BRB No. 00-1012 BLA

THEODORE TINSLEY BATEMAN Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioner 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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Legal Practice Clinic, Washington & Lee University, School of Law), Lexington, Virginia, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington D.C., for employer.

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-1441) of Administrative Law Judge Stuart A. Levin 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 a second time. In his first decision, based on the filing date of August 10, 1995, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with thirty-three years of coal mine employment and found employer to be the responsible operator. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b)(2000), and sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(2000). Accordingly, benefits were awarded.

On appeal, the Board affirmed the findings of the administrative law judge on the length of coal mine employment, on his designation of employer as responsible operator, and at 20 C.F.R. §718.204(c)(1)-(3)(2000) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The Board also affirmed the finding of the administrative law judge that claimant had met his burden of proving the existence of pneumoconiosis arising out of coal mine employment and the presence of at totally disabling respiratory impairment at 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(c)(4)(2000). The Board, however, vacated the administrative law judge's findings on the cause of claimant's disabling respiratory impairment and remanded this case for further consideration of that issue. *See Bateman v. Eastern Associated Coal Co.*, BRB No. 98-0997 BLA (Sept. 30, 1999)(unpub.).

On remand, the administrative law judge again considered the medical opinion evidence regarding the cause of claimant's respiratory impairment. After weighing the evidence, the administrative law judge found it sufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's disabling respiratory impairment. Accordingly, benefits were awarded.

On appeal, employer challenges the findings of the administrative law judge on the cause of claimant's disabling respiratory impairment. Employer also argues that the case

[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.

should be remanded for the administrative law judge to reconsider the existence of pneumoconiosis and the presence of a totally disabling respiratory impairment. 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), has filed a letter indicating that he will not participate 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 claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association 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 April 20, 2001, to which the Director and claimant have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer also responded arguing that 20 C.F.R. §718.204(a) could impact the outcome of this case because it provides that non-respiratory disabilities are irrelevant to a determination of causation. Having considered the briefs submitted by the Director, employer, and claimant, and reviewed the evidence of record, we hold that the disposition of this case is not impacted by the challenged regulations. Because the existence of a totally disabling respiratory impairment has already been found to have been established. *Bateman*, slip op. at 5-6, employer's argument at Section 718.204(a) will not have an impact on the outcome of this case. Therefore, we 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 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 argues that the findings of the administrative law judge on the cause of claimant's disabling respiratory impairment cannot be affirmed. Specifically, employer argues that the administrative law judge erred in crediting the opinions of Drs. Rasmussen, Bembalkar and Amjad and discrediting opinions of Drs. Zaldivar, Fino and Renn.

In according less weight to the opinion of Dr. Renn that smoking was the cause of claimant's disabling respiratory impairment, the administrative law judge concluded that Dr. Renn's opinion was entitled to less weight because Dr. Renn had reasoned that, since claimant was last employed in coal mine employment in 1986, but the first time he was found to have a chronic productive cough was not until 1995, smoking, not coal mine employment, was the causative factor of his respiratory disability. The administrative law judge concluded that Dr. Renn's opinion was rendered less credible because the evidence of record reflected the presence of a chronic cough going back to 1974, *i.e.*, claimant's 1982 compensation award from the West Virginia Workers Compensation Fund refers to medical records revealing a chronic cough of seven to eight years duration. Moreover, because Dr. Renn opined that claimant's bronchitis, which he related to smoking, would tend to disappear when claimant stopped smoking, which he did in 1992, the administrative law judge accorded less weight to Dr. Renn's conclusion that claimant's respiratory impairment was caused solely by claimant's cigarette smoking in light of evidence showing that claimant's respiratory condition continued to worsen after he stopped smoking. This was rational. *Id.*; Employer's Exhibit 7 at p.17; Director's Exhibit 3; *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994), *aff'd on recon.*, 20 BLR 1-64 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibit 3. Accordingly, we affirm the administrative law judge's accordance of less weight to the opinion of Dr. Renn on causation.

Turning to Dr. Zaldivar's opinion, the administrative law judge accorded it little weight because he found that the reason articulated by Dr. Zaldivar for the cause of claimant's disabling respiratory impairment; *i.e.*, asthma, was not supported by the record. The administrative law judge reasoned that because no other physician of record diagnosed asthma or indicated treating claimant for asthma, Dr. Zaldivar's causation opinion was entitled to less weight. Further, the administrative law judge noted that while Dr. Zaldivar opined that claimant's respiratory condition improved when he was hospitalized and placed on treatment for asthma, the record showed frequent hospitalizations of claimant and use of home oxygen that did not appear to show any sustained improvement in claimant's respiratory condition. *See Clark, supra*; *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Deposition of Dr. Zaldivar at 23, 27; Deposition of Dr. Fino at 29.

We agree, however, with employer that the administrative law judge erred in his characterization of Dr. Fino's opinion, *i.e.*, that Dr. Fino based his causation finding on the existence of clinical pneumoconiosis without considering the broad definition of pneumoconiosis under the Act, *i.e.*, a respiratory impairment arising out of coal mine employment. As employer contends Dr. Fino did discuss his reasons for finding that claimant's disabling respiratory impairment did not arise out of coal mine employment. Deposition at 29-30. Accordingly, as the administrative law judge mischaracterized Dr.

Fino's opinion, this case must be remanded for reconsideration of Dr. Fino's opinion, in light of the other evidence, on the issue of causation. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Likewise, we agree with employer that the administrative law judge's consideration of the opinion of Dr. Rasmussen also requires remand. As employer contends, the administrative law judge found Dr. Rasmussen's causation opinion reasoned because it was supported by medical literature which has held "that chronic obstructive lung disease can be caused by exposure to coal mine dust as well as cigarette smoking." Decision and Order on Remand at 13. As employer contends, however, Dr. Rasmussen did not discuss the individual facts of claimant's case with enough specificity to allow the administrative law judge to determine whether it was a reasoned opinion. Claimant's Exhibit 9. Rather, employer contends that claimant's x-ray evidence of pneumoconiosis and his lengthy coal mine employment history provide the only basis for Dr. Rasmussen's findings. Regarding Dr. Bembalkar's opinion, that claimant's pulmonary impairment is due, at least, in part, to coal mine employment, the administrative law judge credited it as corroborative of Dr. Rasmussen's opinion. Accordingly, this case must be remanded for the administrative law judge to reconsider these opinions along with the other opinions on the issue of causation pursuant to the standard set forth in 20 C.F.R. §718.204(c), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000); *Bill Branch Coal Co. 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); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). We reject employer's contention that the administrative law judge accorded too much weight to Dr. Amjad's opinion, however, since the administrative law judge rationally accorded it little weight because Dr. Amjad was not a pulmonary specialist and was merely relying on the opinions of the pulmonary specialists when he rendered his opinion. *See Hicks, supra*; *Akers, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Next, employer contends that a remand is required for reconsideration of the medical opinion evidence at Section 718.202(a)(4) in light of recent decisions issued by the Fourth Circuit. We agree. Subsequent to Board's Decision and Order affirming the administrative law judge's finding of pneumoconiosis based on the medical opinion evidence, the Fourth Circuit held, in *Compton*, *supra*, that all evidence relevant to the existence of pneumoconiosis must be weighed together. Accordingly, because the administrative law judge found the existence of pneumoconiosis based solely on consideration of the medical opinion evidence, this case must be remanded for reconsideration on the issue of pneumoconiosis.[2]

[2] The administrative law judge indicated that the x-ray evidence is mixed, but did not

Regarding employer's other arguments that the case should also be remanded for reconsideration of whether pneumoconiosis arose out of coal mine employment or total respiratory disability was established; we disagree, as employer has not raised any arguments which would require us to revisit these findings which were previously affirmed. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Accordingly, the Decision and Order on Remand 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.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

make any specific finding as to whether the x-ray evidence was sufficient or insufficient to establish the existence of pneumoconiosis. *See* Decision and Order at 3-4.