BRB No. 89-461 BLA

CARLIS DEEL)
)
Claimant-Respondent)
)
v.)
)
DOMINION COAL COMPANY)
)
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 of John J. Forbes, Jr., Administrative Law Judge, United States Department of Labor.

W. Hobart Robinson, Abingdon, Virginia, for claimant.

Mary Lou Smith (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (87-BLA-2461) of Administrative Law Judge John J. Forbes, Jr., granting 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). The administrative law judge reviewed this

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with twenty and one-half years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4) and 718.203(b), and established total disability due to pneumoconiosis under 20 C.F.R. §718.204. Accordingly, benefits were awarded. Employer appeals, contending that the administrative law judge erred in determining that claimant established the existence of pneumoconiosis under Section 718.202(a)(4), and total disability due to pneumoconiosis under 20 C.F.R. §718.204. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[1]

[1] The administrative law judge's findings under 20 C.F.R. §§718.202(a)(1) -(a)(3), 718.203(b), and with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

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. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Employer first contends that the administrative law judge, in finding the existence of pneumoconiosis established under Section 718.202(a)(4), erred in according determinative weight to the opinion of Dr. Sutherland.[2] Employer argues that Dr. Sutherland's opinion is not reasoned, as the physician's conclusions regarding the etiology of claimant's lung condition and consequently his diagnosis of pneumoconiosis were based on a faulty premise, i.e. the absence of any smoking history. The administrative law judge noted that Dr. Sutherland incorrectly stated in one report that claimant had never smoked, but found that this discrepancy was slight inasmuch as Dr. Sutherland's other reports indicated his awareness of claimant's past smoking history. However, a review of the record reveals that Dr. Sutherland never discussed the amount or length of time that claimant smoked.[3]

[2] Contrary to employer's arguments, the administrative law judge did not reject the findings of Drs. Sargent and Garzon without explanation, but rather acted within his discretion in according these opinions less weight. See generally Wilson v. United States Steel Corp., 6 BLR 1-1055, 1-1058 (1984).

[3] The administrative law judge determined that claimant had a smoking history of one to three packs per week for twenty years. Decision and Order at 2.

See Director's Exhibit 18, Claimant's Exhibits 1, 2, 5, 6. As the administrative law judge did not accurately address the discrepancy in Dr. Sutherland's reports, his analysis does not constitute a proper evaluation of the evidence. Consequently, we must vacate his findings under Section 718.202(a)(4) and remand the case for the administrative law judge to reconsider the evidence thereunder.[4]

[4] Employer additionally contends that Dr. Keller's opinion is insufficient to support a diagnosis of pneumoconiosis. We agree. Dr. Keller concluded that most of claimant's problems were due to chronic obstructive pulmonary disease, but he does not relate the chronic obstructive pulmonary disease to coal mine employment or specifically diagnose pneumoconiosis. See Claimant's Exhibit 7.

Next, employer contends that the administrative law judge failed to consider all of the relevant evidence and failed to weigh all probative evidence together, like and unlike, in determining that claimant established total disability under Section 718.204(c). See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986). We agree. The administrative law judge found total disability established pursuant to 20 C.F.R. §718.204(c)(1) based on a qualifying pulmonary function study performed on November 25, 1986.[5] Decision and Order at 7; Director's Exhibit 18. However, the administrative law judge did not address Dr. Garzon's opinion which found this ventilatory study invalid.[6] Employer's Exhibit 2; see Revnack v. Director, OWCP, 7 BLR 1-771 (1985). Moreover, in evaluating the blood gas study evidence pursuant to 20 C.F.R. §718.204(c)(2), the administrative law judge noted that none of the studies produced qualifying values, "although most indicate some impairment in the miner's ability to oxygenate his blood." Decision and Order at 7. As the blood gas study evidence was generally uninterpreted, we agree with employer that the administrative law

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

[6] Contrary to employer's arguments, the administrative law judge may, in his discretion, accord less weight to the non-qualifying and nonconforming pulmonary function study obtained on May 19, 1987, wherein claimant's effort was suboptimal. See Anderson v. The Youghiogheny and Ohio Coal Co., 7 BLR 1-152, 1-154, 1-155 (1984).

judge appears to substitute his own conclusions for those of the physicians. See Hucker v. Consolidation Coal Co., 9 BLR 1-137 (1986); Wetzel v. Director, OWCP, 8 BLR 1-139 (1985). Employer further contends, and we agree, that because the administrative law judge's analysis of the pulmonary function study and blood gas study evidence was flawed, it may have tainted his analysis of the medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4). In addition, the administrative law judge failed to address the medical opinions of Drs. Baxter and Garzon, who found no significant respiratory impairment.[7] See Director's Exhibit 4; Employer's Exhibit 2. Consequently, we vacate the administrative law judge's findings under Section 718.204(c)(1), (c)(2) and (c)(4), and remand the case for the administrative law judge to reconsider the evidence under Section 718.204(c) pursuant to Fields, supra.

[7] Employer additionally contends that the administrative law judge erred in rejecting Dr. Sargent's opinion under Section 718.204(c)(4). We disagree. The administrative law judge did not reject Dr. Sargent's opinion, but merely noted that it was equivocal on the issue of total disability. Decision and Order at 7. This finding is supported by substantial evidence. See Claimant's Exhibit 3 at 7, 11.

Finally, employer contends that the administrative law judge failed to separately determine whether claimant's disability is due to pneumoconiosis under 20 C.F.R. §718.204(b), and mischaracterized the opinion of Dr. Sargent, who attributed the source of claimant's respiratory impairment to smoking alone. We agree. In his analysis on the issue of etiology under Section 718.203(b), the administrative law judge stated that Dr. Sargent based his opinion on an elevated carboxyhemoglobin level which the physician admitted could be due to various factors other than smoking. Decision and Order at 6. In fact, Dr. Sargent stated that the carboxyhemoglobin level probably indicated that claimant was still smoking at the time of the examination, and the elevated level caused at least part of the slight decrease in diffusion capacity on claimant's pulmonary function study. See Claimant's Exhibit 3 at 5, 7, 8, 16. The administrative law judge further found that Dr. Sargent failed to adequately explain why smoking is the source of claimant's condition. However, employer notes that Dr. Sargent explained that claimant suffers an obstructive impairment which typically is attributable to smoking, rather than a mixed obstructive and restrictive impairment typical of pneumoconiosis. See Claimant's Exhibit 3 at 8, 10, 11. Consequently, if on remand the administrative law judge finds total disability established, he must reconsider Dr. Sargent's opinion with the remaining probative evidence, and separately determine the issue of causation under 20 C.F.R. §718.204(b) pursuant to the standard set forth in Scott v. Mason

Coal Co., 14 BLR 1-37 (1990)(en banc).[8]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge

[8] Employer additionally asserts that since claimant's hospital treatment was not directed to pneumoconiosis and none of Dr. Sutherland's reports specifically attribute claimant's disability to pneumoconiosis, this evidence cannot support a finding that claimant is totally disabled due to pneumoconiosis. We disagree. Dr. Sutherland was claimant's attending physician during his hospitalizations for various problems including pneumoconiosis. See Claimant's Exhibits 1, 2, 5.