BRB No. 00-1191 BLA

JERRY E. LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL	)	
CORPORATION	)	
	)	DATE ISSUED:
and	)	
	)	
OLD REPUBLIC INSURANCE	)	
COMPANY	)	
	)	
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 - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane), Charleston, West Virginia, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Dorothy L. Page (Howard M. Radzely, 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:

Employer appeals the Decision and Order on Remand - Awarding Benefits (96-BLA-1625) of Administrative Law Judge Gerald M. Tierney with respect to 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 an application for benefits on January 25, 1996. In a Decision and Order issued on May 12, 1998, the administrative law judge determined that claimant established that he has pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203(b) (2000), and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000).[1] Accordingly, benefits were awarded. Upon consideration of employer's appeal, the Board affirmed the administrative law judge's findings under Sections 718.202(a)(1) and 718.203(b) (2000). The Board further held, however, that employer was correct in asserting that the administrative law judge did not

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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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

properly weigh the medical opinions of Drs. Rasmussen, Zaldivar, and Fino pursuant to Section 718.204(b) (2000). The Board vacated the administrative law judge's findings under Section 718.204(b) (2000) and remanded the case to the administrative law judge for reconsideration of the relevant medical opinions. *Lewis v. Eastern Associated Coal Corp.*, BRB No. 98-1213 BLA (June 11, 1999)(unpub.).

On remand, the administrative law judge accorded greatest weight to Dr. Rasmussen's opinion, based upon his status as a treating physician and his many years of experience in treating pneumoconiosis. The administrative law judge further determined, therefore, that Dr. Rasmussen's opinion was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000).[2] The administrative law judge also reconsidered the issue of the existence of pneumoconiosis, as subsequent to the Board's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000), that in order to determine whether the existence of pneumoconiosis is established, all evidence relevant to Section 718.202(a)(1)-(4) must be weighed together.[3] The administrative law judge found that when weighed together, the x-ray and medical opinion evidence were sufficient to establish that claimant has pneumoconiosis. Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the evidence under Sections 718.202(a)(1), (a)(4), and 718.204(b) (2000). Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not responded to the merits of employer's appeal.

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[2]The criteria pertaining to total disability causation are now set forth in 20 C.F.R. §718.204(c) (2001). The parties agree that the revisions that appear in Section 718.204(c) (2001) do not impact the present case.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 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).

Employer asserts initially that in considering the evidence relevant to the existence of pneumoconiosis and total disability due to pneumoconiosis, the administrative law judge once again improperly relied upon a preference for Dr. Rasmussen based solely upon his status as claimant's treating physician. Employer also maintains that Dr. Rasmussen's opinion is entitled to less weight than the contrary opinions of Drs. Zaldivar and Fino, as Dr. Rasmussen's experience does not overcome Drs. Zaldivar's and Fino's superior qualifications. In addition, employer asserts that Dr. Rasmussen's opinion is equivocal and unreasoned, as he could not distinguish between the effects of coal dust exposure and smoking, did not explain how he reached his conclusion, and did not address claimant's non-mining related cardiac condition.

Upon consideration of employer's arguments, the administrative law judge's Decision and Order, and the relevant evidence, we affirm the administrative law judge's findings with respect to Dr. Rasmussen's opinion under Sections 718.202(a)(4) and 718.204(b) (2000). Employer's allegations of error are, in large part, tantamount to a request that the Board reweigh the evidence of record; a function that the Board is not empowered to perform. *See Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989). In reviewing the administrative law judge's Decision and Order, the Board is charged with determining whether the administrative law judge's findings are rational and supported by substantial evidence. "Substantial evidence" is evidence that is of sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding at issue. *See Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Accordingly, an administrative law judge's finding cannot be vacated merely because a different result could have been reached or a different interpretation of the facts could have been adduced. *Id*.

In its decisions in *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); and *U.S. Steel Mining Co., Inc. v. Director, OWCP* [Jarrell], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), the Fourth Circuit held that when weighing the medical opinion evidence, an administrative law judge must look beyond the surface of the opinion and the status of its author and carefully assess the factors that affect the probative value of the opinion, *i.e.*, the physician's qualifications, the nature and quantity of the documentation underlying the opinion, the extent to which a physician has explained his conclusions, and the sophistication of the doctor's diagnoses. Nevertheless, the court has not abandoned the notion that "as a general matter, the opinions of treating

and examining physicians deserve special consideration." *Grizzle v. Pickands Mather & Co.,* 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *accord Akers, supra*. In the present case, the administrative law judge's findings with respect to Dr. Rasmussen's opinion are consistent with the principles set forth by the Fourth Circuit and are supported by substantial evidence. *See Mays*, *supra*.

The administrative law judge described Dr. Rasmussen's medical reports in detail and identified Dr. Rasmussen's experience in treating black lung disease as a factor separate from his status as claimant's treating physician that warranted granting his opinion determinative weight. Decision and Order on Remand at 1-2; Director's Exhibit 9; Claimant's Exhibits 1, 3. The administrative law judge rationally determined that, contrary to employer's allegations, Dr. Rasmussen provided an adequate explanation for his diagnoses of pneumoconiosis and total disability due to pneumoconiosis, as Dr. Rasmussen referred to claimant's lengthy history of coal mine employment, his less significant history of smoking, the type of impairment demonstrated on objective studies, the medical literature that supports his conclusion, and responded to the criticisms of his opinion proffered by Drs. Zaldivar and Fino. *Id*. The administrative law judge also noted the respective qualifications of the physicians, but acted within his discretion in determining that Dr. Rasmussen's many years of experience in studying and treating pneumoconiosis made his opinion more persuasive. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We affirm, therefore, the administrative law judge's determination that Dr. Rasmussen's opinion is entitled to greater weight pursuant to Section 718.202(a)(4) and the issue of total disability causation than the opinions of Drs. Fino and Zaldivar. *See Jarrell*, *supra*; *Hicks*, *supra*; *Akers*, *supra*. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence supports a finding of pneumoconiosis and is sufficient to establish that claimant is totally disabled due to pneumoconiosis.

With respect to Section 718.202(a)(1), employer has preserved its objection to the Board's affirmance of the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1) (2000), arguing that the administrative law judge could not properly rely on the more recent x-rays of record, as they were only two and five months more recent than the film that the administrative law judge determined was read as negative for pneumoconiosis. Employer also asserts that the administrative law judge's determination that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) comported with the Fourth Circuit's decision in *Compton*. We decline to alter our previous holding as apart from the recency factor, the administrative law judge rationally determined that the preponderance of readings of two of the three films of record by dually qualified physicians is positive for pneumoconiosis. 1998

Decision and Order - Awarding Benefits at 8; Director's Exhibits 11, 12; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 3, 4; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Finally, we hold that contrary to employer's contention, the administrative law judge explicitly weighed the x-ray and medical opinion evidence together and found that claimant established the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order on Remand at 3; *see Compton*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge