BRB No. 00-0983 BLA

GARY L. LOONEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN MINING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano (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; 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-433) of Administrative Law Judge Linda S. Chapman awarding benefits 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 fifth time. In its prior Decision and Order the Board discussed fully the history of this case. *Looney v. Harman Mining Co., Inc*., BRB No. 98-1550 BLA (Sep. 28, 1999)(unpub.). Pursuant to employer's latest appeal, the Board vacated Administrative Law Judge Ralph A. Romano's credibility determinations regarding the medical opinion evidence on the existence of pneumoconiosis and on the cause of claimant's respiratory impairment and remanded the case for reconsideration of those issues by another administrative law judge. *Looney*, *supra*. On remand, the case was reassigned to Administrative Law Judge Linda S. Chapman (the administrative law judge). The administrative law judge considered the opinions of Drs. Fino and Sargent, and concluded that their opinions were hostile to the Act. Thus, she accorded diminished weight to these medical opinions. After considering the remaining medical opinion evidence, the administrative law judge found that claimant met his burden of proving the existence of pneumoconiosis and that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment. Accordingly, benefits were awarded.

On appeal, employer challenges the findings of the administrative law judge regarding the medical opinion evidence, arguing that the administrative law judge failed to follow the Board's previous remand order, that the administrative law judge erred in her credibility findings, and that liability should be transferred to the Black Lung Disability Trust Fund (the Trust Fund) as its due process rights have been violated. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds only to employer's argument that liability should be transferred to the Trust Fund, urging that the Board deny this request.[2]

---

[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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] On August 9, 2001, the United States District Court for the District of Columbia issued its decision in *National Mining Association v. Chao*, D.D.C., 00-3086 (Aug. 9, 2001), granting summary judgment defending final regulations issued on December 20, 2000, 65 Federal Register 79920-80107 under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. In its decision, the court also dissolved the Preliminary Injunction Order that it had issued on February 9, 2001. As a result of the court's decision, the issue raised by the Preliminary Injunction Order is now moot, and we will not address the briefs submitted by the parties in response to the Board's order of April 20, 2001.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim 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* 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*).

Employer initially argues that the decision of the administrative law judge finding the reports of Drs. Fino and Sargent hostile to the Act violates the Board's previous remand Order and must, therefore, be vacated. We agree. In the Board's previous Decision and Order, it held that Judge Romano erred when he found the report of Dr. Fino hostile to the Act.

When the rationale of our administrative law judge's evidentiary ruling is rejected on appeal, the administrative law judge, on remand, is required to follow the directive of the Board regarding the crediting of evidence. *See Muscar v. Director, OWCP*, 18 BLR 1-7 (1999)("an inferior court has no power or authority to deviate from the mandate issued by an appellate court"); *Hall v. Director, OWCP*, 12 BLR 1-80 (1989)("lower forum must not deviate from the orders of a superior forum"); *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986). In the instant case, the administrative law judge failed to comply with the Board's directive in its remand Order which held that Dr. Fino's report was not hostile to the Act. We, therefore, vacate the finding of the administrative law judge that Dr. Fino's opinion was entitled to diminished weight because it was hostile to the Act and remand this case for the administrative law judge to reconsider the credibility of the medical opinion of Dr. Fino. Likewise, as Dr. Sargent did not assume that coal mine employment can never cause an obstructive impairment, the administrative law judge impermissibly found the medical opinion of Dr. Sargent hostile to the Act and must reconsider this opinion on causation, as well. *Id*.

Employer next contends that the administrative law judge erred in failing to discuss the relative merits of the opinions of Drs. Robinette, Forehand, Sargent and Fino as instructed by the Board. Specifically, employer contends that, in addition to erroneously discrediting the opinions of Drs. Fino and Sargent as hostile to the Act, the administrative law judge erroneously "pulled apart" their opinions while assuming that "the competing opinions of Drs. Forehand and Robinette were well-reasoned and worthy of credit without even casual

examination." Employer's Brief at 18.[3] Further, employer contends that recent decisions by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, require reconsideration of the assumption that the opinions of Drs. Robinette and Forehand were well-reasoned citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR (4th Cir. 2000); *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999).[4]

In considering the opinions of Drs. Robinette, Forehand, Sargent and Fino, the administrative law judge gave the opinions of Drs. Sargent and Fino diminished weight, despite their superior qualifications, because she found them hostile to the Act. The administrative law judge concluded that "relying on the opinions of Drs. Robinette and Forehand," she found the existence of pneumoconiosis and disability causation established. Decision and Order on Remand at 15-16. Accordingly, as the administrative law judge erred in according diminished weight to the opinions of Drs. Sargent and Fino for the reason given, and therefore erred in failing to discuss the relative merits of all the opinions, this case must be remanded for reconsideration of the medical opinion evidence on the issues of pneumoconiosis and disability causation. Moreover, in considering the opinions on remand, the administrative law judge must consider them in accordance with the most recent law of the Fourth Circuit. *See Compton*, *supra*; *Jarrell*, *supra*; *Sparks*, *supra*.

Furthermore, since the existence of pneumoconiosis was decided only on the basis of the medical opinion evidence and the Fourth Circuit requires that all evidence relevant to the existence of pneumoconiosis must be weighed together to determine if claimant has met his burden of proving the existence of pneumoconiosis, that finding is vacated and the case is remanded for the administrative law judge to reconsider that issue pursuant to *Compton*,

[3] In its second Decision and Order, the Board affirmed Administrative Law Judge Ralph A. Romano's determination that these reports were reasoned and documented. *See Looney v. Harman Mining Co., Inc.*, BRB No. 96-0637 BLA (June 27, 1996)(unpub.).

[4] Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

supra.

Employer's request for reassignment of this case to a different administrative law judge is, however, rejected. Employer has not proved that this administrative law judge is biased against employer. *See Hicks, supra*; *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Finally, employer contends that the numerous remands in this case show that employer cannot receive a fair adjudication of this case and that due process, therefore, necessitates that liability be transferred to the Trust Fund, citing *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-203 (4th Cir. 1998), and *Consolidation Coal Company v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999). Contrary to employer's assertion, however, and to the cases it cites in support of that assertion, employer has had an opportunity to defend this case since the initial filing of the claim and has done so vigorously, as evidenced by the numerous appeals employer has made in this case. Therefore, 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. *Id.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge