BRB No. 98-1593 BLA

HARLAN O'BRYAN SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL 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 of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

John D. Maddox and Mark E. Solomons (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (92-BLA-0921) of Administrative Law Judge Clement J. Kichuk (the administrative law judge) 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). This case is before the Board for the third time. In the original Decision and Order, Administrative Law Judge Bernard J. Gilday, Jr. credited claimant with thirty-three years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Gilday found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). Although Judge Gilday found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), he also found the evidence insufficient to establish that total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Gilday denied benefits. In response to claimant's appeal, the Board affirmed Judge Gilday's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(c). However, the Board vacated Judge Gilday's finding of no total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *Smith v. Peabody Coal Co.*, BRB No. 93-1241 BLA (Mar. 22, 1994)(unpub.).

On remand, Judge Gilday found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, Judge Gilday awarded benefits to commence as of April 28, 1991, the date claimant filed his application for benefits. Subsequently, in response to the request for reconsideration of the Director, Office of Workers' Compensation Programs (the Director), Judge Gilday modified and amended his decision to reflect that all benefits due and owing to claimant are to commence on June 1, 1991 since claimant's last date of work was June 28, 1991. In disposing of employer's appeal, the Board affirmed Judge Gilday's finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). The Board also affirmed Judge Gilday's determination that the onset date of total disability was June 1, 1991. *Smith v. Peabody Coal Co.*, BRB No. 95-0383 BLA (Sept. 25, 1995)(unpub.). Further, the Board denied employer's request for reconsideration. *Smith v. Peabody Coal Co.*, BRB No. 95-0383 BLA (Order)(Apr. 9, 1996)(unpub.). However, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, reversed the Board's decision and remanded the case for further consideration of the evidence under the proper causation standard. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Hence, the Board remanded the case to the Office of Administrative Law Judges for further consideration consistent with the opinion of the Sixth Circuit. *Smith v. Peabody Coal Co.*, BRB No. 95-0383 BLA (Order)(Feb. 3, 1998)(unpub.).

On the most recent remand, the case was transferred to the administrative law judge, who found the evidence sufficient to establish total disability due to

pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits to commence as of June 1, 1991, based on the date claimant ceased his coal mine employment. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Claimant responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director has declined to participate in 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Specifically, employer asserts that the administrative law judge misapplied the disability causation standard enunciated by the Sixth Circuit in *Smith*.[1] We disagree. The administrative law judge considered the medical opinions of Drs. Anderson, Baker, Lane, Taylor and Traughber. Drs. Baker and Traughber opined that both coal dust exposure and cigarette smoking contributed to claimant's disabling respiratory impairment. Director's Exhibit 8; Claimant's Exhibit 1; Employer's Exhibit 5. Dr. Taylor opined that claimant suffered from a "severe respiratory impairment, most of which was related to cigarette smoking; however, one cannot rule out a component, however small, from his exposure to dust in and around the coal mines." Employer's Exhibit 1. Dr. Anderson opined that claimant

[1]Employer asserts that the administrative law judge erred by focusing more on the dissenting opinion than on properly applying the standard of the majority. Contrary to employer's assertion, the administrative law judge, citing *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997), properly applied the Sixth Circuit's newly clarified causation standard and found that "Claimant has submitted evidence which affirmatively establishes that his pneumoconiosis 'is a contributing cause of some discernible consequence to his totally disabling respiratory impairment.'" Decision and Order on Remand at 11. In applying the Sixth Circuit's causation standard, the administrative law judge merely indicated that he "agree[d] with dissenting Judge Daughtrey...that the medical opinion evidence establishes that pneumoconiosis is more than a mere 'speculative cause' of Claimant's total disability." *Id*.

does not suffer from pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 3. Lastly, Dr. Lane diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease, and opined that chronic obstructive pulmonary disease contributed to claimant's disabling respiratory impairment. Employer's Exhibit 4.

In *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), the Sixth Circuit held that a miner must affirmatively establish that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis under 20 C.F.R. §718.204(b). Further, on appeal, in *Smith*, the Sixth Circuit explained that the term "due to" requires a miner to prove more than a *de minimis* or infinitesimal contribution by pneumoconiosis to his total disability. The Sixth Circuit also explained that the miner's pneumoconiosis must be more than merely a speculative cause of his disability. Rather, the Sixth Circuit held that a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory impairment.

Employer asserts that the administrative law judge erred by relying on the opinions of Drs. Baker and Traughber since the doctors' failure to provide any quantification above infinitesimal renders their evidence legally insufficient to establish total disability due to pneumoconiosis in accordance with *Smith*. As previously noted, Drs. Baker and Traughber opined that both coal dust exposure and smoking contributed to claimant's respiratory impairment. Director's Exhibit 8; Claimant's Exhibit 1; Employer's Exhibit 5. The administrative law judge stated, "I do not interpret the acknowledgment of cumulative causes, to mean that either the smoking or pneumoconiosis was merely an infinitesimal contributor." Decision and Order on Remand at 9. Thus, inasmuch as the administrative law judge rationally found that "[d]espite the fact that Dr. Baker and Dr. Traughber do not quantify the degree of impairment caused by pneumoconiosis and smoking,...their opinions provide sufficient proof that pneumoconiosis is a 'contributing cause of some discernible consequence' of Claimant's disability," *id*. at 11, we reject employer's assertion that the administrative law judge erred by relying on the opinions of Drs. Baker and Traughber.[2] *See Smith, supra*.

[2]Inasmuch as the administrative law judge rationally relied on Dr. Baker's opinion, that the "[e]tiology of [claimant's] impairment is his combined smoking history and coal dust exposure," Claimant's Exhibit 1, because he found that it supports Dr. Traughber's opinion, that both cigarette smoking and coal dust exposure contributed to claimant's respiratory disability, Director's Exhibit 8; Employer's Exhibit 5, we reject employer's assertion that Dr. Baker's opinion is less than credible with respect to the etiology of total disability since Dr. Baker's opinion

that claimant "would definitely have difficulty" working is not a finding of total disability. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Employer also asserts that the administrative law judge erred by relying on Dr. Traughber's opinion since Dr. Traughber rendered a speculative opinion with regard to the cause of claimant's disability. The administrative law judge observed that "[w]hen asked specifically...[if coal dust exposure or smoking] was the cause of Claimant's disability, Dr. Traughber commented, 'Both probably.'" Decision and Order on Remand at 8. The administrative law judge stated, "I do not interpret that comment to mean that smoking was the overwhelming cause of Claimant's disability with pneumoconiosis playing only an infinitesimal role." *Id*. The administrative law judge also stated, "I find that Dr. Traughber concluded that both smoking and pneumoconiosis were contributing causes of Claimant's disability." *Id*. at 8-9. Thus, inasmuch as the administrative law judge, within his discretion as trier of fact, considered all of the relevant medical evidence of record provided by Dr. Traughber and rationally found that "Dr. Traughber clearly opined that both smoking and pneumoconiosis were the cause[s] of Claimant's disability," *id*. at 9, we reject employer's assertion that the administrative law judge erred in relying on the opinion of Dr. Traughber since Dr. Traughber rendered a speculative opinion with regard to the cause of claimant's disability. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Further, since the administrative law judge properly discredited Dr. Anderson's opinion concerning the cause of claimant's disability because the underlying premise of Dr. Anderson, that claimant does not suffer from pneumoconiosis, is inaccurate, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), we reject employer's assertion that the administrative law judge mischaracterized Dr. Anderson's report and erroneously discredited Dr. Anderson's opinion solely because of his negative x-ray reading. In addition, inasmuch as Dr. Lane neither identified the etiology of claimant's chronic obstructive pulmonary disease nor explicitly opined that pneumoconiosis was not the cause of claimant's totally disabling respiratory impairment, Employer's Exhibit 4, we reject employer's assertion that the administrative law judge erred by discrediting Dr. Lane's opinion because he found it to be "hopelessly ambiguous," Decision and Order on Remand at 10. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Finally, inasmuch as the administrative law judge permissibly discredited the opinion of Dr. Taylor because he found that it was not reasoned,[3] we reject, as moot,

[3]The administrative law judge found that "Dr. Taylor's opinion...is not as clear or persuasive as the opinions of Drs. Baker and...Traughber." Decision and Order on Remand at 10.

employer's assertion that the administrative law judge erred in finding Dr. Taylor's opinion sufficient to support a finding of total disability due to pneumoconiosis in accordance with *Smith*. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Therefore, we hold that substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *See Smith, supra*; *Adams, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge