BRB No. 03-0513 BLA

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| CARL T. WOLFORD | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| MORRIS & MARSHALL, INCORPORATED | ) | DATE ISSUED: 03/17/2004 |
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| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Daniel F. Read, Durham, North Carolina, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-BLA-0303) of Administrative Law Judge Linda S. Chapman on a claim[1] 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).[2] This case is before the Board for the second time. In the first

[1] Claimant, Carl T. Wolford, filed his application for benefits on July 10, 1992. Director's Exhibit 1.

[2] 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.

Decision and Order in this case, Administrative Law Judge Christine M. Moore credited claimant with less than ten years of qualifying coal mine employment and found that, although claimant established total respiratory disability, he failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Accordingly, benefits were denied. Although he appealed this decision to the Board, claimant requested that the case be remanded to allow the submission of additional evidence. Director's Exhibit 46. Granting claimant's request, the Board dismissed the appeal and remanded the case to the district director for further proceedings.

Claimant submitted additional medical evidence. The district director, treating claimant's request to submit additional evidence as a request for modification, found that claimant failed to establish a basis for modification. Subsequently, claimant requested a formal hearing. Administrative Law Judge Christine S. McKenna, formerly Christine S. Moore, denied claimant's request for a hearing, adjudicated the claim on the evidentiary record, and determined that, because claimant failed to establish the existence of pneumoconiosis, he failed to establish a change in conditions. Judge McKenna, however, found that newly submitted evidence on length of coal mine employment demonstrated more than ten years of qualifying coal mine employment, and therefore, was sufficient to establish a mistake in a determination of fact in the prior decision. Hence, she granted claimant's request for modification, but denied the claim based on claimant's failure to establish all requisite elements of entitlement. Director's Exhibit 54.

Claimant, without the assistance of counsel, appealed that decision to the Board. While the appeal was pending before the Board, the Office of Administrative Law Judges (OALJ) received a letter written by Dr. Whetsell and forwarded this document to the Board. The Board, therefore, remanded the case to the OALJ to determine whether Dr. Whetsell's letter should have been included in the record when the case was before Judge McKenna. Nevertheless, in the interest of promoting administrative efficiency, the Board addressed Judge McKenna's findings, affirming her determinations regarding length of coal mine employment, modification, and total respiratory disability since these determinations were unchallenged on appeal. The Board held further that even though Judge McKenna correctly determined that the newly submitted evidence failed to establish the existence of pneumoconiosis, she erred in considering factors that were not relevant when analyzing the evidence as to the cause of pneumoconiosis. The Board also held that Judge McKenna did not adequately consider claimant's request for a formal hearing on modification and whether a hearing would be in the interests of justice. Accordingly, the Board vacated Judge McKenna's Decision and Order on Modification denying benefits and remanded the case to the OALJ for further consideration. *Wolford v. Morris & Marshall, Inc.*, BRB Nos. 97-0727 and 95-2165 BLA (Feb. 20, 1998)(unpub.); Director's Exhibits 67, 71.

On remand, Administrative Law Judge Linda S. Chapman (the administrative law judge) found that the biopsy evidence submitted subsequent to Judge McKenna's decisions

affirmatively established the presence of pneumoconiosis, and therefore, found that claimant had demonstrated a change in conditions since the prior denial. The administrative law judge found further that claimant's pneumoconiosis arose out of his coal mine employment and that he had a totally disabling respiratory impairment. The administrative law judge determined, however, that claimant failed to demonstrate by a preponderance of the evidence that his total disability was due to pneumoconiosis (disability causation). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge should have found disability causation established based on the medical opinion evidence of record, specifically the opinions of Drs. Steele and Sporn. Employer responds, urging affirmance of the denial of benefits.3 The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[4]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis, claimant argues that the administrative law judge erred by failing to credit the opinions of Drs. Steele and Sporn, claimant's treating physicians. Claimant asserts that the administrative law judge improperly rejected the opinions of Drs. Steele and Sporn because they failed to quantify the extent to which emphysema and pneumoconiosis contributed to claimant's total disability. Claimant avers that the progressive deterioration of his right lung, which necessitated the removal of that lung, was caused by both emphysema and the deposition of coal dust.

Contrary to claimant's argument, the administrative law judge did not require that the

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[3] Although claimant generally asserts that Drs. Whetsell, Powell, Darcey and Palmer also opined that claimant's disability was due in part to pneumoconiosis, because claimant raises no specific allegation of error regarding the administrative law judge's treatment of those doctors' opinions, we will not address them. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

[4] We affirm the administrative law judge's determinations pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), and 725.310 because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 14.

physicians quantify the precise role that emphysema and pneumoconiosis contributed to claimant's totally disabling respiratory impairment. Instead, she analyzed the medical opinions to determine whether they were sufficient to affirmatively demonstrate that pneumoconiosis was a substantially contributing cause to the miner's total disability. The administrative law judge accorded less weight to the opinion of Dr. Steele, who opined that claimant's "lung injury" was caused by a combination of severe centrilobular emphysema due to tobacco use for over thirty years and moderately severe chronic bronchitis due to coal dust exposure, because Dr. Steele's failure to indicate whether coal dust was "a significant factor in that lung injury" rendered it equivocal, and thus, insufficient to establish that pneumoconiosis was a substantial cause of claimant's total disability. This was rational. *See* 20 C.F.R. §718.204(c)(1); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*,11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Claimant's Exhibit 6. Likewise, the administrative law judge correctly found that Dr. Sporn stated that he was unable to quantify the extent of "the superimposition of any additional pathology to [claimant's] severe emphysema [that] may have contributed to [claimant's] impairment." Director's Exhibit 96; Claimant's Exhibit 5. Consequently, the administrative law judge reasonably discounted Dr. Sporn's opinion that pneumoconiosis "may" have contributed to claimant's impairment in some unknown degree and concluded that Dr. Sporn's opinion was equivocal. *Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at1-19. Accordingly, we affirm the administrative law judge's finding that the opinions of Drs. Steele and Sporn were insufficient to affirmatively demonstrate disability causation. *See Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19; *Endrizzi v. Bethlehem Mines Corp.*, 8 BLR 1-11, 1-13 (1985)(administrative law judge must consider qualified nature of medical opinion).

Claimant also asserts that the administrative law judge erred in crediting the opinions of employer's physicians over those of Drs. Sporn and Steele, claimant's treating physicians. Claimant contends that employer's physicians were unable to render a specific opinion containing any greater scientific certainty concerning the relative contributions of pneumoconiosis and emphysema to his disability, than were Drs. Sporn and Steele. Thus, claimant contends that, by relying on the opinions of employer's physicians, the administrative law judge relied on equally equivocal opinions, *e.g.*, Dr. Fino's opinion that cigarette smoking "could be" the sole cause of claimant's disability.

After considering the medical opinion evidence in its entirety, the administrative law judge concluded that the opinions of Drs. Branscomb, Castle, Perper, and Fino, all of whom acknowledged the presence of only minimal, early-stage pneumoconiosis which, absent any signs of interstitial fibrosis, would not cause impairment, were entitled to dispositive weight because these physicians' opinions were well reasoned and well documented. This determination was rational. *See Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*,

12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Furthermore, contrary to claimant's argument, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has clearly held that the opinions of treating physicians are not entitled to automatic deference but rather obtain "the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, BLR (6th Cir. 2003), *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, BLR (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326-327 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Consequently, the administrative law judge was not required to defer to the opinions of Drs. Steele and Sporn because they had treated claimant. Because claimant has not shown, nor does it appear from the record, that the administrative law judge's determination of the relative credibility of the evidence is irrational, we affirm her determination that claimant has failed to establish disability causation by a preponderance of the evidence.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge