BRB No. 00-0636 BLA

BRUCE M. ERDMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MERCURY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN MINING INSURANCE 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 - Denial of Benefits on Remand from the Benefits Review Board of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Edward Waldman (Judith E. Kramer, Acting 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits on Remand from the Benefits

Review Board (97-BLA-1243) of Administrative Law Judge Paul H. Teitler 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] Claimant filed an application for black lung benefits in February 1994. Director's Exhibit 1. On June 14, 1995 the administrative law judge issued a Decision and Order denying benefits. Director's Exhibit 60. In that decision, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(4)(2000). Accordingly, benefits were denied. Claimant appealed, and on March 22, 1996, the Board affirmed the administrative law judge's Decision and Order denying benefits. Director's Exhibit 68; *Erdman v. Mercury Coal Co.*, BRB No. 95-1776 BLA (Mar. 22, 1996)(unpub.). On November 12, 1996, claimant filed a request for modification, submitting new evidence. Director's Exhibit 69. On June 12, 1998, the administrative law judge issued a Decision and Order Denying Benefits. Therein, the administrative law judge determined that claimant had been totally disabled at the time of the prior filing. However, the existence of pneumoconiosis was still not established. By Decision and Order dated July 16, 1999, the Board remanded this matter for further consideration of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1)(2000). *Erdman v. Mercury Coal Co.*, BRB No. 98-1338 BLA (July 16, 1999)(unpub.).

On remand, the administrative law judge found that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)(2000). Decision and Order at 3. Further, the administrative law judge found that, when weighing all of the relevant evidence, including evidence other than x-ray evidence, apparently pursuant to *Penn Allegheny v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the positive x-ray readings were sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2000). Decision and Order at 3. In addition, the administrative law judge found that claimant's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b)(2000).[2] Decision and Order at 3. However,

[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 65 Fed. Reg. 80, 045-80, 107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We affirm, as uncontested on appeal, the administrative law judge's findings, on remand, that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2000), and that claimant's pneumoconiosis arose out of coal mine employment

the administrative law judge concluded that claimant failed to establish total disability due to pneumoconiosis as required by 20 C.F.R. §718.204(b)(2000). Decision and Order at 4. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that claimant's totally disabling respiratory impairment was not caused, at least in part, by his coal workers' pneumoconiosis. Employer responds, advocating affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter indicating that he will not respond to the current appeal unless specifically requested to do so by the Board.

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 the 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).

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under 20 C.F.R. §718.203(b)(2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule in an Order issued on February 21, 2001, to which the Director and claimant have responded. The Director and claimant take the position that the new regulations will not affect the case. No response has been received from employer.[3] Based on the briefs submitted by the Director and claimant, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within twenty days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

With regard to causation of disability,[4] claimant first argues generally that the administrative law judge erred by failing to provide an explanation for his findings as required by the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); Claimant's Brief at 8; *see also* Claimant's Brief at 10. This argument does not have merit. The administrative law judge credited the negative opinions of Drs. Galgon, Cable and Kaplan over the reports of Dr. Kraynak because the opinions of Drs. Galgon, Cable and Kaplan were better reasoned and better documented and because their qualifications were superior. The administrative law judge also stated that there were discrepancies between the objective laboratory data and Dr. Kraynak's findings. In addition, the administrative law judge stated that Dr. Galgon specifically found that claimant's pulmonary disability was the result of smoking, and that his findings were supported by the opinions of Drs. Cable and Kaplan. Decision and Order at 4.

Claimant also argues that the administrative law judge erred in crediting the opinions of Drs. Galgon, Cable and Kaplan because these physicians did not have the benefit of the positive chest x-ray readings of record and did not consider the x-ray evidence as a whole. Claimant's Brief at 9; *see also* Claimant's Brief at 12.[5] This argument is without merit, since x-ray evidence is not relevant to the cause of disability. *See generally Pettry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990).

Claimant additionally argues that the administrative law judge erred in not finding causation established based on Dr. Kraynak's opinion. Specifically, claimant avers that Dr. Kraynak's opinion was consistent with the objective laboratory data, and that Dr. Kraynak provided ample basis for distinguishing the effects of cigarette smoking on claimant's disability from that of his coal workers' pneumoconiosis. Claimant's Brief at 11-12. Claimant contends generally that Dr. Kraynak's opinion is well reasoned, and there is nothing in the case law, or in this record, which would support a rejection of his opinion on the issue of causation. Claimant's Brief at 12. These arguments by claimant are without merit. The administrative law judge's findings that the existence of pneumoconiosis and totally disabling respiratory impairment were established do not mandate a finding of causation, nor do they necessarily mean that Dr. Kraynak's opinion regarding causation is consistent with the objective laboratory data insofar as causation is concerned. *See generally Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19, 1-22 (1990); *see also Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987). The administrative law judge gave valid reasons for crediting the opinions of Drs. Galgon, Cable and Kaplan over the opinion of Dr. Kraynak. Specifically, the administrative law judge credited these physicians because their opinions were better reasoned and documented and

[4] The provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c) while the provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b).

[5] Claimant states that Dr. Galgon is neither Board-certified nor Board-eligible in radiology. Claimant also states that Dr. Galgon's film was reread by five Board-certified radiologists who were also B readers as positive for pneumoconiosis. Claimant's Brief at 12-13. The administrative law judge was not required to discredit Dr. Galgon's opinion for this reason. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

because their qualifications were superior. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*)(reasoned); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993)(documented); *Price v. Peabody Coal Co.*, , 7 BLR 1-671, 1-675 (1985)(qualifications). In addition, the administrative law judge stated that Dr. Galgon specifically found that claimant's pulmonary disability was the result of smoking, and that his findings were supported by the opinions of Drs. Cable and Kaplan. Decision and Order at 4; *see generally Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 n.4 (1991).

Claimant argues that the administrative law judge erred in crediting the opinions of Drs. Cable and Kaplan because they are remote in time. Claimant's Brief at 12. This argument lacks merit. The administrative law judge is not required to consider the most recent evidence as determinative. *See Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459-460 (1983); *see generally Kowalchick v. Director, OWCP*, 893 F.2d 615, 620-621, 13 BLR 2-226, 2-236-237 (3d Cir. 1990).

Claimant additionally argues that the administrative law judge erred in crediting Dr. Galgon's opinion because it was less than well reasoned.[6] Claimant's Brief at 12-14. We reject claimant's argument. The administrative law judge, in his 2000 Decision and Order, referred to his 1998 Decision and Order as containing his reasons for finding that Dr. Galgon's report was well reasoned. 2000 Decision and Order at 4. In his 1998 Decision and Order, the administrative law judge stated:

> I find Dr. Galgon's opinion to be well-documented and well-reasoned. He obtained a pulmonary function study post-bronchodilator which showed some reversibility and normal vital capacity. He persuasively explained how those changes are not consistent with coal workers' pneumoconiosis, which every physician of record agrees does not respond to bronchodilators and causes primarily a restrictive defect. The results of the pulmonary function study, as well as of the other tests, provide a solid basis for Dr. Galgon's finding that Claimant does not have pneumoconiosis and that the obstruction is related to cigarette smoking. I therefore give his opinion greater weight than that of Dr. Kraynak, and as such, find that pneumoconiosis has not been established under §718.202(a)(4).

1998 Decision and Order at 13. The administrative law judge did not err in crediting Dr. Galgon's opinion as well reasoned. *See generally Clark*, *supra* at 1-155.

[6] Claimant provides an extensive discussion of Dr. Galgon's deposition testimony. Claimant's Brief at 13-14; Employer's Exhibit 2.

Claimant argues that the administrative law judge erred in crediting Dr. Galgon's opinion because it is inimical to the Act. Claimant's Brief at 14-16. Claimant's argument must be rejected. Claimant avers, accurately, that Dr. Galgon holds the belief that symptoms of coughing and shortness of breath decrease after a person leaves coal mine employment. Employer's Exhibit 2, Deposition at 42, lines 20-24, Deposition at 43, lines 3-7; *but see* Deposition at 26. Claimant's Brief at 14. Claimant maintains, accurately, that Dr. Galgon testified that increased coughing is not consistent with coal dust disease or cigarette smoking. Employer's Exhibit 2, Deposition at 43, lines 3-11; *see also* Deposition at 42, lines 21-24. Claimant's Brief at 14.[7] Nevertheless, Dr. Galgon's belief does not rise to the level of hostility, which has been narrowly construed. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988).

Next, claimant argues that the administrative law judge did not explain his rejection of Dr. Kraynak's report. Claimant's Brief at 10. This argument has merit. The administrative law judge discounted Dr. Kraynak's opinion because of "discrepancies found between objective laboratory data and Dr. Kraynak's findings." Decision and Order at 4. Claimant correctly contends that this is not an adequate explanation. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Further, we note that laboratory data is not generally relevant to causation of disability. *See Tucker*, *supra* at 1-41 (pulmonary function studies and blood gas studies are not diagnostic of the etiology of the respiratory impairment, but are diagnostic only of the severity of the impairment); *see generally Pettry*, *supra*, 14 BLR at 1-100. On remand, the administrative law judge should reconsider this issue.

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[7] Claimant correctly contends that Dr. Galgon testified that a diagnosis of coal worker's pneumoconiosis cannot be made on x-ray findings alone. Employer's Exhibit 2, Deposition at 34, lines 19-21; Claimant's Brief at 15. This testimony is not contrary to the spirit of the Act. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Further, claimant contends that Dr. Galgon's opinion is predicated upon his belief that obstructive lung disease does not become evident until "typically beginning around category III." Employer's Exhibit 2, Deposition at 43, lines 21-23; Claimant's Brief at 14. In addition, claimant states that Dr. Galgon is of the opinion that the FEV1 would not be affected by coal workers' pneumoconiosis until a person reaches category III. Employer's Exhibit 2, Deposition at 46, lines 18-24. Claimant avers that Dr. Galgon's belief is not recognized by the governing regulations. Claimant's Brief at 15. Claimant's argument is without merit. A medical report is properly rejected as hostile if it forecloses any possibility that simple pneumoconiosis can be disabling. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988). Category III pneumoconiosis is simple pneumoconiosis. 20 C.F.R. §§718.102(b)(2000), 718.304(a)(2000).

Employer suggests that claimant's argument that Dr. Galgon's opinion is inimical to the Act is untimely and has been waived because claimant did not raise this issue before the administrative law judge. This argument is rejected, inasmuch as claimant raised this issue in a letter memorandum brief submitted to the administrative law judge on November 3, 1999. Letter at 13.

Claimant argues that the administrative law judge erred by relying upon his previous Decision and Order to determine the reasonableness of the medical opinion evidence on the issue of causation. Claimant's Brief at 9; *see also* Claimant's Brief at 10. Specifically, claimant contends that the administrative law judge's review of the medical opinion evidence in the previous Decision and Order was with respect to establishing the existence of pneumoconiosis under Section 718.202(a)(4)(2000). Thus, the question is whether in this instance the administrative law judge's Section 718.202 analysis has equal application at the new Section 718.204(c) causation regulation. The issue of total disability is separate and distinct from the issue of the existence of pneumoconiosis and each of these issues requires an independent weighing of the relevant evidence in the record. *See Rice, supra*. Therefore, we vacate the administrative law judge's finding on the issue of disability causation and remand for further consideration.

Further, claimant avers that since Drs. Galgon, Cable and Kaplan failed to diagnose pneumoconiosis, their opinions are incompetent to address the role that pneumoconiosis played in claimant's respiratory impairment. Claimant's Brief at 9; *see also* Claimant's Brief at 12. This argument by claimant has no merit. In support of his argument, claimant cites *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Claimant's Brief at 10. Contrary to claimant's suggestion, the Board, in *Trujillo*, held that the administrative law judge acted within his discretion in rejecting a doctor's opinion on causation on the basis that its underlying premise, that the miner did not have pneumoconiosis, was inaccurate. *Trujillo, supra* at 1-473.[8] Employer correctly points out that the

[8] Claimant also cites three Court of Appeals cases in support of his argument. Claimant's Brief at 9-10. In *Cort v. Director, OWCP*, 996 F.2d 1549, 17 BLR 2-166 (3d Cir. 1993), the United States Court of Appeals for the Third Circuit held that 20 C.F.R. §727.203(b)(3) assumes total disability and limits rebuttal to instances where disability was caused by some other disease. *Id.* at 2-170. *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994) has been superseded by *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86, 2-90, 2-92 (4th Cir. 1995). In *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the United States Court of Appeals for the Sixth Circuit held that a doctor's opinion that the miner did not have coal workers' pneumoconiosis, already established by the x-ray evidence, deprived the doctor's observations regarding total disability of any probative value. *Id.* at 2-24. We hold that these three cases do not support claimant's argument, especially since they were decided

United States Court of Appeals for the Fourth Circuit has held in *Ballard* that a physician's opinion, despite the fact that it is premised on the understanding that the miner does not suffer from coal workers' pneumoconiosis, may be probative evidence worthy of consideration. Employer's Brief at 5; *DeHue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304, 2-314-315 (4th Cir. 1995); *but see id.*, 19 BLR at 2-316 n.4. On remand, the administrative law judge may reconsider the evidence pursuant to *Ballard* in this case arising within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); *see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86, 2-94 (4th Cir. 1995).

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before *Hobbs* and *Ballard.*

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits on Remand is affirmed in part and vacated in part and remanded for further consideration by the administrative law judge.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge