BRB No. 04-0459 BLA

ESTIL STILTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONG CONSTRUCTION COMPANY	)	DATE ISSUED: 03/29/2005
	)	
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 Awarding Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Helen H. Cox (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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Claim (01-BLA-0468) of Administrative Law Judge Daniel F. Solomon 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). Claimant filed his first claim for benefits on March 30,

1983. That claim was denied by the district director on July 29, 1983, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 48. Claimant filed a second claim on January 27, 1999, which was denied on March 12, 1999, for the same reasons. Director's Exhibit 47. No further action was taken until the filing of the instant claim on June 2, 2000. Director's Exhibit 1.

In his Decision and Order issued on February 12, 2004, the administrative law judge found that the current, duplicate claim was timely filed, and that the evidence established a coal mine employment history of 23.5 years. Decision and Order at 3-5. The administrative law judge further found that the parties stipulated to the existence of pneumoconiosis and that it arose, at least in part, from coal mine employment. In light of these stipulations, the administrative law judge concluded that a material change in conditions was established. Decision and Order at 3, 5-6. Turning to the issues of disability and causation, the administrative law judge found that claimant established the existence of a totally disabling respiratory impairment and that pneumoconiosis was, at least, a contributing cause of that total disability. Decision and Order at 16-17; 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding a material change in conditions established based on employer's stipulation to the existence of pneumoconiosis and erred in finding disability causation established. Employer also raises numerous arguments regarding the administrative law judge's evaluation of the medical opinion evidence on disability causation. Claimant responds and urges that the aard of benefits be affirmed. The Director, Office of Workers' Compensation Programs, (the Director) responds, contending that, even if the administrative law judge erred in finding a material change in conditions established on the basis of employer's stipulation to the existence of pneumoconiosis, the administrative law judge's finding, based on newly submitted evidence, that claimant established that his total disability was due to pneumoconiosis, an element also previously adjudicated against him, would, nonetheless, establish a material change in conditions.[1]

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).

[1] We affirm the administrative law judge's finding of total respiratory disability as that finding is unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer first asserts that the administrative law judge erred in finding that claimant established a material change in conditions based on employer's stipulation to the presence of pneumoconiosis based on pathology evidence. Employer further argues that its stipulation cannot establish a material change in conditions because it is based on pathology evidence from 1995, which predates the most recent 1999 denial of benefits in this case.

In finding that claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge relied upon employer's stipulation conceding the existence of pneumoconiosis arising out of coal mine employment, elements previously adjudicated against claimant. Decision and Order at 6; Hearing Transcript at 29-30. In light of employer's concession and its withdrawal of the existence of pneumoconiosis as an issue in the case, the administrative law judge properly found that the existence of pneumoconiosis and a material change in conditions were established and turned to consider whether the record, as a whole, supported the other elements of entitlement. 20 C.F.R. §725.46, 725.463; *Nippes v. Florence Mining Co.*, 12 BLR 1-108, 1-109 (1985)(a stipulation of fact made by a party is binding upon the parties and upon the trier-of-fact) (McGranery, J. dissenting, would hold that the stipulation in the case was not one of fact, but one of law, and was not therefore controlling); see 20 C.F.R. §725.309(d)(2000); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997).

Next, employer asserts that the administrative law judge erred in finding that the evidence of record established disability causation. Specifically, employer argues that the administrative law judge erred in crediting the opinions of Drs. Robinette and Rasmussen, which support a finding of disability causation, Director's Exhibits 14, 16 40; Claimant's Exhibit 1, over the contrary opinions of Drs. Castle, Naeye, Forehand and Fino, Employer's Exhibits 1, 16, 17, 23, 25, 26, 27.

Section 718.204 states that a miner shall be considered totally disabled due to pneumoconiosis, if pneumoconiosis, as defined by the Act, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a substantially contributing cause if it has a material adverse effect on the miner's respiratory or pulmonary condition or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii). Claimant must demonstrate that pneumoconiosis is a necessary condition of disability; it must play more than a de minimis role in claimant's disabling respiratory impairment. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003).

After reviewing the administrative law judge's findings on disability causation, his analysis of the medical opinion evidence, and employer's arguments on appeal, we

conclude that the administrative law judge's finding on disability causation cannot be affirmed because the basis on which the administrative law judge has accorded greater or lesser weight to the medical opinions is confusing and does not, therefore, provide a clear basis upon which we can adequately review his ultimate finding. Specifically, we are unable to discern how the administrative law judge used the pulmonary function study and blood gas study evidence to credit Dr. Rasmussen's opinion over Dr. Fino's, especially since the administrative law judge accorded less weight to Dr. Naeye's opinion, in part, because he did not review the pulmonary function study evidence.

Moreover, in assigning greater weight to the opinion of Dr. Robinette because he was claimant's treating physician and because of his "superior" qualifications, the administrative law judge did not sufficiently explain the nature of Dr. Robinette's relationship to claimant, his basis for determining that Dr. Robinette demonstrated greater familiarity with claimant's condition, compared to the other physicians of record, or the administrative law judge's reasons for finding that Dr. Robinette possessed "superior" qualifications when he had found that Drs. Castle and Fino possessed the same qualifications (all three physicians were Board-certified internists and pulmonologists). Decision and Order at 9, 12, 16 and 17; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-624 (6th Cir. 2003). Additionally, the administrative law judge must evaluate the opinions of the physicians regarding the existence of pneumoconiosis in light of the Fourth Circuit's holding in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2000) and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), especially in light of the fact that Dr. Castle acknowledged the existence of pneumoconiosis based on the same pathology evidence which demonstrated the presence of pneumoconiosis in this case. We, thus, direct the administrative law judge to reconsider the medical opinion evidence and to clarify his reasons for crediting or not crediting such evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge