BRB No. 06-0669 BLA

HUBERT P. WATTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ATLAS MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESSS & PERSONAL INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 05/31/2007
	)	
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-5843) of Administrative Law Judge Thomas F. Phalen, Jr., awarding benefits on a subsequent 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] The administrative law judge credited claimant with at least twelve years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish that claimant has a total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer raises multiple challenges to administrative law judge's finding that the evidence is sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), asserting that the administrative law judge erred in his conclusion regarding claimant's smoking history and his evaluation of the medical opinions. Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). 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. Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.[2]

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

[1] Claimant filed his first claim on October 15, 1992. Director's Exhibit 1. On September 6, 1995, Administrative Law Judge Paul H. Teitler issued a Decision and Order denying benefits, finding that claimant had failed to satisfy any of the elements of entitlement. *Id.* Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on September 25, 2002. Director's Exhibit 3.

[2] Because the administrative law judge's finding that the evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 & Grills Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed 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* 30 U.S.C. §901; 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*).

We initially address employer's assertion that the administrative law judge erred in failing to conduct a rational analysis of claimant's smoking history at 20 C.F.R. §718.202(a)(4). In addressing claimant's smoking history, the administrative law judge considered claimant's answers to employer's interrogatories, claimant's deposition and hearing testimony,[3] and the reports of Drs. Baker, Chaney, Hudson, Jarboe and Powell.[4] Taking into consideration all of the conflicting evidence regarding claimant's smoking history, the administrative law judge determined that the smoking history noted in Dr. Baker's 1992 report, the longest smoking history reported, is the most persuasive. The administrative law judge stated:

> According to the record, [c]laimant's smoking history ranges from none to upwards of 10 pack-years. I note, however, that the reported history is subject to vide [sic] variation. I presume that [c]laimant would not purposely overstate his smoking history, thereby presenting a possible

[3] The administrative law judge noted that "[claimant] testified that he is currently exposed to smoke because 16 to 17 members of his girlfriend's family smoke, but he noted that he usually tries to step outside when there are two to three of them smoking in a room. (Tr. 21)." Decision and Order at 10.

[4] The administrative law judge stated that:

> In 1992, Dr. Anderson reported that Claimant smoked ¾ packs per day from 1975 until 1983, or six pack-years. (DX 1). Dr. Powell reported in 1992 that Claimant smoked for four to five years at a rate of one pack per day, or five pack-years. Dr. Baker reported in 1992 that Claimant smoked from the 1960's until the early 1970's at a rate of less than a pack per day, or less than 10 pack-years. Dr. Hudson reported in 1993 that Claimant smoked for four years. Finally, in 1995, Dr. Chaney reported that Claimant did not smoke.

Decision and Order at 10.

> detriment to his own case, thus, I find that [sic] Dr. Baker's 1992 report to be the most persuasive. Therefore, I find that [c]laimant has a smoking history of less than 10 pack-years.

Decision and Order at 10.

In addition, the administrative law judge discussed the results of the carboxyhemoglobin test administered by Dr. Jarboe. In his April 17, 2003 report, Dr. Jarboe noted that claimant provided a five year smoking history. Director's Exhibit 20. Dr. Jarboe also noted that although claimant stated that he had not smoked since the early 1970's, his carboxyhemoglobin level was compatible with smoking a pack of cigarettes a day. *Id*. In his May 23, 2005 report, Dr. Jarboe stated that the results of the carboxyhemoglobin test are a manifestation of exposure to products of combustion. Employer's Exhibit 3. Dr. Jarboe also stated that elevations of the magnitude seen in this case are nearly always caused by continued exposure to tobacco smoke. *Id*.

The administrative law judge determined that the results of the carboxyhemoglobin test did not establish that claimant is currently a smoker. The administrative law judge stated:

> While the carboxyhemoglobin levels reported by Dr. Jarboe present a question as to whether Claimant continues to smoke, based on his hearing testimony concerning exposure to second-hand smoke, it is evident that Claimant is regularly exposed to cigarette smoke, but I find that there is no definitive proof that he is currently a smoker.

Decision and Order at 10.

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Contrary to employer's assertion, we hold that the administrative law judge acted within his discretion in finding that the carboxyhemoglobin test did not establish that claimant is a current smoker. Thus, because the administrative law judge reasonably found that claimant has a smoking history of less than 10 pack-years, *Lafferty*, 12 BLR at 1-192, we find no merit in employer's assertion that the administrative law judge erred in failing to conduct a rational analysis of claimant's smoking history.[5]

[5] In light of our holding regarding 20 C.F.R. §§718.202(a)(4) and 718.204(c) *infra*, we note that claimant's smoking history, as well as his exposure to second hand smoke, should be factored into an etiology analysis of the evidence with respect to the existence

Employer additionally contends that the administrative law judge erred in finding the evidence sufficient to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, employer asserts that the administrative law judge erred in shifting the burden of proof to employer to establish that claimant did not have legal pneumoconiosis.[6] The administrative law judge considered the opinions of Drs. Baker and Jarboe. Dr. Baker diagnosed coal workers' pneumoconiosis,[7] chronic obstructive pulmonary disease and chronic bronchitis related to coal dust exposure. Director's Exhibit 18; Claimant's Exhibits 4, 6. Dr. Jarboe diagnosed pulmonary emphysema and chronic asthmatic bronchitis unrelated to coal dust exposure and opined that claimant does not have coal workers' pneumoconiosis. Director's Exhibit 20; Employer's Exhibit 3.

Regarding legal pneumoconiosis, the administrative law judge discussed Dr. Baker's finding of hypoxemia based on the blood gas studies, as well as his diagnoses of chronic bronchitis, based on claimant's reported history of symptoms, and chronic obstructive pulmonary disease with severe obstructive defect, based on the pulmonary function study evidence. Decision and Order at 17. Although Dr. Baker attributed all three of these symptoms and/or conditions to both cigarette smoking and coal dust exposure, the administrative law judge discredited the portions of the doctor's opinions with respect to the diagnosis of chronic bronchitis and the finding of hypoxemia since they were not well-reasoned or well-documented. *Id*. Conversely, the administrative law judge found that Dr. Baker's diagnosis of chronic obstructive pulmonary disease arising, in part, from coal mine employment constituted a well-reasoned and well-documented diagnosis of legal pneumoconiosis, noting that the diagnosis was based on the pulmonary function studies and claimant's breathing abnormalities, and that the doctor "clearly

---

of legal pneumoconiosis and as well as into any causation analysis of the evidence with respect to total disability due to pneumoconiosis.

[6] Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R §718.201(a)(2).

[7] The administrative law judge permissibly discounted Dr. Baker's diagnosis of clinical pneumoconiosis because he found that it is based only on an x-ray reading and claimant's history of coal mine employment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). However, a finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

explained how he arrived at his determination that this condition was caused by both coal dust and cigarette smoke exposure." *Id*. The administrative law judge then found that Dr. Baker's opinion was "bolstered by his credentials as an internist and pulmonologist" and accorded his diagnosis of legal pneumoconiosis "substantial probative weight." *Id*.

The administrative law judge next discussed the three reports by Dr. Jarboe, submitted between 2003 and 2005, and noted that Dr. Jarboe diagnosed pulmonary emphysema and chronic asthmatic bronchitis in each of these reports, based primarily on the qualifying pulmonary function study evidence he considered.[8] *Id*. The administrative law judge further noted that Dr. Jarboe opined that these conditions were due solely to cigarette smoking. *Id*. The administrative law judge found that Dr. Jarboe's opinion was "adequately supported by the objective evidence" he considered and that his diagnosis of smoking induced chronic obstructive pulmonary disease was well-reasoned and well-documented. Decision and Order at 18. The administrative law judge then stated that Dr. Jarboe's opinion was "bolstered by his credentials as an internist and pulmonologist" and he accorded his opinion "substantial probative weight." *Id.*

Although the administrative law judge concluded that both opinions were adequately supported by the objective evidence and entitled to substantial probative weight, he found "Dr. Baker's opinions to be better supported, and thus, the most persuasive." In so finding, the administrative law judge stated:

> Specifically, while Dr. Jarboe provided a number of reasons in each of his reports why he believed the PFT evidence proved that [c]laimant's COPD was caused by smoking, I did not find his opinion sufficient enough to overcome Dr. Baker's conclusion that coal dust exposure played a significant role. Stated another way, Dr. Jarboe has clearly and logically explained why he believes [c]laimant's COPD was caused, in part, by cigarette smoking, but Dr. Baker also clearly and logically explained why he believes that [c]laimant's COPD was caused, in part, by coal dust exposure. In addition, Dr. Baker does not dispute Dr. Jarboe's diagnosis, and in fact, he stated that cigarette smoking obviously had an impact on [c]laimant's pulmonary condition. However, Dr. Baker went on to conclude that it was not possible to flatly state that coal dust exposure, which is a known cause of obstructive airway disease, played no role. I find Dr. Baker's conclusion to be more convincing.

Decision and Order at 18.

[8] Dr. Jarboe noted that the reversible component of the airflow obstruction is typical of smoking and not coal dust exposure. Director's Exhibit 20; Employer's Exhibit 3.

The Administrative Procedure Act, 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). In this case, we find merit in employer's assertion that the administrative law judge did not adequately explain the factors he relied on in finding that Dr. Baker's opinion was more "convincing" than Dr. Jarboe's contrary opinion, since he found that both doctors clearly and logically explained their conclusions. Employer's Brief at 11; *see Wojtowicz*, 12 BLR at 1-165. As employer suggests, it appears that the administrative law judge preferred Dr. Baker's opinion because it was not rebutted by Dr. Jarboe's opinion, thus shifting the burden of proof to employer. Thus, we hold that the administrative law judge erred in failing to provide a valid basis for according determinative weight to Dr. Baker's opinion rather than to Dr. Jarboe's contrary opinion. In view of the foregoing error, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the evidence.

Employer also asserts that the administrative law judge erred in substituting his opinion for that of the physician. This contention has merit. The administrative law judge discounted Dr. Jarboe's opinion, stating that:

> Finally, Dr. Jarboe placed a great amount of emphasis on the fact that Claimant's 2003 PFT showed reversibility. Based on this, Dr. Jarboe concluded that Claimant's COPD was not consistent with coal mine dust exposure, which causes a fixed impairment. However, I find that his failure to explain why Claimant's post-bronchodilator values remain qualifying under the regulations diminishes the weight of his ultimate conclusion because it leaves open the possibility of an underlying, fixed impairment. Thus, the objective evidence is more consistent with Dr. Baker's mixed etiology diagnosis. As a result, I find Dr. Baker's diagnosis of legal pneumoconiosis is more persuasive and better supported by the objective evidence than Dr. Jarboe's.

Decision and Order at 18.

The Board has long held that the interpretation of the objective data is a medical determination for which an administrative law judge cannot substitute his own opinion. *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). In his March 23, 2005 report, Dr. Jarboe observed that the April 17, 2003 FEV1 improved by 16% after bronchodilating

agents were administered. Employer's Exhibit 3. Further, Dr. Jarboe observed that the variable function of the study indicated reversible airway disease that is not caused by coal dust exposure. *Id*. Thus, to the extent that the administrative law judge found that the post-bronchodilator values of the 2003 pulmonary function study leave open the possibility of an underlying, fixed impairment, we hold that the administrative law judge erred in substituting his opinion for that of the physician. *Casella*, 9 BLR at 1-135.

Upon reconsideration of the evidence on remand, the administrative law judge is instructed to provide a specific explanation regarding his weighing of the conflicting opinions and an explicit rationale for his credibility determinations and must not substitute his opinion for that of the physician.

Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Dr. Baker diagnosed pneumoconiosis and opined that claimant has a severe to totally disabling pulmonary impairment due to coal dust exposure and cigarette smoking. Director's Exhibit 15. Dr. Jarboe opined that coal dust inhalation did not cause claimant's disabling respiratory impairment. Director's Exhibit 20; Employer's Exhibit 3. The administrative law judge found that Dr. Baker's opinion outweighed Dr. Jarboe's opinion on the ground that Dr. Jarboe did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order at 19. However, in view of our decision to vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), which necessarily impacts his determination with regard to disability causation, we also vacate the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of the evidence thereunder, if reached.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge