

BRB No. 03-0574 BLA

EDWARD K. GRAY )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 BENJAMIN COAL COMPANY, ) DATE ISSUED: 06/29/2004  
 INCORPORATED )  
 )  
 and )  
 )  
 INTERNATIONAL BUSINESS & )  
 MERCANTILE REASSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (01-BLA-0787) of Administrative Law Judge Gerald M. Tierney rendered on a duplicate 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).<sup>1</sup> The administrative law judge found fourteen years of coal mine employment established and he adjudicated the claim pursuant to 20 C.F.R. Part 718, based on the date of filing.<sup>2</sup> Decision and Order at 4. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence established the existence of pneumoconiosis, an element of entitlement previously adjudicated against claimant, and thus, found that a material change in conditions was established pursuant to *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The administrative law judge further found, on considering all the evidence of record, that the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis were established. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the existence of legal pneumoconiosis established. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, is not participating 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'Keefe 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

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<sup>1</sup> 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup> Claimant's August 30, 1995 claim was denied October 8, 1997 because claimant did not establish the existence of either clinical or legal pneumoconiosis. Director's Exhibit 34. Claimant filed the instant, duplicate claim on October 1, 2000. Director Exhibit 1.

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 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 first contends that the administrative law judge erred in finding that claimant had only a twenty pack year cigarette smoking habit rather than the far more extensive habit that appears in some of the treatment records, *i.e.*, a habit of as many as four packs daily, spanning at least forty-five years, ending in 1970. Employer's Brief 14-15. Employer contends that the administrative law judge's finding of a minimum of a pack a day, twenty year smoking history, rather than a forty-five year smoking history, is unsupported by the record because it is based on the administrative law judge's belief that to credit claimant with a forty-five year smoking history would have required him to find that claimant started smoking at the age of nine, which the administrative law judge believed was highly unlikely. Employer asserts that by finding only a twenty year smoking history rather than a longer, more extensive, smoking history, the administrative law judge impermissibly substituted his own opinion for evidence in the record and he did not resolve inconsistencies in the evidence which showed a smoking history of anywhere from one-half pack to four packs daily for anywhere from twenty to forty-five years.

After summarizing the various smoking histories, the administrative law judge stated that "a smoking history of at least 45 years quitting in 1981 would seem unlikely as Claimant, born in 1927, would have had ... [to] [start] smoking at age nine." Decision and Order at 7. The administrative law judge concluded, therefore, that in reconciling the varied histories, he found "a minimal smoking history of about one pack per day for twenty years ending in 1970." Decision and Order at 7.

Employer's argument regarding claimant's smoking history is no more than a request that we reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 11 BLR 1-111, 1-113 (1989). In reconciling claimant's conflicting smoking histories, the administrative law judge concluded that claimant had, at the minimum, a twenty year smoking history. Decision and Order at 7. Employer has failed to show how the administrative law judge's finding of, at least, a twenty year smoking history as opposed to a forty-five year smoking history affected his finding of the existence of legal pneumoconiosis, however. The record reflects that Dr. Fino admitted that even if claimant smoked only a pack a day for twenty years that is the type of smoking history that can cause the kind of pulmonary problem claimant has, Employer's Exhibit 20, Fino Deposition at 38, and Dr. Zlupko admitted that a debilitating chronic obstructive pulmonary disease, such as claimant's, cannot be definitively attributed to smoking, as opposed to another exposure, based upon a twenty or thirty year smoking history, Director's Exhibit 18, Zlupko Deposition at 19. In its brief, employer candidly admitted: "No one reading the administrative law judge's decision can tell what impact the judge's

findings or Gray's smoking habit had on his credibility findings." Brief for Employer at 16. Employer has failed, therefore, to show that the administrative law judge's finding regarding claimant's smoking history adversely impacted employer.

Employer next contends that the administrative law judge erred in rejecting the opinion of Dr. Fino as contrary to the views of the scientific community, when Dr. Fino stated that claimant's fifteen years of coal mine employment was not the type of coal dust exposure that would cause a significant obstructive abnormality. Employer argues, however, that Dr. Fino has not disputed that coal dust exposure can cause chronic obstructive lung disease, but has stated only that not every miner's obstructive lung disease is caused by coal dust exposure. Thus, employer contends that nothing in Dr. Fino's comments is at odds with the Department's conclusions, the prevailing views of the scientific community, or the Department's interpretation of the regulations, and the administrative law judge erred in rejecting Dr. Fino's opinion based on that sweeping generalization and ignoring the doctor's specific testimony.

In considering Dr. Fino's 2001 report and 2002 testimony, the administrative law judge recognized that Dr. Fino had acknowledged that some miners will get significant obstructive lung disease due to coal dust exposure. Nonetheless, the administrative law judge rejected Dr. Fino's opinion because the Department has concluded that Dr. Fino's opinion regarding the link between chronic obstructive pulmonary disease and coal mine employment was not in accord with the prevailing view of the scientific community, *citing Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001). Claimant responds, arguing that the administrative law judge did not reject Dr. Fino's opinion out of hand, based on prior opinions proffered by Dr. Fino which have been rejected by the Department as contrary to the prevailing review of the scientific community, regarding the link between chronic obstructive pulmonary disease and coal mine employment. Rather, claimant contends that the administrative law judge rejected Dr. Fino's opinion after a careful review of its findings and comparing it to the other medical evidence of record.

While, as claimant argues, the administrative law judge addressed some of Dr. Fino's specific findings, *i.e.*, Dr. Fino's opinions regarding claimant's blood gas study test results, the administrative law judge may not, as he appears to have done here, reject Dr. Fino's specific opinion concerning this claimant's condition because his general opinion regarding the link between chronic obstructive pulmonary disease and coal mine employment has been rejected by the Department. Instead, the administrative law judge is required to address the specific opinions physicians provide in a particular case. Further, as employer points out, the administrative law judge did not, in this case, consider all of the bases which Dr. Fino stated for his opinions. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002) *citing Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)(administrative law judge is required to consider quality of a physician's reasoning). Accordingly, the administrative law

judge's rejection of Dr. Fino's opinion for the general reason that it is contrary to the views of the scientific community and the Department's conclusions regarding the link between chronic obstructive pulmonary disease and coal mine employment is vacated and the case is remanded for reconsideration of Dr. Fino's specific opinion regarding the condition of this claimant.

Employer also contends that the administrative law judge erred in crediting the opinion of Dr. Sherman who found that it was impossible to separate the effects of smoking and coal dust exposure. Employer asserts that the administrative law judge erred in finding Dr. Sherman's opinion to be reasoned and documented, when in fact he merely found that coal dust exposure can contribute to pulmonary disease, not that claimant's actual exposure had contributed to his pulmonary disease. Employer contends by accepting Dr. Sherman's theory, one creates a presumption that all miners with obstructive disease must have pneumoconiosis, a theory which has been rejected. *National Mining Assn v. DOL*, 292 F.3d 849 (D.C. Cir. 2002). In this same vein, employer contends that the administrative law judge failed to fully consider Dr. Sherman's deposition other than to reference it by its exhibit number.

Contrary to employer's argument, we believe that the administrative law judge's Decision and Order reflects that he did consider Dr. Sherman's deposition testimony. Decision and Order at 9. In considering the medical opinions, the administrative law judge noted that employer argued that the only basis of Dr. Sherman's opinion was the fact that claimant had a history of coal mine employment. The administrative law judge noted, however, that a similar observation could be made about the opinions of Drs. Fino and Zlupko, because claimant's smoking history was their primary consideration in eliminating coal mine dust exposure as a cause of claimant's pulmonary disease. The administrative law judge stated that Dr. Sherman discussed how the medical literature supported his point of view. The administrative law judge concluded, therefore, that Dr. Sherman's opinion was both documented and reasoned. Employer is doing no more, however, than requesting that we reweigh the evidence, which we are not empowered to do. *Anderson*, 11 at 1-113. In this case, the administrative law judge found that Dr. Sherman's opinion was supported by the medical literature on which he relied. Employer's experts' criticism of that literature does not compel acceptance of their opinions over the opinion of Dr. Sherman.

Finally, employer contends that the administrative law judge ignored uncontradicted medical evidence that claimant's pulmonary impairment was not legal pneumoconiosis because he did not have it when he left the mines. Employer contends that Dr. Pickerill testified that progression in the type of case presented by claimant would be "quite rare" or "unusual," that Dr. Fino explained that the "legal" pneumoconiosis claimant had did not generally progress after coal dust exposure ceased and that claimant's data did not support the conclusion that claimant's chronic obstructive pulmonary disease was latent and progressive. Employer contends that neither Dr.

Sherman nor any other medical expert disputed these findings and that there is no evidence that “legal pneumoconiosis” has ever been latent and progressive as opposed to clinical. Employer further contends that the regulation defining pneumoconiosis as latent and progressive requires each claimant to prove that his particular kind of pneumoconiosis is progressive and latent and that neither Drs. Sherman nor Bizousky, in this case, explained how claimant could leave the mines with no evidence of legal pneumoconiosis and then develop a disabling form of the disease many years later, long after his last exposure. This argument is rejected.

As the Director states:

First, 20 C.F.R. §718.202(a)(2002) does not require the miner to prove that his pneumoconiosis is a specific form of the disease recognized as latent and progressive. He need only establish that he has ‘pneumoconiosis’ as that disease is defined by the Black Lung Benefits Act and Section 718.201. Section 718.201(a) defines both ‘clinical’ and ‘legal’ pneumoconiosis; either manifestation is sufficient to prove the miner has the disease for purposes of the Act. Section 718.201(c) does not differentiate between the clinical and legal forms of the disease in defining it as one that may be latent or progressive. Thus, the regulations do not impose any burden of proof on the miner to establish latency or progressivity as separate facts apart from the existence of pneumoconiosis.

Director’s Brief at 2-3; *see Kramer*, 305 F.3d 203, 22 BLR 2-467; *Swarrow*, 72 F.3d 308, 20 BLR 2-76; *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004)(court rejected employer’s argument that Section 718.201(c) requires claimant to prove that he suffers from the kind of pneumoconiosis found to be progressive and latent; court held that the regulation is not so limited, but is instead designed to ‘prevent[] operators from claiming that pneumoconiosis is never latent and progressive.’).

Nonetheless, because of the error previously discussed, *i.e.*, the administrative law judge’s rejection of Dr. Fino’s opinion for the reason given, we must vacate the administrative law judge’s Decision and Order awarding benefits and remand this case for reconsideration.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge