

BRB No. 01-0651 BLA

MYRLE J. JONES)
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 Claimant-Petitioner)
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 v.)
)
 DEBRA LYNN COALS, INCORPORATED) DATE ISSUED:
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 and)
)
 APPOLO FUELS, INCORPORATED)
)
 Employer/Carrier-)
 Respondents)
)
 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 - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Myrle J. Jones, Middlesboro, Kentucky, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order On

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, filed an appeal on behalf of claimant, but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Remand - Denying Benefits (97-BLA-0606) of Administrative Law Judge Rudolf L. Jansen 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).² This case is on appeal to the Board for a second time. In his first Decision and Order, the administrative law judge found, among other things, that the evidence of record failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Benefits were, accordingly, denied. Pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1)-(3), 718.204(c)(2)-(3)(2000), but vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 718.204(c)(1), (4)(2000) and remanded the case for further consideration under those sections. The Board further held that if on remand the administrative law judge finds the existence of pneumoconiosis and total disability established, the administrative law judge must also determine whether pneumoconiosis arose out of coal mine employment and whether claimant was totally disabled due to pneumoconiosis. *See Jones v. Debra Lynn Coals, Inc.*, BRB No. 99-1145 BLA (July 28, 2000) (unpub.). On remand, the administrative law judge found that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that total disability was established pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv), formerly cited as 20 C.F.R. §718.204(c)(1), (4). The administrative law judge, however, found that the evidence failed to establish that pneumoconiosis substantially contributed to his totally disabling respiratory impairment at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

² 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.

Pursuant to a lawsuit challenging revisions to 47 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*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On appeal, claimant contends generally that the administrative law judge erred in finding causation was not established. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. Employer also challenges the findings of the administrative law judge on the existence of pneumoconiosis and the presence of a totally disabling respiratory impairment. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In order to be entitled to benefits in the instant case, claimant must establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment. See 20 C.F.R. §718.204(c)(1).³ In finding the evidence insufficient to meet

³ A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

claimant's burden of proof on causation, the administrative law judge correctly concluded that although Dr. Moore, the claimant's treating physician, found the existence of pneumoconiosis, because he did not opine that claimant was totally disabled due to pneumoconiosis, Claimant Exhibit 2, his opinion was "neither for nor against a finding of total disability due to pneumoconiosis." Decision and Order at 6;⁴ *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994), *modif. on recon.* 20 BLR 1-64 (1996). In addition, the administrative law judge permissibly accorded less weight to the medical opinions of Drs. Branscomb, Dahhan and Fino, all of whom diagnosed a significant respiratory impairment related to claimant's smoking, because they did not diagnose the existence of coal workers' pneumoconiosis. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Accordingly, the administrative law judge's finding that the opinions of Drs. Moore, Branscomb, Dahhan and Fino did not establish causation is affirmed. *Tussey, supra; Carson, supra.*⁵

Turning to the medical opinions of Drs. Baker and Westerfield, the administrative law judge found that Dr. Baker attributed claimant's respiratory impairment to pneumoconiosis, chronic obstructive pulmonary disease, chronic bronchitis, and hypoxemia, while Dr. Westerfield diagnosed category one pneumoconiosis and a less than eighty percent pulmonary capacity, but attributed claimant's respiratory impairment to chronic obstructive lung disease. *See* Decision and Order at 6; Director's Exhibits 12, 13; Claimant's Exhibit 1. While noting that both physicians were credentialed, pulmonary specialists, the administrative law judge accorded determinative weight to the opinion of Dr. Westerfield, based on his additional credentials as a Board-certified medical examiner, and because his opinion was corroborated by the opinions of Drs. Branscomb, Dahhan and Fino that claimant's significant respiratory impairment was due to smoking.

⁴ Dr. Moore diagnosed the existence of pneumoconiosis and a moderate chronic obstructive lung disease. Claimant's Exhibit 2.

⁵ Although the administrative law judge did not refer to Dr. Smiddy's opinion in his discussion of the evidence relevant to causation, this error, if any, is harmless inasmuch as Dr. Smiddy did not discuss the cause of the severe disabling respiratory impairment he diagnosed. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We do not see, however, without further explanation by the administrative law judge, how Dr. Westerfield's credential as a Board-certified medical examiner entitles his opinion to greater weight on the issue of causation. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Although we note that that error, if any, would not, by itself be enough to render the administrative law judge's decision irrational if the administrative law judge's other findings regarding Dr. Westerfield's opinion were supported by the record and in accordance with law. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

In the instant case, however, a review of the record shows that Dr. Westerfield, in addition to diagnosing the existence of pneumoconiosis and a respiratory impairment due to chronic obstructive lung disease, also opined that the miner's total disability was due to heart and lung disease. Director's Exhibit 12. Accordingly, inasmuch as Dr. Westerfield stated that the miner's disability was due to heart and lung disease and Dr. Baker opined that, in addition to coal workers' pneumoconiosis, claimant's obstructive airway disease was also related to his dust exposure, Claimant's Exhibit 1, we vacate the administrative law judge's findings regarding the opinions of Drs. Westerfield and Baker, and remand the case for reconsideration of their opinions. *See* 20 C.F.R. §718.201(a)(2); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-241 (4th Cir. 1996); *Barnes v. Director, OWCP*, 19 BLR 1-73 (1995); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); *see also* 5 U.S.C. §557(c)(3)(A) *as incorporated into the Act* by 5 U.S.C. §554(c)(2); 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Likewise, the administrative law judge's finding that the opinions of Drs. Branscomb, Dahhan and Fino bolster Dr. Westerfield's opinion on causation is troubling inasmuch as he had otherwise discounted their opinions on the issue of causation because they did not diagnose the existence of pneumoconiosis. *See Tussey, supra*. Additionally, although the administrative law judge correctly noted that Dr. Moore's opinion was "neither for nor against" a finding of total disability due to pneumoconiosis because Dr. Moore did opine that claimant was disabled due to pneumoconiosis, Dr. Moore's diagnosis of pneumoconiosis may be supportive of other opinions on causation. *See Tussey, supra*. Accordingly, for these reasons, we must vacate the administrative law judge's finding on causation and remand the case for further consideration of the relevant evidence under the standard set forth at Section 718.204(c)(1)(i), (ii). 20 C.F.R. §718.204(c)(1)(i), (ii).

Further, in support of the administrative law judge's denial, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis and total disability established. Employer while acknowledging that the Board previously affirmed the administrative law judge's finding at Section 718.202(a)(1), nonetheless, contends that the administrative law judge erred in not considering the negative x-ray evidence in conjunction with the medical opinion evidence at Section 718.202(a)(4) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). This argument is rejected,

however, inasmuch as *Compton* was decided by the United States Court of Appeals for the Fourth Circuit while this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has not required consideration of x-ray and medical opinion evidence together. *See Cornett, supra; Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

As to employer's arguments concerning the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), the administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record to determine whether the evidence is documented and reasoned, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and therefore, to determine whether a party has met its burden, *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Accordingly, we reject employer's arguments inasmuch as the Board cannot reweigh the evidence. The administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis is supported by substantial evidence and in accordance with law. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-6 (1989); *see also Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99-2-103 (6th Cir. 1983). Likewise, for the same reasons we affirm the administrative law judge's findings at Section 718.204(b)(2)(i), (iv). 20 C.F.R. §718.204(b)(2)(i), (iv); *Cornett, supra; Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Rowe, supra; Clark, supra; Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields, supra*.

Accordingly, the administrative law judge's Decision and Order On Remand - Denying 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

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge