BRB No. 01-0851 BLA

JOHN H. JUSTICE Claimant-Petitioner v. SCOTTS BRANCH COAL COMPANY and MAPCO, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 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.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Inc.), Prestonburg, Kentucky, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denial of Benefits (1999-BLA-0430) 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 case is before the Board for the second time. Claimant's initial application for benefits filed on October 24, 1987 was finally denied on December 1, 1989 because the evidence established neither the existence of pneumoconiosis nor the presence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 36 at 1, 70. On December 17, 1997, claimant filed the current application, which is a duplicate claim for benefits because it was filed more than one year after the final denial of a previous claim. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d)(2000).

After a hearing, the administrative law judge credited claimant with thirty-eight and three-quarter years of coal mine employment and found that the evidence developed since the prior denial established that claimant was totally disabled, but did not establish the existence of pneumoconiosis. The administrative law judge denied benefits because he concluded that the newly submitted evidence did not establish a material change in conditions as required by Section 725.309(d).

Upon consideration of claimant's appeal, the Board held that because the new evidence was found to establish total disability, an element of entitlement previously adjudicated against claimant, the requisite material change in conditions was established as a matter of law. *Justice v. Scotts Branch Coal Co.*, BRB No. 00-0494 BLA at 3 (Jan. 31, 2001)(unpub.), citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Consequently, the Board vacated the denial of benefits and remanded the case for the administrative law judge to consider whether all of the record evidence, including that submitted with the previous claim, supported a finding of entitlement to benefits. Additionally, the Board instructed the administrative law judge to address Dr. Maan Younes's physical examination report, which the administrative law judge had overlooked. Finally, the Board affirmed the administrative law judge's determination to accord less weight to the medical opinions of Drs. R.V. Mettu and Robert Cohen diagnosing pneumoconiosis.

On remand, the administrative law judge considered all of the evidence of record and found that the x-ray readings and medical opinions did not establish the existence of pneumoconiosis. The administrative law judge additionally found that the evidence did not establish that claimant's total disability is due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

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[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.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinions regarding the existence of pneumoconiosis and the cause of claimant's total disability. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the multiple opinions, old and new, by physicians who had either examined claimant or reviewed his medical records. Among the recent medical opinions, the physicians agree that claimant suffers from a severe obstructive lung impairment. The disputed issue is whether claimant's lung impairment is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

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[2] We affirm as unchallenged on appeal the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Drs. Robert Penman and John Myers diagnosed pneumoconiosis by chest x-ray but did not address the etiology of claimant's impairment. Director's Exhibit 36 at 141, 148. Dr. William Anderson diagnosed pneumoconiosis by chest x-ray and attributed claimant's obstructive impairment solely to smoking. Director's Exhibit 36 at 100, 145. Dr. R.V. Mettu, one of claimant's treating physicians, diagnosed chronic bronchitis and obstruction which he believed "could be" due to smoking or coal dust exposure. Director's Exhibit 36 at 120. Dr. D.H. Stamper, Jr., also a treating physician, opined that coal mine dust exposure "may have contributed" to claimant's chronic lung disease. Director's Exhibit 36 at 147. Drs. Maan Younes and Robert Cohen diagnosed severe obstructive lung disease which they attributed to both smoking and coal dust exposure. Director's Exhibits 7, 26. By contrast, Drs. Matt Vuskovich, Emery Lane, Robert Powell, Bruce Broudy, Gregory Fino, Keith Chandler, and Ben Branscomb concluded that claimant does not have pneumoconiosis, and attributed his obstructive lung impairment to a long history of smoking.[3] Director's Exhibits 10, 28, 29, 31, and 36 at 6, 22, 42, 90, 92, 95, 107.

The administrative law judge found that the opinions by Drs. Vuskovich, Lane, Powell, Broudy, Fino, Chandler, and Branscomb were each documented, well reasoned, and "entitled to substantial weight." Decision and Order on Remand at 12-13. He gave less weight to the opinions diagnosing pneumoconiosis. On appeal, claimant focuses on the weight accorded to the opinions of Drs. Mettu, Cohen, and Younes.

Claimant contends that the administrative law judge failed to accord proper weight to the opinion of claimant's treating physician, Dr. Mettu. The opinions of treating physicians "should be '[g]iven their proper deference.'" *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, BLR (6th Cir. 2002), quoting *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). However, where an administrative law judge finds that a treating physician's opinion is not credible, the administrative law judge need not accord additional weight to the treating physician's opinion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir.1995); *see also* 20 C.F.R. §718.104(d)(5)("[T]he relationship between the miner and his treating physician may constitute substantial evidence in support of the . . . decision to give that physician's opinion controlling weight, provided that the weight given . . . shall also be based on the credibility of the physician's opinion . . . .").

The administrative law judge considered Dr. Mettu's opinion from claim one stating that claimant's pulmonary impairment "could be" due to coal dust exposure, Director's Exhibit 36 at 120, but permissibly found that the opinion was too equivocal to establish the existence of pneumoconiosis. *See Justice, supra*. Under these

[3] Claimant has not challenged the administrative law judge's finding that he "has a smoking history of 50 pack years." Decision and Order at 4.

circumstances, the administrative law judge was not required to accord greater weight to Dr. Mettu's opinion.[4] *See Griffith, supra*.

Claimant next contends that the administrative law judge's analysis of Dr. Cohen's opinion runs afoul of *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In *Cornett*, the court held that an administrative law judge erred by using "the contributing causality of smoking" to discount the opinions of two physicians who stated unequivocally that coal dust exposure contributed to the miner's respiratory impairment, merely because they could not allocate blame between smoking and coal dust. *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. The court emphasized that under the legal definition of pneumoconiosis, "Cornett was not required to demonstrate that coal dust was the only cause" of his impairment; it was enough that both doctors "were unequivocal that coal dust exposure aggravated Cornett's pulmonary problems, thus supporting the existence of 'legal,' although possibly not 'medical,' pneumoconiosis." *Id*.

In this case, Dr. Cohen reviewed the medical evidence and, relying on a forty-year coal mine employment history and a fifty-year smoking history, diagnosed severe obstructive lung disease. Director's Exhibit 26. Dr. Cohen attributed the obstructive lung disease to both smoking and coal dust, citing claimant's "substantial work history significant for coal dust exposure . . . more than half of which occurred before modern dust control regulations were in effect," progressively worsening symptoms of chronic lung disease, pulmonary function and blood gas study abnormalities, positive and negative x-ray readings, and the medical literature causally connecting obstructive impairments and hypoxia to coal dust exposure. Director's Exhibit 26 at 6-7. Dr. Cohen concluded that claimant's "40 years of coal dust exposure, and 50 pack years of smoking were significantly contributory to the development of his severe obstructive lung disease. . . ." Director's Exhibit 26 at 8. Dr. Cohen maintained that "even if the CXR evidence [were] judged as negative . . . Mr. Justice has clinical and physiological evidence for pneumoconiosis." Director's Exhibit 26 at 7.

Previously, the administrative law judge seemed to indicate that he found Dr. Cohen's opinion not to be as well explained as the contrary opinions of record. Decision and Order at 23; *Justice*, slip op. at 4-5. On remand, however, the administrative law judge recast his finding, stating that he discounted Dr. Cohen's opinion because "Dr. Cohen failed to explain the extent to which coal dust exposure, as compared to cigarette smoking, contributed to the claimant's impairment." Decision and Order on Remand at 13. The record reflects that Dr. Cohen stated unequivocally that coal dust exposure was "significantly contributory" to claimant's

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[4] The administrative law judge previously found Dr. Mettu's opinion from claim two, stating that claimant's impairment "could be caused or aggravated from [*sic*] coal dust exposure," to be equivocal. Director's Exhibit 24; *Justice*, slip op. at 5.

severe obstructive lung disease. Director's Exhibit 26 at 8. Therefore, it was "a legal error [to use] the contributing causality of smoking as a reason for discounting" Dr. Cohen's opinion. *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. Consequently, we must vacate the administrative law judge's finding and remand this case for him to reweigh Dr. Cohen's opinion under 20 C.F.R. §§718.201 and 718.202(a)(4) consistently with *Cornett*.

Claimant alleges further that the administrative law judge selectively analyzed Dr. Younes's opinion when he accorded diminished weight to Dr. Younes's diagnosis of pneumoconiosis. The administrative law judge exercises broad discretion in assessing the documentation and reasoning of a medical opinion. *See Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). However, in so doing, the administrative law judge must consider the doctor's report as a whole. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984).

Dr. Younes examined and tested claimant on January 9, 1998 and diagnosed severe chronic obstructive pulmonary disease (COPD). Director's Exhibit 7. Dr. Younes concluded that tobacco smoking was the primary etiology of claimant's COPD, but stated that "coal dust exposure is a contributing factor." Director's Exhibit 7 at 4. Asked specifically whether claimant's lung disease was related to coal mine employment, Dr. Younes checked "Yes," and wrote: "Based on [claimant's] severe impairment and his 40 year work history in the mines." Director's Exhibit 7 at 5. Dr. Younes reiterated that the "[p]rimary etiology of impairment is smoking tobacco. However[,] working for 40 yrs in a dusty environment is a contributing factor." *Id.* The administrative law judge discounted Dr. Younes's opinion, finding that "the severity of the . . . impairment is irrelevant to the cause of the impairment," and that a history of coal dust exposure is "insufficient" for diagnosing pneumoconiosis. Decision and Order on Remand at 14.

It appears, however, that the administrative law judge failed to consider Dr. Younes's etiology opinion in the context of the opinion as a whole, in which the doctor describes an impairment so severe as to render claimant totally disabled and the doctor twice states that it is "primarily" due to smoking. In light of this diagnosis, the doctor's determination that coal dust exposure is a contributing factor "Based on his severe impairment and his 40 year work history in the mines," could reflect a finding that claimant's impairment is more severe than could reasonably be expected if due solely to smoking. The record does not reflect whether the administrative law judge considered this interpretation because he stated summarily that the severity of claimant's impairment was "irrelevant," and that coal dust exposure alone was insufficient to support a finding of pneumoconiosis. *See Hess, supra*; Decision and Order on Remand at 14. Therefore, we vacate the administrative law judge's finding as to Dr. Younes's opinion and instruct him to

reweigh Dr. Younes's report in its entirety on remand.

In finding that claimant did not establish that his totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000), the administrative law judge relied on the same reasons he gave for finding that the medical opinions did not establish the existence of pneumoconiosis. Decision and Order on Remand at 15. Because we have vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), we vacate his finding as to disability causation and instruct him to consider on remand whether claimant is totally disabled due to pneumoconiosis as defined at 20 C.F.R. §718.204(c).

In the closing paragraph of claimant's brief, he alleges that the administrative law judge credited the opinions of employer's experts without considering that their opinions conflict with the concept of legal pneumoconiosis. However, claimant points to no specific medical opinion in making this allegation. The administrative law judge, of

course, must apply the legal definition of pneumoconiosis when analyzing the medical opinions on remand. *See* 20 C.F.R. §718.201; *Cornett, supra*. Claimant should identify for the administrative law judge any medical opinions he believes to be flawed in this regard.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge