

BRB No. 98-1327 BLA

CARL M. HAMRICK)
)
 Claimant-Respondent)
)
 v.)
)
 ARMCO, INCORPORATED) DATE ISSUED: 7/9/99
)
 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 Awarding Benefits of
Rudolf L. Jansen, Administrative Law Judge, United States Department
of Labor.

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Lisa A. Warner (Shaffer & Shaffer), Madison, West Virginia, for employer.

Rita Roppolo (Henry L. Solano, 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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (86-BLA-2133) of Administrative Law Judge Rudolf L. Jansen 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 fifth time. In the initial Decision and Order, the administrative law judge credited claimant with thirteen years of qualifying coal mine employment and found that claimant¹ established the existence of pneumoconiosis which arose from his coal mine employment and total respiratory disability pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(c)(2). The administrative law judge then found that claimant failed to establish total disability due to pneumoconiosis pursuant to 718.204(b). Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(1), 718.203(b) and 718.204(c). The Board then vacated the administrative law judge's findings pursuant to Section 718.204 and remanded the claim for the administrative law judge to reconsider whether claimant's pneumoconiosis is at least a contributing cause of his totally disabling respiratory impairment at Section 718.204(b) pursuant to the standard enunciated in *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). *Hamrick v. Armco, Inc.*, BRB No. 89-2392 BLA (Jan. 25, 1991)(unpub.).

On remand, the administrative law judge found the opinions of Drs. Rasmussen, that claimant's pneumoconiosis was the most likely cause of his impairment, and Zaldivar, that any lung deficiency is due to obesity and emphysema caused by cigarette smoking, to be equally probative, resolved the issue in favor of claimant and found that claimant established that pneumoconiosis contributed to his totally disabling respiratory impairment pursuant to Section 718.204(b). Accordingly, benefits were awarded commencing as of August 1, 1982. On remand, the Board affirmed the administrative law judge's findings regarding the entitlement date and pursuant to Section 718.204(b), as well as the award of benefits. *Hamrick v. Armco*,

¹Claimant is Carl M. Hamrick, the miner, who filed a claim for benefits on August 3, 1982. Director's Exhibit 1.

Inc., BRB No. 92-0152 BLA (Jan. 27, 1994)(unpub.). Following employer's appeal, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, vacated the Board's affirmance of the administrative law judge's Decision and Order and remanded the case to the Board for reconsideration in light of the United States Supreme Court's decision in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and the Fourth Circuit decisions in *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) and *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). *Armco, Inc. v. Hamrick*, No. 94-1391 (4th Cir. Mar. 6, 1995)(unpub.). On remand, the Board remanded the case for the administrative law judge to reconsider whether the medical opinions of record establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(b). *Hamrick v. Armco, Inc.*, BRB No. 92-0152 BLA (July 18, 1995) (unpub. Order on Remand).

On remand, the administrative law judge denied employer's request that the record be reopened to allow an updated report from Dr. Zaldivar, assigned Dr. Zaldivar's opinion less weight than Dr. Rasmussen's opinion based on Dr. Zaldivar's mistaken premise that claimant does not have pneumoconiosis, and found that claimant established that pneumoconiosis contributed to his totally disabling respiratory impairment pursuant to Section 718.204(b). Accordingly, benefits were again awarded. On appeal, the Board vacated the administrative law judge's findings pursuant to Section 718.204(b) and remanded the case for the administrative law judge to reconsider Dr. Zaldivar's opinion in light of the Fourth Circuit's holdings in *Dehue Coal Co. v. Ballard [Ballard]*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and *Hobbs v. Clinchfield Coal Co.[Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). The Board further held that the administrative law judge did not abuse his discretion in declining to reopen the record on remand, but "strongly" encouraged the administrative law judge to consider reopening the record on remand given the protracted procedural history of the case and the recent decisions of the Fourth Circuit in *Ballard* and *Hobbs*. *Hamrick v. Armco, Inc.*, BRB No. 96-1034 BLA (Aug. 30, 1996) (unpub.). The Board denied motions for reconsideration filed by claimant and the Director, Office of Workers' Compensation Programs (the Director), by Orders dated October 30, 1996 and June 24, 1997 respectively.

In the instant Decision and Order on Remand, the administrative law judge considered Dr. Zaldivar's opinion in light of the Fourth Circuit's decisions in *Ballard* and *Hobbs*, found the opinion entitled to lesser weight than Dr. Rasmussen's opinion and again found that claimant established total disability due to

pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were again awarded. On appeal, employer contends that the administrative law judge erred in assigning less than equal weight to Dr. Zaldivar's opinion on the basis of the Fourth Circuit's holdings in *Ballard* and *Hobbs*. Claimant and the Director respond, urging the Board to affirm the administrative law judge's Decision and Order.

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).

In *Hobbs* and *Ballard*, the Fourth Circuit recognized that even though an administrative law judge has found that a claimant suffers from pneumoconiosis, a physician's disability causation opinion premised on an understanding that the claimant does not have pneumoconiosis may still have probative value. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); see also *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 790, 19 BLR 2-86 (4th Cir. 1995). The court explained in *Ballard* that a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *Ballard, supra*.

Employer initially contends that, because Dr. Zaldivar acknowledged that the miner had respiratory impairment, but concluded that his obesity and emphysema caused by his smoking history caused the miner's total disability, Dr. Zaldivar's opinion is consistent with *Hobbs and Ballard* and, thus, the administrative law judge erred in assigning the opinion less weight. Employer's Brief at 12-15. Dr. Zaldivar, in an opinion dated May 3, 1988, opined that the miner had no radiographic evidence of pneumoconiosis but suffered from restriction of vital capacity due to obesity and emphysema due to smoking. Dr. Zaldivar concluded that, strictly from a pulmonary standpoint, claimant is capable of doing his usual coal mine employment. Employer's Exhibit 3.

The administrative law judge considered Dr. Zaldivar's opinion in light of the court's holdings in *Hobbs* and *Ballard* and found that "there is no justification, under these two most recent Fourth Circuit cases, for assigning greater probative weight to Dr. Zaldivar's opinion or to rely on his opinion over that of Dr. Rasmussen."²

²Dr. Rasmussen diagnosed pneumoconiosis and total respiratory disability and

Decision and Order on Remand at 4. In support of this finding the administrative law judge noted that Dr. Zaldivar's opinion contains no diagnosis of either clinical or statutory pneumoconiosis and that Dr. Zaldivar believed that claimant was not disabled by any malady from performing his usual coal mine work. *Id.* The administrative law judge concluded that Dr. Zaldivar's opinion "was premised on not one, but two erroneous assumptions, *i.e.*, that the claimant did not suffer from pneumoconiosis and that he was not disabled." *Id.* We agree with the administrative law judge's interpretations of *Hobbs* and *Ballard*.

In the instant case, unlike in *Ballard*, the administrative law judge permissibly found that Dr. Zaldivar's opinion is inconsistent with the administrative law judge's findings because he opined that claimant has neither legal nor clinical pneumoconiosis and because he opined that claimant is not totally disabled from a respiratory standpoint. See *Ballard, supra*; Employer's Exhibit 3. While, as employer contends, Dr. Zaldivar opined that claimant has a respiratory impairment, he also opined, contrary to the administrative law judge's findings, that claimant was not totally disabled by his respiratory impairment. *Id.* Thus, the administrative law judge acted within his discretion in finding that Dr. Zaldivar's opinion is not entitled to greater weight than Dr. Rasmussen's opinion because Dr. Zaldivar's opinion is in conflict with facts found by the administrative law judge. Decision and Order on Remand at 4-5; *Ballard, supra*; *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), *rev'g on other grounds*, 18 BLR 1-59 (1994)(*en banc*); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

concluded that claimant's coal mine exposure is at least a significant contributing factor to his total impairment. Claimant's Exhibit 2.

Employer next contends that, because the administrative law judge found that the applicable case law does not justify according greater weight to Dr. Zaldivar's report, the reports of Drs. Rasmussen and Zaldivar are entitled to equal weight and, thus, claimant failed to sustain his burden of proof. Employer's Brief at 16. We disagree. After finding that Dr. Zaldivar's opinion is not entitled to greater weight than Dr. Rasmussen's opinion, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion, that claimant's "coal mine exposure is at least a significant contributing factor to his total impairment" is well-reasoned and well-documented and establishes that claimant's totally disabling respiratory impairment is due to pneumoconiosis pursuant to Section 718.204(b).³ Decision and Order on Remand at 5; 1991 Decision and Order at 3; Claimant's Exhibit 2; *Lafferty, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Because the administrative law judge rationally relied upon Dr. Rasmussen's opinion to establish causation pursuant to Section 718.204(b), we reject employer's contention and affirm the administrative law judge's finding that claimant established that his total disability is due to pneumoconiosis pursuant to Section 718.204(b).

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

SO ORDERED.

³In his 1991 Decision and Order, the administrative law judge stated that he placed "great weight on the opinion of Dr. Rasmussen because he is board-certified in internal medicine and performed a thorough examination of the Claimant." 1991 Decision and Order at 3. The administrative law judge also found that Dr. Rasmussen's opinion was "medically well-reasoned based on the objective medical evidence." *Id.*

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge