BRB No. 98-0479 BLA

ALTON L. BEERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
	)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Tulowitzki and Bilonick), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-1784) of Administrative Law Judge Thomas M. Burke 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). In his original Decision and Order, the administrative law judge credited claimant with over forty years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. Part 718. Accordingly, benefits were awarded. Employer appealed and in *Beers v.*

Bethenergy Mines, Inc., BRB No. 96-1546 BLA (June 26, 1997)(unpub.), the Board discussed the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and concluded that the administrative law judge erred in discrediting the opinions of Drs. Begley, Solic, Strother and Cox on the basis that they "considered only 'clinical pneumoconiosis'" inasmuch as each physician diagnosed a respiratory impairment, but attributed the impairment to conditions other than coal mine employment. The Board noted that the administrative law judge commented that "[i]t seems unreasonable that none of the physicians admitted any possibility of a significant effect on claimant's lungs resulting from over forty years of coal dust exposure." The Board determined that the administrative law judge's disagreement with the doctors' findings was not a sufficient basis upon which to discredit their opinions. Consequently, the Board vacated the administrative law judge's findings of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and remanded the case for further consideration. On remand, the administrative law judge again found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. On appeal herein, employer contends that the administrative law judge erred in finding that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer specifically contends that there is no significant difference between the administrative law judge's previous assessment of the medical opinions and his

rationale for discrediting them and the assessment and rationale he utilized on remand in finding the existence of "legal" pneumoconiosis established at Section 718.202(a)(4) and total disability due to pneumoconiosis established at Section 718.204(b). We agree. In his Decision and Order on Remand, the administrative law judge credited Dr. Malhotra's opinion, that claimant's impairment was due to pneumoconiosis and that smoking did not play a big role in claimant's pulmonary problem, over the opinions of Drs. Solic, Strother, Begley and Cox, who found no pneumoconiosis and that claimant's pulmonary impairment was due solely to smoking or smoking and neurofibromatosis. The administrative law judge stated that in his prior decision he discredited the opinions of Drs. Solic, Strother, Begley and Cox not because they considered only clinical pneumoconiosis, but because they did not give proper consideration to the possibility that claimant's pulmonary condition might be caused or aggravated by legal pneumoconiosis. The administrative law judge concluded that these physicians did not offer sufficient reasoning for discounting claimant's forty years of coal dust exposure as a causative factor in claimant's pulmonary problems. The administrative law judge briefly discussed each opinion and their perceived deficiencies and gave the opinions of Drs. Solic, Strother, Begley and Cox less credit than Dr. Malhotra's opinion as they did not adequately address the diagnosis of legal pneumoconiosis in light of claimant's forty years of coal dust exposure. For similar reasons, the administrative law judge found total disability due to pneumoconiosis at Section 718.204(b).

The administrative law judge is required to weigh all the evidence of record and draw conclusions, inferences, and resolve the conflicts in the medical evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Co.*, 12 BLR 1-77 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In the previous decision and in the instant case, the administrative law judge consistently gave diminished weight to opinions of the physicians he concluded failed to explain why forty years of coal dust exposure did not contribute to claimant's pulmonary impairment, but did not review the medical opinions in the context of the objective evidence of record, which may provide a basis for determining the credibility of the opinions. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). The administrative law judge gave Dr. Malhotra's opinion determinative weight, but did not state why he found the diagnosis compelling. Rather, the administrative law judge simply notes the deficiencies in certain other opinions. In this respect the administrative law judge appears to have considered it critical that these medical opinions persuasively explain why forty years of coal dust exposure played no role in claimant's respiratory impairment, and in so doing, ignored the explanations offered by the physicians who interpreted the objective data and attempted to explain how they were able to differentiate the effects of smoking and coal dust exposure in reaching their respective conclusions. Consequently, we

again vacate his findings of the existence of pneumoconiosis at Section 718.202(a)(4) and total disability due to pneumoconiosis at Section 718.204(b) and remand this case for further consideration.

Additionally, we note that subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Consequently, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) on remand, then the administrative law judge must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Williams, supra*. If the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), he must then address the remaining issues of entitlement, *i.e.*, whether claimant's totally disabling respiratory impairment is due to pneumoconiosis pursuant to Section 718.204(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge