BRB No. 99-0735 BLA

WALKER E. QUEEN	)	
	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BENJAMIN COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
STATE WORKER'S INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Jeffrey S. Goldberg (Henry L. Solano, 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, Administrative

Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-2099) of Administrative Law Judge Thomas M. Burke, Jr., awarding benefits on a duplicate 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 is before the Board. By Decision and Order of July 21, 1997, the Board affirmed the administrative law judge's findings under 20 C.F.R. §718.204(c), but vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a) and 718.204(b). *Queen v. Benjamin Coal Co.*, BRB No. 96-1733 BLA (July 21, 1997)(unpublished). Citing the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the Board also instructed the administrative law judge to weigh all the evidence relevant to Section 718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Id.* Additionally, the Board held that if the administrative law judge, on remand, finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), he must address whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. *Id.*[2]

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[1]Claimant filed this duplicate claim on January 13, 1994. Director's Exhibit 1. Claimant's previous claim, filed on June 22, 1987, was denied by the district director on September 15, 1987. Director's Exhibit 43. There is no evidence that claimant took any further action in regard to this 1987 claim.

[2]On October 9, 1997, the Board denied employer's motion for reconsideration. *Queen v. Benjamin Coal Co.*, BRB No. 96-1733 BLA (Oct. 9, 1997)(Order)(unpublished). Employer filed an appeal to the United States Court of Appeals for the Third Circuit challenging the Board's affirmance of the administrative law judge's finding of total

On remand, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's findings under Sections 718.202(a)(1)-(4) and 718.204(b). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, limited his response to the administrative law judge's weighing of the evidence under Section 718.202(a), and the administrative law judge's evaluation of Dr. Fino's opinion.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

In order to establish entitlement to benefits under 20 C.F.R Part 718 in a living miner's claim, a claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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disability pursuant to 20 C.F.R. §718.204(c). On October 16, 1998, employer's appeal was dismissed for lack of jurisdiction.

Employer asserts that the administrative law judge failed to properly consider all the evidence together pursuant to Section 718.202(a)(1)-(4). Employer argues that when considering the twenty-five negative x-ray readings of record in conjunction with the four medical opinions of record, "the only proper conclusion is that Claimant does not suffer from coal workers' pneumoconiosis." Employer further argues that Dr. Fino's opinion that claimant does not have pneumoconiosis, is consistent with the other evidence of record, and that his opinion is entitled to "great weight" because of his qualifications as a pulmonologist. Employer argues, that in contrast, Dr. Bizousky's qualifications are not part of the record and his opinion is in direct contradiction to the medical evidence of record, *i.e.* negative x-rays and non-qualifying pulmonary function studies and blood gas studies.[3]

Four physicians submitted opinions relevant to the issue of pneumoconiosis and total disability due to pneumoconiosis. Drs. Michos and Fino opined that claimant did not have pneumoconiosis, and Drs. Bizousky and Malhorta opined that claimant had pneumoconiosis. In his Decision and Order awarding benefits issued on August 21, 1996, the administrative law judge did not credit the opinions of Drs. Michos and Malhorta because he found that they based their opinions entirely on x-ray evidence. The Board affirmed, as unchallenged, the administrative law judge's basis for discrediting Dr. Michos' opinion and remanded the case for the administrative law judge to reconsider the opinions of Drs. Bizousky and Fino. *Queen v. Benjamin Coal Co.*, BRB No. 96-1733 BLA (July 21, 1997)(unpublished).

[3]Employer alleges that Dr. Bizousky failed to consider claimant's "significant smoking history." The Board in its previous decision rejected employer's argument holding that "not only did Dr. Bizouski consider claimant's smoking history, he found that it was a partial contributor to his chronic obstructive pulmonary disease." *Queen v. Benjamin Coal Co.*, BRB No. 96-1733 BLA slip op. at 3 (July 21, 1997)(unpublished).

The administrative law judge reconsidered the opinions of Drs. Fino and Bizousky in conjunction with the x-ray evidence and, within his discretion, found the medical opinion of Dr. Bizousky sufficient to establish chronic bronchitis related to coal dust exposure, finding that the "absence of the disease on chest x-rays does not render Dr. Bizousky's opinion less probative." *Williams, supra;* Decision and Order on Remand at 4, 5. The administrative law judge was not required to give more weight to Dr. Fino's report based solely on his superior qualifications. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In his Decision and Order awarding benefits issued on August 21, 1996, the administrative law judge acknowledged Dr. Fino's qualifications. However, the administrative law judge, citing *Labelle Processing Co. v. Swarrow*, 72 F.2d 308, 20 BLR 2-76 (3d Cir. 1996), properly found Dr. Fino's premise that he could not diagnose industrial bronchitis because claimant was no longer working in the mines, an erroneous basis upon which to find "no pneumoconiosis under the legal definition."[4] Decision and Order on Remand at 3. In contrast, the administrative law judge, within a proper exercise of his discretion, found the opinion of Dr. Bizousky well reasoned and well documented as it was based on the miner's work and smoking histories, examination, and positive x-rays. *Clark, supra;* Decision and Order on Remand at 5. The administrative law judge reasonably found that Dr. Bizousky's opinion was not diminished in value because the x-ray he relied on was later interpreted negatively because "the study constituted one of multiple factors considered, *i.e.* coarse crackles in the lungs, restriction and obstruction on ventilatory testing, and the fact that the miner was short of breath and experienced dyspnea on exertion." Decision and Order on Remand at 4. Accordingly, we reject employer's arguments and affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section

[4]In *Labelle Processing Co. v. Swarrow*, 72 F.2d 308, 20 BLR 2-76 (3d Cir. 1996), the United States Court of Appeals for the Third Circuit, in pertinent part, held that "(a) latent condition such as pneumoconiosis may not become manifest until long after exposure to the causative agent (*i.e.* coal dust)." *Id* at 314, 20 BLR 2-88.

718.202(a).[5] *Williams, supra.*

Under Section 718.204(b), employer argues that the administrative law judge ignored the non-qualifying pulmonary function and arterial blood gas studies of record. Employer notes that Dr. Fino's opinion that claimant was not disabled by pneumoconiosis was based on the objective evidence of record, *i.e.* negative x-rays and non-qualifying pulmonary function studies and blood gas studies, and that Dr. Fino's opinion is entitled to more weight because of his superior qualifications. We disagree. The administrative law judge, within the proper exercise of his discretion, gave less weight to Dr. Fino's opinion that coal dust exposure did not contribute to claimant's impairment because Dr. Fino determined that claimant's pulmonary impairment would have been present at or about the time claimant left the mines if it was caused by black lung disease. Decision and Order on Remand at 5; Employer's Exhibit 6. The administrative law judge properly found Dr. Fino's opinion to be contrary to the decision in *Swarrow. See supra* at 4 n. 3. Further, contrary to employer's argument, neither pulmonary function study evidence nor blood gas study evidence, by itself, is diagnostic of the etiology of claimant's lung disease. *Tucker v. Director, OWCP,* 10 BLR 1-35 (1987); *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). We thus affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis at Section 718.204(b).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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[5]Notwithstanding the Board's prior instruction, on remand, the administrative law judge did not make specific findings under 20 C.F.R. §718.203(b). Because the parties stipulated to seventeen years of coal mine employment, the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b) is applicable in this case. Inasmuch as there appears to be no evidence to rebut the presumption arising under Section 718.203(b), we decline to again remand this case for findings at Section 718.203(b).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge