BRB No. 02-0507 BLA

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| ROBERT W. BARTLEY<br><br>Claimant-Petitioner<br><br>v.<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Respondent | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | <br><br><br><br><br><br><br>DATE<br>ISSUED:___________<br><br><br>DECISION and ORDER |

Appeal of the Decision and Order on Remand – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Robert W. Bartley, Elkhorn City, Kentucky, *pro se*.

Michelle S. Gerdano (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denial of Benefits (98-BLA-1318) of Administrative Law Judge Daniel J. Roketenetz 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).[1] This case involves a

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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.

duplicate claim and a request for modification.[2] Claimant filed the instant claim for benefits on March 31, 1994. On November 3, 1996, Administrative Law Judge Michael P. Lesniak issued a Decision and Order denying benefits. Judge Lesniak found that although the evidence established the existence of pneumoconiosis, the newly submitted evidence failed to establish total disability or total disability due to pneumoconiosis. Accordingly, Judge Lesniak found that claimant failed to establish a material change in conditions and he denied benefits.

On claimant's appeal, the Board held that substantial evidence supported Judge Lesniak's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Therefore, the Board affirmed the denial of benefits. *Bartley v. Director, OWCP,* BRB No. 96-0689 BLA (Sept. 26, 1996)(unpub.). The Board reaffirmed its holdings on reconsideration. *Bartley v. Director, OWCP,* BRB No. 96-0689 BLA (Nov. 26, 1996)(Decision and Order on Recon.)(unpub.).

On March 13, 1997, claimant sent a letter to the Department of Labor, which was construed as a request for modification. 20 C.F.R. §725.310 (2000). On September 22, 1999, Administrative Law Judge

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Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant's initial claim for benefits, filed on December 20, 1979, Director's Exhibit 31, was denied by Administrative Law Judge Bernard J. Gilday, Jr.. Judge Gilday credited claimant with twenty six and three-quarters years of coal mine employment, and found the x-ray evidence sufficient to establish invocation of the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1). Judge Gilday also found rebuttal of the presumption established pursuant to 20 C.F.R. §727.203(b)(1) because claimant was working at that time. Judge Gilday also found that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D.

On claimant's appeal, the Board affirmed Judge Gilday's rebuttal finding at Section 727.203(b)(1), and held that entitlement was not established pursuant to 20 C.F.R. §410.490. The Board affirmed the denial of benefits. *Bartley v. Director, OWCP*, BRB No. 86-0803 BLA (Feb. 22, 1988)(unpub.).

[3] Although the regulations at 20 C.F.R. §725.309 and 20 C.F.R. §725.310 have been amended, the revised regulations apply only to claims filed after January 19, 2001, and thus, are not applicable in the instant case. *See* 20 C.F.R. §725.2.

Daniel J. Roketenetz (the administrative law judge) issued a Decision and Order – Denial of Benefits. The administrative law judge accepted, as the law of the case, Judge Gilday's length of coal mine employment finding, as well as his finding that claimant established the existence of pneumoconiosis. The administrative law judge found that claimant's pneumoconiosis arose out of his coal mine employment, however, he found that the medical evidence submitted with the duplicate claim was insufficient to establish total disability due to pneumoconiosis. Consequently, benefits were denied.

On appeal, the Board affirmed the administrative law judge's finding that the evidence submitted subsequent to the February 22, 1988 denial of benefits in the miner's first claim was insufficient to demonstrate the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000).[4] Further, the Board determined that there was no need to address the administrative law judge's findings regarding the cause of claimant's disability. Thus, the Board affirmed the denial of benefits. *Bartley v. Director, OWCP,* BRB No. 00-0148 BLA (Sept. 29, 2000)(unpub.).

Claimant appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the administrative law judge's finding that the newly submitted evidence was insufficient to demonstrate total disability pursuant to Section 718.204(c)(1)-(3) (2000). However, the Sixth Circuit found errors in the administrative law judge's weighing of the medical opinion evidence at Section 718.204(c)(4) (2000). The court stated "we conclude that the ALJ's analysis of the medical opinion evidence relating to the causation of total disability is not supported by substantial evidence and requires a remand to the ALJ for further consideration of that evidence." *See Bartley v. Director, OWCP*, No. 00-4390 (6th Cir. June 7, 2001)(unpub.), slip op. at 5. The court remanded the case for consideration of a report authored by an "attending physician" to determine whether it was written by Dr. Thompson, and, if so, to consider it in conjunction with the other opinions of Dr. Thompson. In addition, the court instructed the administrative law judge to reconsider the weight he accorded to Dr. Fritzhand's opinion. In so doing, the Sixth Circuit noted that it has held that where an administrative law judge has found the evidence sufficient to establish the existence of pneumoconiosis, in considering the cause of any disability claimant may have, the

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[4] The provision pertaining to total disability, previously set out at 20 C.F.R. '718.204(c), is now found at 20 C.F.R. '718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. '718.204(b), is now found at 20 C.F.R. '718.204(c).

administrative law judge "should treat as 'less significant' physicians' reports finding no pneumoconiosis." *Id.*

By Order dated August 27, 2001, the Board remanded the case to the administrative law judge for further consideration consistent with the Sixth Circuit's opinion. *Bartley v. Director, OWCP*, BRB No. 00-0148 BLA (Aug. 27, 2001)(Order)(unpub.).

On March 26, 2002, the administrative law judge issued his Decision and Order on Remand- Denial of Benefits. The administrative law judge noted that total disability had not yet been established. The administrative law judge reviewed the medical opinions, and found that, even assuming that the illegibly signed report was written by Dr. Thompson, the reports of Dr. Thompson were insufficient, both individually and collectively, to establish that claimant suffers from a disabling respiratory impairment arising out of his coal mine employment. The administrative law judge also found the opinions of Drs. Wells, Page and Fritzhand insufficient to demonstrate total disability due to pneumoconiosis. The administrative law judge, therefore, denied benefits.

Claimant generally asserts that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.,* 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

In discussing the medical opinion evidence on remand, the administrative law judge proceeded, assuming that the August 1989 opinion is an opinion authored by Dr. Thompson.[5] The administrative law

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[5] The evidence submitted with the instant claim includes the following medical reports. Dr. Wells examined claimant in 1994 and stated that from a pulmonary standpoint, claimant is not able to perform his usual coal mine employment, and the physician indicated that further exposure to dust would compromise claimant's respiratory system. Director's Exhibit

judge stated "I do not find these three reports individually or collectively, sufficient to establish that the Claimant is suffering from a disabling respiratory impairment arising out of his coal mine employment." 2002 Decision and Order at 6. The administrative law judge found that Dr. Thompson "fails to provide a clear analysis in support of his conclusions or a well-reasoned report…." 2002 Decision and Order at 6. Further, the administrative law judge found that Dr. Thompson's opinions are "devoid of reasoning or documentation sufficient to support his opinion." 2002 Decision and Order at 7. The administrative law judge noted that Dr. Thompson is claimant's treating physician, but indicated that his status as the treating physician cannot overcome these deficiencies in his opinion. The administrative law judge also found that the opinions of Drs. Wells, Page and Fritzhand are insufficient to establish total disability. The administrative law judge noted the comment in the opinion authored by cardiologist Dr. Booth, that claimant's condition from coronary artery disease "may" be aggravated by his coal mine employment. The administrative law judge determined that this opinion was speculative at best, and found it insufficient to support a finding of total disability. The administrative law judge noted that Dr. Page's opinion did not address disability, and the administrative law judge found that Dr. Wells' suggestion

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11. In 1989, Dr. Booth, one of claimant's treating physicians, stated that claimant has coronary artery disease. Dr. Booth stated that the exact etiology of claimant's exertional dyspnea is uncertain. Dr. Booth stated that the impact of claimant's "medical condition is that he would be unable to function as a mine inspector." Director's Exhibit 12. In 1990, Dr. Booth opined that claimant's condition from coronary artery disease "may be" aggravated by his coal mine employment. Director's Exhibit 16. The Attending Physician's Report with an illegible signature, dated August 11, 1989, answers the question "Do you believe disability is related to history of injury given above?" by stating "the patient has had dust exposure". Director's Exhibit 13. In his 1990 opinion, Dr. Page stated that he has examined claimant in the past. Dr. Page noted that claimant has "suffered dust exposure throughout his employment." Director's Exhibit 15. In 1991, Dr. Page examined claimant and stated, based on his 1989 examination of claimant, that claimant "should not be allowed to work." Director's Exhibit 17. In a 1990 report, Dr. Thompson, claimant's treating physician, opined that claimant's dust exposure and the stress of his job contributed to claimant's early disability from cardio-pulmonary disease. Director's Exhibit 14. In a 1991 opinion, Dr. Thompson noted that the "least amount of exertion" causes claimant to become severely short of breath, and Dr. Thompson opined that claimant is unable to do any kind of exertional activity. Director's Exhibit 19. Dr. Fritzhand examined claimant in 1994 and opined that claimant has no impairment. Director's Exhibit 20.

that claimant should avoid further exposure to dust, does not constitute a diagnosis of total disability. 2002 Decision and Order at 7-8. The administrative law judge found that Dr. Fritzhand's opinion does not support a finding of total disability. 2002 Decision and Order at 8. The administrative law judge, therefore, found the evidence insufficient to establish that claimant is totally disabled due to pneumoconiosis.

In view of the instructions from the Sixth Circuit that the inquiry is whether claimant's pneumoconiosis rendered him totally disabled, we consider the administrative law judge's findings regarding disability causation. We affirm the administrative law judge's finding that the evidence does not establish total disability due to pneumoconiosis pursuant to Section 718.204(c).

Specifically, we affirm the administrative law judge's finding that Dr. Booth's opinion, *see* Director's Exhibits 12, 16, is too equivocal to support a finding that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). *See Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984). In addition, we affirm the administrative law judge's finding that Dr. Thompson's opinion is not adequately reasoned or documented and therefore fails to support a finding that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). The administrative law judge is charged with evaluating the medical evidence and determining whether the opinions are reasoned and documented, and determining the relative weight to accord to each opinion, s*ee Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The Board has held that in order to be considered documented, a medical opinion must set forth the clinical findings, observations and facts upon which the physician based his diagnosis. In order to be considered reasoned, the documentation underlying the medical opinion must support the physician's assessment of the miner's health. *See Fields, supra*. Since the administrative law judge's finding that Dr. Thompson's opinion regarding claimant's respiratory condition is not adequately reasoned is supported by substantial evidence, s*ee Clark, supra*; *Fields, supra*, we affirm the administrative law judge's finding that Dr. Thompson's opinion is not entitled to determinative weight, despite his status as claimant's treating physician.[6] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, ___ BLR ___ (6th Cir. 2002). We, therefore, affirm the administrative law judge's finding

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[6] In addition, the opinions of Drs. Page, Wells and Fritzhand are not probative on the issue of disability causation at 20 C.F.R. §718.204(c). *See* Director's Exhibits 11, 15, 20.

that the evidence does not establish disability due to pneumoconiosis pursuant to Section 718.204(c).

Consequently, since we affirm the administrative law judge's finding that the newly submitted evidence does not establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c), we also affirm the administrative law judge's finding that claimant has not established a material change in conditions pursuant to Section 725.309 (2000). *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Inasmuch as claimant has failed to establish a material change in conditions, entitlement is precluded.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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Administrative Appeals Judge