BRB No. 01-0415 BLA

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| DENNIS E. COMPTON<br><br>Claimant-Respondent<br><br>v.<br><br>ISLAND CREEK COAL COMPANY<br><br>Employer-Petitioner<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order--Award of Benefits on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Dennis E. Compton, Amherstdale, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order---Award of Benefits on Remand (1996-BLA-1445) of Administrative Law Judge Ralph A. Romano rendered 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 second time. Initially, the administrative law

judge found that claimant did not establish the existence of pneumoconiosis by chest x-ray evidence but established the existence of pneumoconiosis by medical opinion evidence, and established further that he is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. Upon consideration of employer's appeal, the Board affirmed the award of benefits. *Compton v. Island Creek Coal Co*., BRB No. 97-1477 BLA (Jun. 26, 1998)(unpub.).

Employer appealed to the United States Court of Appeals for the Fourth Circuit, which held that the administrative law judge erred by weighing the x-ray evidence and medical opinions separately, and instructed him to weigh all of the relevant evidence together to determine whether a preponderance the evidence established the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The court also held that the administrative law judge erred in evaluating certain medical opinions. Specifically, the court held that the administrative law judge erred in finding Dr. Dominic Gaziano's opinion to be well documented and reasoned when it was based solely on a chest x-ray reading, and erred in discounting Dr. Gregory Fino's opinion that claimant does not have pneumoconiosis solely because Dr. Fino did not examine claimant. 211 F.3d at 211-12, 22 BLR at 2-175, 2-177. The court further held, however, that substantial evidence supported the administrative law judge's finding that Dr. Oscar Carrillo's opinion diagnosing pulmonary disease due in part to coal dust exposure was documented and reasoned, and also supported the administrative law judge's decision to accord less weight to the opinions of Drs. George Zaldivar and Michael Castle because Dr. Zaldivar did not consider whether coal dust exposure aggravated claimant's respiratory impairment and because Dr. Castle understated claimant's exposure to coal dust. 211 F.3d at 212-13, 22 BLR at 2-176-78. On the issue of disability causation, the court held that the administrative law judge properly accorded less weight to the opinions of Drs. Zaldivar and Castle, but erred in discrediting Dr. Fino's opinion because he did not examine claimant and did not diagnose pneumoconiosis. 211 F.3d at 214, 22 BLR at 2-179-80. Consequently, the court vacated the Board's decision and remanded the case with instructions for the Board to remand the case to the administrative law judge for further consideration.

On remand, the administrative law judge credited the opinion of Dr. Carrillo as supportive of a finding of the existence of legal pneumoconiosis, and found that the negative x-ray evidence weighed with the medical opinions did not negate the evidence of the existence of legal pneumoconiosis. The administrative law judge additionally credited Dr. Carrillo's opinion to find that claimant's total disability is due to pneumoconiosis. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical opinions regarding the existence of pneumoconiosis, and

did not weigh together the x-ray evidence and medical opinions to determine whether the existence of pneumoconiosis was established. Employer alleges further that the administrative law judge erred in his weighing of the medical opinions when he found that claimant's total disability is due to pneumoconiosis. Claimant has not filed a response to employer's appeal, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer argues that the administrative law judge erred in finding the existence of pneumoconiosis established because he erred in discounting Dr. Fino's opinion that claimant's obstructive pulmonary impairment is unrelated to coal dust exposure. Employer's contention has merit. In the administrative law judge's original decision, he accorded less weight to Dr. Fino's opinion because Dr. Fino's conclusion that claimant's lung condition improved after the administration of bronchodilators conflicted with the finding of Dr. Zaldivar, who administered the pulmonary function study in question and detected no response to bronchodilators. [1997] Decision and Order at 10. Reviewing this determination on appeal, the Fourth Circuit court held that "[a]lthough the ALJ noted that the two physicians reached different conclusions about the effect of bronchodilators, the only reason given by the ALJ for crediting Dr. Zaldivar's conclusion over Dr. Fino's is that Dr. Zaldivar examined Compton. Accordingly, the ALJ erred . . . ." 211 F.3d at 212, 22 BLR at 2-177.

On remand, the administrative law judge accorded less weight to Dr. Fino's opinion because the administrative law judge found that Dr. Fino's conclusion as to the effect of bronchodilators "directly contradicts the finding of the physician who actually performed the test." Decision and Order on Remand at 5. Review of the administrative law judge's Decision and Order on Remand does not disclose his reason for crediting Dr. Zaldivar's interpretation of the test results over Dr. Fino's, beyond stating once again that Dr. Zaldivar actually performed the test. As employer notes, Dr. Fino reviewed the pulmonary function study conducted by Dr. Zaldivar and identified a 13% improvement in claimant's FVC measure after using

bronchodilators. Director's Exhibit 32 at 8, 14. In light of these facts and the Fourth Circuit court's holding on this issue, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand this case for him to reconsider the medical opinion evidence as to the existence of pneumoconiosis as defined in the Act and regulations. *See* 30 U.S.C. §902(b); 20 C.F.R. §718.201.

Employer argues further that the administrative law judge did not weigh together the x-ray evidence and medical opinions but merely rejected the x-ray evidence as irrelevant. Because the administrative law judge must reweigh the medical opinions on remand, he must again weigh together the x-ray and medical opinion evidence in any event. *See Compton, supra*. Contrary to employer's assertion, however, the administrative law judge on remand may appropriately bear in mind the difference between clinical and legal pneumoconiosis when weighing the medical evidence. "Evidence that does not establish medical pneumoconiosis, *i.e.*, an x-ray read as negative for coal workers' pneumoconiosis, should not necessarily be treated as evidence weighing *against* a finding of legal pneumoconiosis." *Compton*, 211 F.3d at 210, 22 BLR at 2-173 (emphasis in original); *see also Id.* at n.8 ("We encourage ALJs to be mindful of this distinction and of the different diagnostic purposes attending various pieces of evidence.")

Employer contends that the administrative law judge's finding that claimant's total disability is due to pneumoconiosis is not supported by substantial evidence. Because the administrative law judge must reevaluate the medical opinion evidence in conjunction with all other relevant evidence to determine whether the existence of pneumoconiosis is established, which analysis may affect his weighing of the evidence regarding disability causation, we vacate the administrative law judge's findings at 20 C.F.R. §718.204(b)(2000) and remand this case for him to determine whether pneumoconiosis, if found established, is a substantially contributing cause of claimant's total disability as defined in revised 20 C.F.R. §718.204(c). *See* 20 C.F.R. §§725.2(c); 718.204(c).

Accordingly, the administrative law judge's Decision and Order--Award of Benefits on Remand is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge