BRB No. 02-0502 BLA

GARY L. LOONEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN MINING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand and Order Denying Motion for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Helen H. Cox (Howard M. Radzely, Acting 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: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand and Order Denying Motion for Reconsideration (94-BLA-0433) of Administrative Law Judge Linda S. Chapman 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 sixth time. The Board has previously discussed fully the procedural history of this case. *See Looney v. Harman Mining Co.*, BRB No. 00-0983 BLA (Aug. 21, 2001)(unpub.); *Looney v. Harman Mining Co.*, BRB No 98-1550 BLA (Sept. 28, 1999)(unpub.).

In the Decision and Order issued on August 21, 2001, the Board held that the administrative law judge's finding that Dr. Fino's opinion is hostile to the Act violated the prior Board order, and the Board vacated this finding. In addition, the Board held that the administrative law judge erred in finding Dr. Sargent's opinion to be hostile to the Act. As these findings by the administrative law judge impacted her weighing of the evidence regarding the existence of pneumoconiosis and disability causation, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 718.204(c). The Board also noted that the administrative law judge had not discussed the relative merits of the opinions of Drs. Robinette, Forehand, Sargent and Fino and instructed the administrative law judge to do so. The administrative law judge was advised to consider these medical opinions in accordance with the recent law of the Fourth Circuit. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). The Board rejected employer's request that the case be reassigned to another administrative law judge and its contention that employer could not receive a fair adjudication in this case and that due process necessitated that liability be transferred to the Black Lung Disability Trust Fund (Trust Fund). *See Looney v. Harman Mining Co.*, BRB No. 00-0983 BLA (Aug. 21, 2001)(unpub.).

On January 18, 2002, the administrative law judge issued her Decision and Order on Remand, which is the subject of the instant appeal. The administrative law judge reviewed the medical opinions of Drs. Fino and Sargent and found them hostile to the Act and "entitled to little, if any, weight." 2002 Decision and Order at 4. The administrative law judge stated that even if she had not found the opinions of

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[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.

Drs. Fino and Sargent to be hostile to the Act, she would still deem these opinions unreliable, as they focus on the existence of medical pneumoconiosis and do not address the issue of legal pneumoconiosis. In weighing the medical opinion evidence, the administrative law judge relied on a prior statement by the Board, that the opinions of Drs. Forehand and Robinette are documented and reasoned and could support a finding of pneumoconiosis. The administrative law judge found that claimant established the existence of pneumoconiosis at Section 718.202(a), *see Compton*, *supra*, and that claimant's total disability is due to pneumoconiosis at Section 718.204(c). Accordingly, the administrative law judge awarded benefits. Employer requested reconsideration, which the administrative law judge denied in her Order Denying Motion for Reconsideration issued on March 15, 2002.

On appeal, employer asserts that the administrative law judge has failed to comply with the Board's directives. Specifically, employer refers to the administrative law judge's continued finding that the opinions of Drs. Fino and Sargent are hostile to the Act, in addition to the administrative law judge's failure to specifically comply with the Board's instruction to consider the medical opinions in accordance with recent Fourth Circuit case law. Employer contends that these errors require remand. Employer also alleges that the alternate rationale provided by the administrative law judge for discrediting the opinions of Drs. Fino and Sargent must be vacated. Employer again requests that the case be transferred to another administrative law judge, and it again contends that its right to due process has been violated and it asserts that liability for benefits should be transferred to the Trust Fund.

Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds solely on the issue of transfer of liability. The Director maintains that employer's right to due process has not been violated in this case, and the Director urges the Board to reject employer's assertion. Employer has filed a reply brief reasserting its position.

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

As an initial matter, employer asserts that the administrative law judge's finding that the reports of Drs. Fino and Sargent are hostile to the Act violates the Board's previous remand order and must, therefore, be vacated. Upon further

reflection, we have determined that the administrative law judge acted within her discretion in finding that Dr. Fino's opinion is hostile to the Act. The administrative law judge concluded that Dr. Fino's report and deposition testimony leave "no room for doubt" that "in his opinion, coal dust exposure does not cause obstructive disease, pure or otherwise." 2002 Decision and Order at 4. We hold that this is a reasonable interpretation of Dr. Fino's opinion, and that the administrative law judge, therefore, permissibly found that Dr. Fino's opinion is hostile to the Act. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). We, therefore, vacate our prior holding to the contrary. However, we cannot affirm the administrative law judge's finding that Dr. Sargent's opinion is hostile to the Act. Dr. Sargent's opinion, in the instant case, is very similar to his opinion in the Fourth Circuit's *Stiltner* case, *see Stiltner*, 86 F.3d at 341, n.5, 20 BLR at 2-254, n.5, which the court determined was a creditable opinion. Thus, we hold that, on remand, the administrative law judge must provide further clarification and explanation of her finding that Dr. Sargent's opinion is hostile to the Act in view of the court's holding in *Stiltner*. We therefore vacate the administrative law judge's findings regarding the existence of pneumoconiosis at Section 718.202(a) and disability causation at Section 718.204(c).[2]

[2] As employer points out, Drs. Fino and Sargent found that claimant's pulmonary function study results were reversible following the administration of bronchodilators, and concluded that such results were not indicative of pneumoconiosis. On remand, therefore, the administrative law judge is additionally instructed to consider, independent of the issue of whether these doctors' opinions are hostile to the Act, whether these opinions provide a credible and objective basis for finding that claimant does not suffer from pneumoconiosis, and whether they should be credited on that basis.

Employer also challenges the alternate basis provided by the administrative law judge for according little weight to Dr. Sargent's opinion.[3] Specifically, the administrative law judge accorded Dr. Sargent's opinion little weight, finding that Dr. Sargent did not address the issue of legal pneumoconiosis, and because Dr. Sargent believes that "without a positive x-ray, there can be no disabling pneumoconiosis." 2002 Decision and Order at 5.

[3] In view of our affirmance of the administrative law judge's finding that Dr. Fino's opinion is hostile to the Act, we decline to address employer's challenge to the administrative law judge's alternate bases for discrediting Dr. Fino's opinion.

A review of Dr. Sargent's opinion reflects, as asserted by employer, that Dr. Sargent did, in fact, address the issue of legal pneumoconiosis.[4] During his deposition, Dr. Sargent stated that claimant does not have coal workers' pneumoconiosis or *a dust disease of the lung related to his coal mine employment*. Employer's Exhibit 13 at 24 (emphasis added). In his medical opinion dated September 7, 1993, Dr. Sargent opined that claimant:

> is not suffering from coal worker's [sic] pneumoconiosis. This determination is made on the basis of a negative x-ray and also on the basis of the character of his ventilatory impairment. When coal worker's [sic] pneumoconiosis causes a ventilatory impairment it causes a mixed obstructive and restrictive pattern. It also causes the impairment in the presence of a positive x-ray. [Claimant] does not have a positive x-ray and he has an obstructive impairment without evidence of restriction….

Director's Exhibit 38.

Inasmuch as Dr. Sargent addressed whether claimant suffers from a lung disease arising out of his coal mine employment, we vacate the administrative law judge's finding that Dr. Sargent did not address legal pneumoconiosis. In addition, we cannot affirm the administrative law judge's finding that Dr. Sargent's opinion is unreliable because he believes that "without a positive x-ray, there can be no disabling pneumoconiosis." 2002 Decision and Order at 5. Dr. Sargent did not make such a statement. Rather, Dr. Sargent stated that coal workers' pneumoconiosis causes impairment in the presence of a positive x-ray. Director's Exhibit 38. Moreover, Dr. Sargent indicated that his opinion that claimant does not

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[4] Legal pneumoconiosis, as defined in the regulations:

> includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
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> For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §718.201(a)(2), (b).

suffer from coal workers' pneumoconiosis or a dust disease related to his coal mine employment was based on his consideration of claimant's x-rays, his history of occupational exposure, claimant's symptoms, the pulmonary function and blood gas study results, other risk factors, and the character of claimant's impairment. Employer's Exhibit 13 at 24. Consequently, we vacate the administrative law judge's finding that Dr. Sargent's opinion is unreliable for the aforementioned reasons.

Employer also asserts that the administrative law judge erred by failing to follow the Board's instruction that she reexamine the opinions of Drs. Robinette and Forehand to determine whether these opinions are reasoned and documented in light of recent Fourth Circuit case law. We agree. In her Decision and Order, the administrative law judge merely referenced an earlier holding by the Board in its 1996 Decision and Order. In so doing, the administrative law judge has not complied with the Board's instruction to consider the medical opinions in accordance with the recent law of the Fourth Circuit, namely the decisions in *Compton*, *Sparks*, and *Jarrell*. An adjudicatory body must apply the law in effect at the time of its decision, unless application of the intervening law would result in a "manifest injustice." *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989)(Decision and Order on Reconsideration)(*en banc*). Because the administrative law judge has not complied with the Board's instruction, and there has been no assertion that application of the current case law would result in a manifest injustice, we again instruct the administrative law judge to consider the medical opinions in accordance with the most recent law of the Fourth Circuit.

We now consider employer's request that this case be reassigned to a different administrative law judge on remand. Employer contends that a "fresh look at the evidence" is required, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). In view of the circumstances of this case, we do not find a basis to reassign this case to another administrative law judge, *see generally Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992), and we, therefore, deny employer's request.

Finally, we consider employer's assertion that it should be dismissed from this case. Employer maintains that as a result of the numerous remands in this case, it cannot receive a fair adjudication and that its due process rights have been violated. Employer additionally contends that liability for the payment of any benefits should be transferred to the Trust Fund. In response, the Director asserts that lengthy litigation and unfavorable outcomes do not constitute a violation of a party's right to due process. Further, the Director states "A responsible operator's remedy for its dissatisfaction with an ALJ's findings is not transfer of liability to the Trust Fund; it is

an appeal to the Board or the court of appeals." Director's Letter at 3.

We agree with the Director. Employer has had an opportunity to defend this case since the initial filing of the claim and it has done so vigorously, as evidenced by the numerous appeals employer has filed in this case. Since employer has not provided a valid legal basis for its argument that its due process rights will be violated by remanding this case to the administrative law judge, we reject employer's argument.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, her findings regarding the existence of pneumoconiosis and disability causation are vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge