

BRB No. 03-0559 BLA

MARY E. RAY (o/b/o CHESTER W. RAY))
)
 Claimant-Petitioner)
)
 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 03/26/2004
)
 Respondent)
)
 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-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge United States Department of Labor.

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

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

BEFORE: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (2000-BLA-0433) of Administrative Law Judge Robert L. Hillyard 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 is the second time this case

¹ 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

has been before this Board. On remand, the administrative law judge again found the evidence of record insufficient to establish either the existence of pneumoconiosis or total disability.

On appeal, claimant asserts that the administrative law judge failed to follow the Board's instructions and made inconsistent findings. Claimant also contends that the administrative law judge's Decision and Order is not supported by substantial evidence. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director), has not responded to 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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first argues that the administrative law judge erred in not considering the credibility of Dr. Lane's unequivocal diagnosis of clinical coal worker's pneumoconiosis, as instructed by the Board. In its previous Decision and Order, the Board held that the administrative law judge permissibly rejected Dr. Lane's diagnosis of legal pneumoconiosis because it was equivocal, but that the administrative law judge did not consider the credibility of Dr. Lane unequivocal finding of clinical pneumoconiosis. The Board, therefore, remanded the case for the administrative law judge to consider the credibility of Dr. Lane's clinical pneumoconiosis finding.

On remand, the administrative law judge rejected Dr. Lane's diagnosis of clinical pneumoconiosis because he found it to be based solely on a positive x-ray. The administrative law judge found that Dr. Lane's opinion was unreasoned as he made no attempt to support his diagnosis of clinical pneumoconiosis beyond his reference to a positive x-ray reading, even though he conducted a physical examination, took histories, and administered a pulmonary function study, blood gas study and EKG. The administrative law judge, therefore, accorded little weight to Dr. Lane's finding of clinical pneumoconiosis. This was rational. 20 C.F.R. §718.202(a)(4); *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Accordingly, because the administrative law judge considered Dr. Lane's finding of clinical pneumoconiosis but rejected it as unreasoned, we reject claimant's assertion that the administrative law judge failed to follow the Board's remand instructions.

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant next asserts that the administrative law judge mischaracterized Dr. O'Bryan's opinion by confusing Dr. O'Bryan's opinion regarding the existence of pneumoconiosis with his opinion concerning the cause of pneumoconiosis. The Board remanded the case because the administrative law judge had failed to consider Dr. O'Bryan's opinion that smoking and coal dust exposure played equal parts in the development of claimant's asthmatic bronchitis. In considering Dr. O'Bryan's opinion, on remand, the administrative law judge determined that Dr. O'Bryan's opinion that claimant's "asthmatic bronchitis" could be due to "possible" allergies and "possible" non-specific wheezing and bronchitic illness and that he "[thought] that smoking and coal dust exposure played an equal part in the development of this process" was equivocal and vague. Decision and Order at 5. This was rational. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 188, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Claimant also asserts that the administrative law judge erred in disregarding Dr. Wright's opinion concerning the presence of chronic obstructive pulmonary disease due to smoking and exposure to respirable dust because Dr. Wright found the absence of clinical pneumoconiosis by x-ray. Claimant contends that the administrative law judge failed to even discuss Dr. Wright's finding of legal pneumoconiosis. The Board directed the administrative law judge's to reconsider Dr. Wright's opinion because the administrative law judge had accorded less weight to Dr. Wright's opinion as relying on positive x-ray readings when the administrative law judge had found the x-ray evidence to be negative for pneumoconiosis. Specifically, the Board rejected the administrative law judge's analysis of Dr. Wright's opinion because 1) Dr. Wright had relied only, in part, on positive x-rays to find pneumoconiosis and 2) Dr. Wright's diagnosis of chronic obstructive pulmonary disease associated with smoking and the inhalation of respirable dust could be sufficient to establish the existence of legal pneumoconiosis.

On remand, the administrative law judge reconsidered Dr. Wright's opinion. The administrative law judge accorded it less weight because he found the diagnosis of clinical pneumoconiosis to be based solely on positive x-ray interpretations. This was rational. *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Worhach*, 17 BLR 1-105. The administrative law judge also accorded it less weight because Dr. Wright's attribution of chronic obstructive pulmonary disease to the inhalation of respirable dust was unreasoned inasmuch as Dr. Wright did not state whether claimant was exposed to respirable dust during the course of his surface mine employment and did not denote the source of the "respirable dust" which contributed to claimant's chronic obstructive pulmonary disease. Although the administrative law judge acknowledged that an inference of legal pneumoconiosis could be made based on claimant's long history of surface coal mine

employment and Dr. Wright's diagnosis of chronic obstructive pulmonary disease due in part to the inhalation of "respirable dust," the administrative law judge found that such an inference was not mandated and that he found Dr. Wright's opinion to be vague. Inasmuch as claimant is required to establish the existence of legal pneumoconiosis, the administrative law judge's analysis of Dr. Wright's opinion is rational. See 20 C.F.R. §718.201; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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); *Holdman*, 202 F.3d at 882, 22 BLR at 2-42; *Griffith*, 49 F.3d at 188, 19 BLR at 2-117; *Anderson*, 12 BLR at 1-113; see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Accordingly, we affirm the administrative law judge's reconsideration of the opinions of Drs. Lane, O'Bryan, and Wright and the administrative law judge's finding that these opinions did not establish the existence of clinical or legal pneumoconiosis. Inasmuch as the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument concerning total disability. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge