BRB No. 99-0320 BLA

ALVIE R. RUDASH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL CORPORATION	)	
	)	DATE ISSUED:
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 Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (93-BLA-0796) of Administrative Law Judge Edward Terhune Miller awarding benefits 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). This case is on appeal before the Board for a second time. In his initial Decision and Order issued on May 23, 1995, the administrative law judge accepted employer's stipulation that claimant had at least thirty-one years of qualifying coal mine employment and a totally disabling respiratory impairment, and adjudicated this claim, filed on April 13, 1992, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§727.202(a)(4), 718.203(b), and total disability due

to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's acceptance of employer's stipulations and his finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(3), but vacated his findings pursuant to Sections 718.202(a)(4), 718.203(b) and 718.204(b), and remanded this case for a reevaluation of Dr. Jaworski's opinion in light of its equivocal nature. The Board further instructed the administrative law judge to weigh all relevant evidence thereunder after redetermining the probative value of the opinions of Drs. Fino and Renn in light of the holdings of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), and *Stiltner v. Island Creek Coal Co.*, 86, F.3d 337, 20 BLR 2-246 (4th Cir. 1996). *Rudash v. Consolidation Coal Co.*, BRB No. 95-1628 BLA (Oct. 25, 1996)(unpub.).

On remand, the administrative law judge again found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4), 718.203(b), and disability causation pursuant to Section 718.204(b). Consequently, the administrative law judge awarded benefits.

In the present appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(b). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to submit a brief on appeal.

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

Employer initially contends that the administrative law judge erred in relying on the opinions of Drs. Lebovitz and Levine to support his finding that the weight of the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer asserts that Drs. Lebovitz and Levine did not explicitly articulate any basis for their diagnoses of pneumoconiosis other than positive x-ray interpretations and claimant's lengthy coal mine employment history, whereas the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis and the Fourth Circuit has recognized that a lengthy coal mine history alone does not conclusively establish that a miner's impairment or disability is due to pneumoconiosis or coal dust exposure, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Employer argues that the

administrative law judge did not resolve the inconsistency between his finding that the x-ray evidence did not establish the existence of pneumoconiosis and his decision to rely on the reports of Drs. Lebovitz and Levine, who based their diagnoses of pneumoconiosis in part on positive x-ray evidence. Employer further asserts that since Drs. Lebovitz and Levine did not affirmatively link any other diagnosed respiratory or pulmonary condition with dust exposure in claimant's coal mine employment, their opinions are insufficient to establish "legal" pneumoconiosis as defined at 20 C.F.R. §718.201. Employer's arguments have some merit.

Subsequent to the issuance of the administrative law judge's Decision and Order, the Fourth Circuit held that, in determining whether a miner has met his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence, the administrative law judge must consider all relevant evidence together rather than merely within the "discrete subsections" of Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000). In the present case, inasmuch as the administrative law judge did not weigh the x-ray evidence with the physicians' opinions, or determine whether Drs. Lebovitz and Levine diagnosed legal as opposed to clinical pneumoconiosis, we vacate his finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and remand the case for further findings consistent with *Compton, supra*. On remand, in evaluating the conflicting medical opinions of record, the administrative law judge must examine the reasoning employed in each medical opinion in light of the objective evidence supporting that opinion, and also must take into account any contrary x-rays, test results or diagnoses. *See Compton, supra*; *Hicks, supra*; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999).

Employer next contends that the opinions of Drs. Jaworski, Levine and Lebovitz are legally insufficient to satisfy claimant's burden of establishing that pneumoconiosis was a necessary cause of claimant's disability, and that the administrative law judge provided invalid reasons for discounting the contrary opinions of Drs. Fino and Renn at Section 718.204(b). Inasmuch as the administrative law judge's weighing of the evidence on remand at Section 718.202 may impact upon his findings regarding the issue of disability causation, we also vacate his findings at Section 718.204(b) for reconsideration of the evidence thereunder. With respect to employer's specific allegations of error, while the administrative law judge could reasonably conclude that the opinion of Dr. Jaworski was more consistent with the broader legal definition of pneumoconiosis than the contrary opinions of Drs. Fino and Renn, Decision and Order at 13, *see Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988), we agree with employer's argument that Dr. Jaworski's opinion is insufficient to meet claimant's burden at Section 718.204(b) because the administrative law judge found it too equivocal to affirmately establish the existence of pneumoconiosis or the effects thereof at Section 718.202(a)(4). Decision and Order at 5; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). However, we reject employer's assertion that the

administrative law judge improperly accorded little weight to the opinion of Dr. Fino. The administrative law judge accurately determined that, while Dr. Fino did not opine that obstructive airways disease can never be caused by coal dust exposure, Dr. Fino's deposition testimony revealed that he would never diagnose simple pneumoconiosis based on a pure obstructive impairment. Decision and Order at 6-8; Employer's Exhibit 15. The administrative law judge thus could reasonably conclude that Dr. Fino's opinion was inconsistent with the legal definition of pneumoconiosis and the holdings of the Fourth Circuit in *Warth* and *Stiltner*, and therefore merited little weight. Decision and Order at 8. Further, despite his finding that Dr. Renn's opinion was not inimical to the Act, Decision and Order at 10, the administrative law judge could permissibly find Dr. Renn's conclusions unpersuasive. Decision and Order at 9-10, 12; *see Lane v. Union Carbide Corp.*, 105 .3d 166, 21 BLR 2-34 (4th Cir. 1997). We agree, however, with employer's argument that the administrative law judge shifted the burden of proof by requiring Drs. Fino and Renn[1] "[t]o explain how more than thirty years of coal dust exposure could have absolutely no effect on Claimant's condition," Decision and Order at 13; rather, the administrative law judge must determine on remand whether claimant has met his burden of affirmatively establishing that his total respiratory disability is due to pneumoconiosis. *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).[2]

[1]Employer accurately maintains that Drs. Fino and Renn considered claimant's coal mine employment history but provided multiple reasons for attributing claimant's disability solely to smoking. Director's Exhibit 21; Employer's Exhibits 1, 9, 11, 15.

[2]Employer also contends, as it did in the prior appeal of this case, that the administrative law judge erred in failing to make an explicit finding regarding the extent of claimant's smoking history. Inasmuch as the Board previously addressed and rejected employer's arguments, and no exception to the law of the case doctrine has been demonstrated, we decline to revisit this issue in the present appeal. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Accordingly, the Decision and Order on remand of the administrative law judge awarding benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge