrative law judge=s

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regulations.

[2] The administrative law judge=s determination that the existence of a totally disabling respiratory impairment was established, *see* Decision and Order on Remand at 11, is unchallenged on appeal and therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer first asserts that the administrative law judge=s statement that AI have also considered claimant=sY. smoking history of approximately 18-20 pack years,@ Decision and Order on Remand at 14, fails to resolve the conflicting evidence on claimant=s smoking history. Specifically, employer contends that the administrative law judge has not adequately considered that the carboxyhemoglobin test conducted by Dr. Zaldivar demonstrates a substantially longer smoking history than that found by the administrative law judge and is uncontradicted by other medical evidence.

The Board previously instructed the administrative law judge to Aaddress all the relevant evidence concerning claimant=s smoking history when determining the extent of claimant=s smoking historyY@ *Lucas,* slip op. at 7-8 n.10. On remand, the administrative law judge found that claimant established an eighteen pack year smoking history based on the medical opinion of claimant=s treating physician, Dr. Rasmussen, Claimant=s Exhibit 1. The administrative law judge, noting Dr. Rasmussen=s thorough knowledge of claimant=s medical history, found the physician=s opinion to be well-reasoned and well-documented. Decision and Order on Remand at 11. Further, the administrative law judge found that Dr. Zaldivar=s opinion, that claimant=s smoking history was substantially lengthier based on the results of claimant=s carboxyhemoglobin test, was not credible because it lacked other evidentiary support for a lengthier smoking history and the physician himself stated that the carboxyhemoglobin test was not necessarily reliable. Employer=s Exhibit 21. Similarly, the administrative law judge concluded that Dr. Morgan=s reliance on the carboxyhemoglobin test conducted by Dr. Zalidvar, to find an eighty-six pack year smoking history, Director=s Exhibit 16, was unsupported by any other medical evidence of record. Further, the administrative law judge rejected Dr. Jarboe=s categorization of claimant=s smoking history because Dr. Jaboe also relied on Dr. Zaldivar=s carboxyhemoglobin test. Employer=s Exhibit 4. Accordingly, we conclude that the administrative law judge sufficiently complied with the Board=s remand instructions and by addressing all the evidence relevant to claimant=s smoking history. Contrary to employer=s assertions, the administrative law judge provided permissible bases for crediting Dr. Rasmussen=s determination regarding claimant=s smoking history. *See Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see generally See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Moreover, we conclude that, contrary to employer=s assertions the administrative law judge rationally concluded, that the smoking history relied upon by Dr. Zaldivar as based upon the carboxyhemoglobin test and relied

upon by Drs. Morgan and Jarboe[3] was not credible because Dr. Zaldivar himself stated that such a test Ais not very accurate,@ Employer=s Exhibit 21 at 74, and was not otherwise supported by the evidence of record. Decision and Order at 6-9. We thus hold that the administrative law judge permissibly concluded that the opinion of Dr. Rasmussen established a smoking history of 18 pack years and reject employer=s assertion that the record establishes an alternative smoking history as such an assertion is tantamount to a request that the Board reweigh the evidence of record, a role outside of the Board=s scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Employer next asserts that the administrative law judge has failed to weigh the evidence relevant to the existence of pneumoconiosis pursuant to the Board=s remand instructions and the Fourth Circuit court=s decision in *Compton*, 211 F.3d 203, 22 BLR 2-162. Specifically employer contends that the administrative law judge=s statement that the x-ray evidence was Asuggestive@ of the existence of pneumoconiosis, but not Aconclusive,@ on the issue, failed to reflect adequate consideration of the evidence and requires remand for a more specific finding. Employer further argues that the administrative law judge failed to address adequately the medical opinions of Drs. Loudon, Castle and Fino, who concluded that claimant did not suffer from pneumoconiosis, Employer=s Exhibits 4, 7, 8, 12, 13. Moreover, employer argues that the administrative law judge failed to provide a basis for according greatest weight to the medical opinions of Dr. Rasmussen as the physician=s treatment records do not support his conclusion that claimant suffered from pneumoconiosis. Lastly, employer argues that the administrative law judge provided no basis for his conclusion that the opinion used to buttress the findings of Dr. Rasmussen, that of Dr. Gobusney, Claimant=s Exhibit 3, was well-reasoned and well-documented, and further failed to indicate why, Dr. Alexander=s diagnosis of pneumoconiosis, which was based exclusively on an x-ray interpretation constituted a credible medical opinion diagnosing the existence of pneumoconiosis.

When this case was previously before the Board, the Board held that the administrative law judge was to consider together, pursuant to *Compton*, all of the evidence relevant to the existence of pneumoconiosis, *i.e.*, x-rays, CT scans, and medical opinions.

[3] Dr. Zaldivar administered a carboxyhemoglobin test on May 19, 1999 and concluded that the resulting test score of 8 demonstrated a smoking history of one or more packs of cigarettes per day. Employer=s Exhibits 2, 10, 14. Dr. Morgan relied upon Dr. Zaldivar=s carboxyhemoglobin test and concluded that claimant smoked at least one and one-half and probably up to two and one-half packs of cigarettes a day which projects to an 86-year pack year smoking history. Director=s Exhibit 16. Dr. Jarboe relied upon Dr. Zaldivar=s carboxyhemoglobin test to conclude that claimant smoked over one pack per day from his early teens. Employer=s Exhibit 4.

Lucas, slip op. at 6. The Board further instructed that the administrative law judge was to explain his bases for concluding that the opinions of Dr. Rasmussen and Cohen diagnosing pneumoconiosis, Claimant=s Exhibits 1, 8, were better reasoned and documented than the contrary opinions. Additionally, the Board instructed the administrative law judge to reconsider the qualifications of all the physicians when weighing the medical reports. *Lucas*, slip op. at 4-5.

On remand, the administrative law judge considered the thirty reading of seven x-rays, concluding that nine x-ray readings and CT scans were positive for the existence of pneumoconiosis, while the remainder were not supportive of the existence of pneumoconiosis. Decision and Order on Remand at 4-6. The administrative law judge concluded that overall the x-ray evidence Athough suggestive of pneumoconiosis, is not conclusive on the issue of whether claimant suffers from pneumoconiosis.@ Decision and Order on Remand at 6. Considering the medical opinion evidence of record, the administrative law judge concluded that the opinions of Dr. Rasmussen regarding the existence of pneumoconiosis were entitled to the greatest weight because they reflected a great knowledge of claimant=s medical history, took into account all the factors contributing to claimant=s condition, and were based on a review of all the medical evidence of record. Decision and Order on Remand at 10. The administrative law judge, therefore, found Dr. Rasmussen=s opinion to be the best reasoned and documented because it was most consistent with all the underlying evidence. Decision and Order on Remand at 11. Contrary to the assertions of employer, the administrative law judge permissibly found that the opinions of Drs. Zaldivar, Jarboe and Morgan were flawed as these physicians relied on a smoking history not otherwise supported by the record. The administrative law judge permissibly discredited Dr. Zaldivar=s opinion of no pneumoconiosis because the physician relied upon a carboxyhemoglobin test which he admitted Ais not a reliable test.@ Decision and Order at 8; Hearing Transcript at 74. He further permissibly discredited the opinions of no pneumoconiosis rendered by Drs. Morgan and Jarboe because these physicians relied, too, upon the carboxyhemoglobin test administered by Dr. Zaldivar. In addition, contrary to the assertions of the employer, the administrative law judge found that the opinions of Drs. Fino and Castle were undermined as they were based on an inaccurate smoking history. Decision and Order on Remand at 8.

In considering all the evidence together, the administrative law judge concluded that the weight of the evidence supported a finding of pneumoconiosis. In reaching this determination, the administrative law judge considered the x-ray evidence, the CT scans, and the medical opinion evidence, consistent with the Board=s remand instructions to consider the evidence in a manner consistent with *Compton*. The administrative law judge has, therefore, complied with the Board=s remand instructions and has provided sufficient bases for according greatest weight to the medical opinions of Dr. Rasmussen over the contrary evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR

1-46 (1985). Employer has failed to establish that the administrative law judge=s credibility determination, *i.e.*, the determination that Dr. Rasmussen=s opinion is the most credible of record, is irrational. We therefore affirm the administrative law judge=s decision to accord the opinion of Dr. Rasmussen greatest weight. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988)(*en banc*)(Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable). We are thus unable to say that the administrative law judge has abused his discretion in finding the existence of pneumoconiosis established at Section 718.202(a) as he has addressed the Board=s concerns and addressed the relevant medical evidence. *See Hicks* at 138 F.3d 524, 21 BLR at 2-323; *Akers* 131 F.3d at 438, 21 BLR at 2-269.

We recognize that the administrative law judge=s x-ray evidence conclusion, *i.e.*, that such evidence was Anot conclusive@ but suggestive of the existence of pneumoconiosis lacks clarity. We conclude however, that this lack of clarity does not require remand because the holding in *Compton* requires an administrative law judge to address all relevant evidence at Section 718.202(a) and not each component separately. Further we hold that while the administrative law judge has failed to fully expound on Dr. Loudon=s opinion, the administrative law judge specifically indicated that he was incorporating, by reference his consideration of the evidence in his previous decision. Decision and Order on Remand at 3. In that initial Decision, the administrative law judge concluded that Dr. Loudon=s opinion was flawed as it was based on an inaccurate length of coal mine employment history. Initial Decision and Order at 8, 13. To the extent that we conclude that the administrative law judge has properly accorded greatest weight to the medical opinion of Dr. Rasmussen as claimant=s treating physician and has provided an opinion best supported by the underlying documentation of record, we hold that any error in the administrative law judge=s analysis of Dr. Loudon=s opinions is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Moreover, we conclude that the administrative law judge as trier-of-fact could permissibly conclude that positive x-ray opinion of Dr. Alexander as well as the medical opinion of Dr. Gobusny provides support for a finding of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984) *see Compton, supra*. We therefore affirm the administrative law judge=s finding of pneumoconiosis. *See* 20 C.FR. ' 718.202(a).

Finally, employer contends that the administrative law judge erred in concluding disability causation was established. Specifically, employer contends that the administrative law judge=s finding was cursory as it was based on the conclusions he reached in addressing the existence of pneumoconiosis. Employer contends that the administrative law judge=s analysis had the effect of shifting the burden of establishing causation to employer by requiring it to disprove the link between pneumoconiosis and disability.

In order to establish disability causation pursuant to Section 718.204(c), a claimant must establish that pneumoconiosis is a substantially contributing cause of the miner=s totally disabling respiratory impairment. *See* 20 C.F.R. ' 718.204(c)(1).

While the administrative law judge has not presented an extensive discussion of the issue of disability causation, we nevertheless hold that his finding that claimant has established disability causation is supported by substantial evidence and complies with the Board=s remand instructions. In reaching his finding on causation, the administrative law judge accorded greatest weight to the opinion of Dr. Rasmussen as it best accounted for claimant=s history of both coal mine dust exposure and smoking and claimant=s other health conditions in concluding that coal mine dust exposure was, in fact, a significant contributing factor to claimant=s disability. Decision and Order on Remand at 12; *see Clark* at 12 BLR 1-149.

While we recognize that the administrative law judge did not specifically address all the other evidence of record on the issue of disability causation, substantial evidence supports a finding that Dr. Rasmussen=s opinion is the most credible of record on the issue of disability causation. Accordingly, the administrative law judge has complied with the Board=s remand instructions and has provided affirmable bases for finding that the medical opinion evidence supports a finding of disability causation. *See* 20 C.F.R. ' 718.204(c).

Accordingly the administrative law judge=s Decision and Order on Remand-Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER
Administrative Appeals Judge