BRB No. 03-0849 BLA

PAUL EDWARD LeMASTERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	DATE ISSUED: 09/30/2004
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (97-BLA-1752) of Administrative Law Judge Gerald M. Tierney 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] Claimant[2] filed a claim for benefits on December 18, 1996. In a Decision and Order dated September 16, 1999, the administrative law judge credited claimant with twenty-four years and ten months of coal mine employment, and considered entitlement under the applicable regulations at 20 C.F.R. Part 718 (2000). The administrative law judge found that employer conceded that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) (2000) and 718.203(b) (2000). The administrative law judge further found that, while the evidence was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(3) (2000), he established total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Consequently, the administrative law judge awarded benefits. Employer appealed. The Board affirmed, as unchallenged on appeal, the administrative law judge's findings regarding the length of coal mine employment, that the existence of pneumoconiosis arising out of coal mine employment was established under Sections 718.202(a) (2000) and 718.203(b) (2000), and that total disability was not established under Section 718.204(c)(1)-(3) (2000). *LeMasters v. Hobet Mining, Inc.*, BRB No. 00-0104 BLA (Oct. 31, 2000)(unpublished). The Board vacated the administrative law judge's findings at Section 718.204(c)(4) (2000), and instructed the administrative law judge to reconsider Dr. Repsher's medical opinion, and to weigh the like and unlike evidence at Section 718.204(c)(1)-(4) (2000) to determine whether the totality of the evidence established total disability. *Id*. The Board also vacated the administrative law judge's findings at Section 718.204(b) (2000), instructing him to make further findings regarding claimant's smoking history and to reconsider all of the medical opinions in light of these findings. *Id*.

In his Decision and Order on Remand dated June 7, 2001, the administrative law judge found the evidence sufficient to establish total disability under Section 718.204(c) (2000), and total disability due to pneumoconiosis under Section 718.204(b) (2000). Consequently, he awarded benefits. Employer appealed. The Board affirmed the administrative law judge's finding that claimant established total disability under Section 718.204(c) (2000). *LeMasters v. Hobet Mining, Inc.*, BRB No. 01-0794 BLA (July 24, 2002)(unpublished). The Board vacated, however, the administrative law judge's

[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 regulations.

[2]Claimant is the miner, who died on February 1, 2001, after the May 20, 1999 hearing while his claim was pending.

findings with respect to disability causation under Section 718.204(b) (2000). In remanding the case for reconsideration on this issue, the Board held that the administrative law judge erred in failing to consider the opinions of Drs. Fino and Repsher regarding causation. *Id*. The Board also held that the administrative law judge failed to resolve the conflicting evidence regarding the length of claimant's smoking history, an omission which affected the credibility and the weight to be accorded to the medical opinions at Section 718.204(b) (2000). *Id*. The Board further held that the administrative law judge erred in failing to explain why Dr. Rasmussen's qualifications override the qualifications of Drs. Dahhan and Castle. *Id*. The Board thus instructed that, in reconsidering the issue of disability causation on remand, the administrative law judge was required: to consider all of the relevant evidence of record; to make a finding regarding the length of claimant's smoking history; to consider the rationale behind the medical opinions; and to provide specific explanations for his weighing of the evidence in accord with the holdings of the United States Court of Appeals for the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).[3] *Id*.

In his Decision and Order on Remand dated August 21, 2003, the administrative law judge credited claimant's hearing testimony to determine that claimant was not a heavy smoker, and smoked one pack of cigarettes per week. The administrative law judge then credited Dr. Rasmussen's opinion over the contrary opinions of Drs. Fino, Repsher, Dahhan and Castle in finding the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge impermissibly applied the revised regulation at Section 718.204(c) in this claim, and challenges the administrative law judge's credibility determinations with respect to the medical opinions on the issue of disability causation under Section 718.204(c). Claimant has not filed a response brief. The Director, Office of Worker's Compensation Programs (the Director), has filed a letter indicating he does not intend to take a position with regard to the weight the administrative law judge accorded to the conflicting medical opinions of record. The Director responds, however, to employer's contention that the administrative law judge erred in retroactively applying the amended regulation at Section 718.204(c), stating that employer's contention is without merit.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

[3]Because claimant's coal mine employment occurred in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's contention that the administrative law judge impermissibly applied the amended regulation at Section 718.204(c) retroactively in this case. Revised Section 718.204(c) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). The United States Court of Appeals for the District of Columbia, the only court that has reviewed the revised regulations to date, held in *National Mining Ass'n v. Chao*, 292 F.3d 849 (D.C. Cir. 2002), that the provision for establishing total disability due to pneumoconiosis under Section 718.204(c) is not impermissibly retroactive as applied to pending claims. *Chao*, 292 F.3d at 864.

With regard to the administrative law judge's credibility determinations on remand with respect to the relevant evidence under Section 718.204(c), employer contends that the administrative law judge improperly credited the opinion of Dr. Rasmussen, who opined that claimant's pneumoconiosis was a major contributing factor in his totally disabling respiratory impairment, over the contrary opinions of Drs. Fino, Dahhan, Repsher and Castle.

Specifically, employer first argues that the administrative law judge improperly substituted his opinion for the opinions of Drs. Dahhan, Repsher and Castle in determining that claimant was "not a heavy smoker." Employer further argues that, assuming *arguendo* that the administrative law judge's finding that claimant smoked only one pack of cigarettes per week was correct, it was irrational for the administrative law judge to find that the smoking history relied upon by Dr. Rasmussen was more consistent with claimant's actual smoking history than were the histories relied upon by Drs. Dahhan, Repsher and Castle, smoking histories which the administrative law judge found were "far greater." Decision and Order on Remand at 4. Employer's contentions lack

merit. The administrative law judge was instructed on remand to resolve the conflicting evidence regarding the number of cigarettes claimant smoked per day over a forty year period, as this finding "impacts the credibility and the weight to be accorded the medical opinions" under Section 718.204(c). *LeMasters v. Hobet Mining, Inc.*, BRB No. 01-0794 BLA (July 24, 2002)(unpublished), slip. op. at 4. Explaining that he observed claimant at the hearing and found him to be a credible witness, the administrative law judge permissibly credited his testimony that he was never a heavy smoker, smoking only one pack per week.[4] *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); Decision and Order on Remand at 2; Hearing Tr. at 25. Additionally, the administrative law judge rationally found that, among the histories relied upon by the various physicians, the one-half pack per day smoking history relied upon by Dr. Rasmussen was most consistent with claimant's one pack per week history. Decision and Order on Remand at 4. While employer correctly states that Dr. Dahhan noted in his examination that claimant reported a one-*quarter* pack per day history, which employer argues is clearly more consistent with a one pack per week history than the one-*half* pack per day history Dr. Rasmussen relied upon, employer omits that Dr. Dahhan specifically indicated in his report that he was basing his opinion on the forty pack year, *i.e.*, one pack per day for forty years, history which Dr. Gaziano noted in his 1997 examination. Employer's Exhibit 7 at 2-3. In addition, as the administrative law judge correctly stated, Drs. Repsher and Castle relied upon "far greater" histories than Dr. Rasmussen. Decision and Order on Remand at 4; Employer's Exhibits 5-7, 10. Drs. Repsher and Castle, who reviewed the evidence of record, indicated they relied upon smoking histories in excess of forty pack years in formulating their opinions. Employer's Exhibits 5-7, 10. We reject, therefore, employer's contentions that the administrative law judge's findings on remand with respect to claimant's smoking history were irrational and unsupported by substantial evidence.

We are unable to affirm, however, the administrative law judge's decision to credit Dr. Rasmussen's opinion over the contrary opinions of Drs. Fino, Dahhan, Repsher and Castle, in light of employer's remaining contentions on appeal. First, as employer

[4]Contrary to employer's contention, the administrative law judge did not err in failing to credit the history of a "few packs per day" which was noted in a 1993 hospitalization report during claimant's hospitalization for a heart condition. Employer's Exhibit 3. The administrative law judge noted this evidence, Decision and Order on Remand at 2, but permissibly credited claimant's testimony, as discussed, *supra*. Employer's contention that the administrative law judge should have credited the history noted in the hospitalization report amounts to a request to reweigh the evidence. The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

contends, the administrative law judge erred in crediting Dr. Rasmussen's opinion based on his credentials, without discussing the credentials of Drs. Fino, Dahhan, Repsher and Castle, all of whom are Board-certified pulmonary specialists. Employer's Exhibits 4-7, 9-10. While the administrative law judge may credit Dr. Rasmussen's opinion based on his qualifications, the administrative law judge, in contravention of the Board's remand instructions, has not explained how Dr. Rasmussen's compare to the qualifications of Drs. Fino, Dahhan, Repsher and Castle. *Hicks*, *supra*; *Akers*, *supra*; *see LeMasters v. Hobet Mining, Inc.*, BRB No. 01-0794 BLA (July 24, 2002)(unpublished), slip. op. at 4-5.

In addition, we agree with employer that the administrative law judge improperly discounted the opinions of Drs. Dahhan, Repsher and Castle by essentially finding that their opinions are hostile to the Act. While the administrative law judge did not explicitly find these opinions "hostile to the Act," the administrative law judge noted that Dr. Rasmussen stated in his September 14, 1998 report:

> Drs. Repsher, Castle, and Dahhan, while conceding the presence of simple pneumoconiosis, adhere to the concept that only cigarette smoking is capable of producing chronic obstructive lung disease and that chronic obstructive lung disease is not the consequence of coal mine dust exposure.

Claimant's Exhibit 8; *see* Decision and Order on Remand at 3. The administrative law judge also cited the Department of Labor's comments to the amended regulations regarding the Department's determination that coal dust exposure can result in a clinically significant obstructive impairment. Decision and Order on Remand at 3; *see* 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000). As employer argues, Drs. Dahhan, Repsher and Castle do not indicate that coal dust exposure can never cause an obstructive impairment, however, but rather acknowledge that coal dust exposure may cause an obstructive impairment. The physicians' opinions thus may be accorded weight on the issue of disability causation, and should not have been discounted on the ground that the physicians believed coal dust exposure does not cause obstructive impairment. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). We vacate, therefore, the administrative law judge's credibility determinations and weighing of the medical opinion evidence of record under Section 718.204(c), and remand the case for further consideration of the evidence thereunder.[5] In considering the relevant

[5]Employer argues that this case should be referred to a different administrative law judge on remand because the case has "reached the point of administrative gridlock." Petition for Review and brief at 25. We reject employer's contention, as employer has failed to demonstrate bias or a pattern of intransigence on the administrative law judge's part. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

evidence on remand, the administrative law judge must address the relevant factors bearing on the credibility of the medical opinions, which not only include the qualifications of the physicians submitting the opinions, but the explanations the doctors provide in support of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases for their diagnoses.[6] *Hicks*, *supra*; *Akers*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6]Employer further argues that the administrative law judge selectively analyzed the assessments of Drs. Fino, Dahhan, Repsher and Castle, discounting their opinions by critiquing portions of their analyses of objective studies in the record, without discussing their entire opinions. Employer contends that the administrative law judge also failed to explain adequately why he found Dr. Rasmussen's opinion to be better reasoned and documented than the opinions of Drs. Fino, Dahhan, Repsher and Castle. We find merit in employer's contentions. On remand, the administrative law judge must consider the evidence in a manner consistent with the holdings in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).