

BRB No. 00-0641 BLA

DAVID L. MAYNARD)
)
 Claimant-Petitioner)
)
 v.)
)
 GRACE COAL COMPANY,)
 INCORPORATED)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer-Carrier)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

) DATE ISSUED:

) DECISION and ORDER

Appeal of the Decision and Order on Remand - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Randy G. Clark (Clark & Johnson), Pikeville, Kentucky, for claimant.

Michael J. Pollack (Arter & Hadden LLP), Washington, D.C., for employer.

Rita Roppolo (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Benefits (96-BLA-1623) of Administrative Law Judge Daniel J. Roketenetz 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 before the Board for the second time. In his initial Decision and Order - Denying Benefits issued on July 1, 1997, the administrative law judge credited claimant with sixteen and one-quarter years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis, and found that claimant was totally disabled, but that his total disability was not due to pneumoconiosis. Consequently, the administrative law judge denied benefits.

On claimant's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding and his finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3)(2000), but vacated his findings at 20 C.F.R. §718.202(a)(4)(2000). The Board affirmed the administrative law judge's finding that claimant suffered from a totally disabling respiratory impairment, but vacated the administrative law judge's disability causation finding, and remanded the case to the administrative law judge for further consideration. *Maynard v. Grace Coal Co.*, BRB No. 97-1484 BLA (July 23, 1998)(unpub.).

On remand, the administrative law judge found the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Accordingly, he denied benefits.

On appeal, claimant asserts that the administrative law judge erred by failing to follow the Board's instructions on remand. Claimant maintains that Dr. Younes' opinion

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.

supports a finding of pneumoconiosis and total disability. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which employer and the Director have responded. Claimant has not submitted a brief.² Employer asserts that the amended regulations do not affect the disposition of the issues before the Board on appeal. Employer further asserts, however, that if the amended regulations are upheld, remand would be required for further development of the evidence. The Director states that the amended regulations have no impact on this appeal. Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We turn to claimant's assertion regarding Dr. Younes's opinion.³ On remand, the

² Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

³ Dr. Younes examined claimant on June 9, 1995, and in his report, dated June 27, 1995, the physician diagnosed "chronic obstructive pulmonary disease as evidenced by spirometry" and bilateral pleural plaques. Director's Exhibit 15. Dr. Younes opined that claimant's chronic obstructive pulmonary disease had two causes, the primary cause was cigarette smoking, and the secondary cause was occupational dust exposure. Director's Exhibit 15. In the section of the medical opinion where Dr. Younes addressed the etiology of the bilateral pleural plaques, he stated "R/O asbestos exposure." Director's

Exhibit 15. In a letter responding to questions posed by the claims examiner, Dr. Younes indicated that claimant has pneumoconiosis as defined by the regulations and that claimant has a severe obstructive impairment which disables him from performing his coal mine employment. He also stated “Obesity causes restrictive ventilatory impairment and clearly the patient has obstructive impairment and possibly restrictive impairment as well which we cannot be certain of unless we do complete lung function tests, including lung volumes.” Director’s Exhibit 16.

administrative law judge reconsidered Dr. Younes's opinion in conjunction with the physician's response to the claims examiner's questions. The administrative law judge stated:

Dr. Younes' response hardly can be said to amount to a clarification of the effect of the Claimant's obesity on his respiratory condition. If anything, his response makes his ultimate conclusion that the Claimant suffers from pneumoconiosis related to his coal mine employment even more suspect. His response is that the Claimant may have a restrictive defect but he cannot determine that fact unless he obtains complete lung function tests, including lung volumes. Dr. Younes did not obtain such tests, and so cannot know if the Claimant has a restrictive lung dysfunction. Since he does not know this, then he obviously cannot know the effect of this condition on the Claimant, and more importantly, how that knowledge would have altered his diagnosis. Given the inconclusive nature of Dr. Younes' opinion and his even more inconclusive clarification, I find that his report is neither well-reasoned or [*sic*] well-documented.

Decision and Order on Remand at 3. Accordingly, the administrative law judge determined that Dr. Younes's opinion:

does not stand against the opinions of Drs. Branscomb, Broudy, Fino and Wright, who find no disabling pulmonary impairment related to coal mine employment. All of their opinions, unlike that of Dr. Younes, were well-reasoned and supported by objective medical evidence.

Decision and Order on Remand at 3.

In order to be relied upon, a medical opinion must be both documented and reasoned. The Board has held that in order to be considered documented, a medical opinion must set forth the clinical findings, observations and facts upon which the physician based his diagnosis. In order to be considered reasoned, the documentation must support the physician's assessment of the miner's health. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

We affirm the administrative law judge's finding that the supplemental letter from Dr. Younes is inconclusive regarding the impact of claimant's obesity on his respiratory condition. Dr. Younes states that obesity causes a restrictive impairment. Dr. Younes essentially states that claimant has an obstructive impairment; claimant may have a restrictive impairment, but he cannot be certain of this without a complete lung function test. As the administrative law judge rationally found, this opinion does not clarify the physician's opinion regarding the impact of obesity on claimant's lung condition. *See*

Kuchwara v. Director, OWCP, 7 BLR 1-167 (1984). Consequently, we affirm the administrative law judge's finding that Dr. Younes's opinion is not well reasoned.⁴ See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields, supra*.

Based on our affirmance of the administrative law judge's finding that Dr. Younes's opinion is not adequately reasoned, and our previous affirmance of the administrative law judge's decision to accord diminished weight to the opinions of Drs. Myers and Anderson, who diagnosed pneumoconiosis, see *Maynard*, slip op. at 4, n.4, we have affirmed the administrative law judge's discrediting of all of the medical opinion evidence supportive of claimant's burden of establishing the existence of pneumoconiosis. We, therefore, affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis. Inasmuch as claimant has failed to establish the existence of pneumoconiosis, one of the essential elements of entitlement pursuant to Part 718, see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

⁴ Contrary to the implication in claimant's brief on appeal, the Board did not instruct the administrative law judge to credit Dr. Younes' opinion. See *Maynard v. Grace Coal Co.*, BRB No. 97-1484 BLA (July 23, 1998)(unpub.), slip op. at 4.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge