BRB No. 02-0549 BLA

WILLIAM H. BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TORIE MINING, INCORPORATED	)	DATE ISSUED:
	)	
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 On Remand Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand Awarding Benefits (00-BLA-0467) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) 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 is before the Board for

[1] The Department of Labor has amended the regulations implementing the Federal

the second time. The Board, in *Bentley v. Torie Mining Inc.*, BRB No. 01-0217 BLA (Oct. 19, 2001)(unpublished), affirmed the administrative law judge's finding that claimant established the existence of pneumoconiosis by x-ray evidence at 20 C.F.R. §718.202(a)(1) (2000) and total respiratory or pulmonary disability at 20 C.F.R. §718.204(c)(4) (2000). The Board vacated the administrative law judge's findings regarding disability causation at 20 C.F.R. §718.204(b) (2000) and remanded the case for the administrative law judge to consider the relevant evidence pursuant to the revised regulation at 20 C.F.R. §718.204(c).[2] On remand, the administrative law judge set forth the relevant evidence, the provisions of 20 C.F.R. §718.204(c), and relevant case law of the United States Court of Appeals for the Sixth Circuit within whose jurisdiction the instant case arises. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The administrative law judge noted claimant's burden to establish that pneumoconiosis is a substantially contributing cause of his total respiratory or pulmonary disability. The administrative law judge, in determining that claimant met his burden to establish disability causation in this case, relied on the opinions of Drs. Younes[3] and Baker,[4] and Dr. Potter,[5] claimant's treating physician. The administrative law judge

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Coal Mine Health and Safety Act of 1969, as amended (the Black Lung Act). These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] 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).

[3] Dr. Younes diagnosed coal workers' pneumoconiosis due to claimant's coal mine employment and chronic obstructive pulmonary disease due to smoking and coal mine employment. Dr. Younes opined that claimant's impairment was primarily due to cigarette smoking and secondarily due to occupational dust exposure. Director's Exhibit 11.

[4] Dr. Baker found a Class II impairment due to claimant's coal workers' pneumoconiosis. He opined that claimant's physiological impairment due to obstructive airway disease, as well as his x-ray evidence of pneumoconiosis, suggest that claimant is one-hundred percent disabled for performing coal mine work or work in similarly dusty conditions. Director's Exhibit 24. Dr. Baker opined:

> Patient has a long history of smoking as well as dust exposure. Both conditions are known causes of obstructive airway disease. It is thought that any pulmonary impairment was caused in part by his coal dust exposure as well as his cigarette smoking history.

credited these opinions, finding that they were supported by the medical data and corroborated by claimant's history of thirty-two years of underground coal mine employment and by his moderate cigarette smoking history. Accordingly, benefits were awarded.

On appeal, employer contends that the Board's decision to affirm the administrative law judge's prior findings that the x-ray evidence establishes the existence of pneumoconiosis and that claimant is totally disabled due to a respiratory or pulmonary impairment, must be revisited in light of intervening controlling authority, namely *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001) and *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 865 (U.S. Jan. 13, 2003), respectively. Employer further contends that the Board, in affirming the administrative law judge's finding that claimant established total respiratory or pulmonary disability in this case, erred in failing to require that the administrative law judge analyze the relevant evidence as a whole prior to making such a determination. Employer also contends that the administrative law judge on remand, in determining the cause of claimant's impairment, applied the wrong standard, failed to follow the Board's remand instructions, and did not adequately explain his reasons for crediting the opinions of Drs. Younes, Baker and Potter. Claimant responds, and seeks affirmance of the decision below as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, and contends that the 2002 decision of the United States Court of Appeals for the District of Columbia Circuit in *Nat'l Mining Ass'n* does not constitute intervening precedent mandating that the Board revisit its affirmance of the administrative law judge's finding that the x-ray evidence establishes the existence of pneumoconiosis. Employer has filed a reply brief.

Id.

[5] Dr. Potter opined that claimant is totally disabled due to pneumoconiosis. Director's Exhibit 33. Dr. Potter also stated that claimant's coal workers' pneumoconiosis, due to his exposure to coal and rock dust, is the cause of claimant's impairment "in total." Claimant's Exhibit 1.

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. §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).

Employer contends that the Board's decision to affirm the administrative law judge's finding that the x-ray evidence establishes the existence of pneumoconiosis must be revisited in light of the District of Columbia Circuit's decision in *Nat'l Mining Ass'n*. Employer relies on the court's reference to the concession of counsel for the Director at oral argument that the occurrence of latent and progressive pneumoconiosis is rare. Employer argues that insofar as the administrative law judge, in his original Decision and Order, relied on the theory that pneumoconiosis is progressive in applying the later evidence rule and in finding the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1) (2000), he erred. Employer argues that there is no medical support in the record to show that claimant's pneumoconiosis was "one of those very rare ones in which his disease progressed in the absence of further exposure." Employer's Brief at 14. Employer asserts that the x-ray readings simply reflect a difference of opinion, and not a progression of the disease over time. Employer thus alleges that it was not rational for the administrative law judge to credit Dr. Mathur's positive x-ray reading of the July 15, 2000 x-ray over Dr. Fino's negative reading of the July 5, 2000 x-ray on the theory that claimant's pneumoconiosis progressed. Employer also argues that it was not rational for the administrative law judge to credit Dr. Mathur's positive reading of a November 1988 x-ray over the negative readings of the June and July 1988 x-rays rendered by Drs. Sargent and Barrett, based on the theory that claimant's pneumoconiosis progressed. Employer asserts that in so doing the administrative law judge erroneously disregarded uncontradicted x-ray films by qualified readers.

The Director responds that *Nat'l Mining Ass'n* does not constitute intervening precedent, and argues that counsel for the Director merely conceded, at oral argument, that not every case of pneumoconiosis is progressive and that not every coal miner who does not have pneumoconiosis at the end of his mining career will eventually develop it. Employer replies that the administrative law judge summarily relied on the later evidence rule based on the unsubstantiated theory that pneumoconiosis is progressive.

Employer's contention, that the decision in *Nat'l Mining Ass'n* constitutes intervening case law compelling the Board to revisit its prior affirmance of the administrative law judge's finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000), lacks merit. The administrative law judge, in his Decision and Order dated October 25, 2000, noted that pneumoconiosis is a progressive and irreversible disease. *See* 2000 Decision and Order at 10. The administrative law judge then accorded little weight to five x-rays dated before 1981

and interpreted as negative by B-readers, because he found them separated from the most recent x-rays by over seventeen years and therefore found them too old to be probative of claimant's condition. *Id*. The administrative law judge also accorded greatest weight to the x-ray interpretations rendered by physicians who were dually qualified as Board certified radiologists and B-readers. The administrative law judge accorded determinative weight to the positive x-ray interpretations of Dr. Mathur, however, as he was the only dually qualified reader to interpret recent x-rays over a two-year period, namely from 1998 to 2000. *Id*. at 11-12. The Board upheld, as rational, the administrative law judge's weighing of the x-ray evidence. *Bentley*, slip op. at 3. The fact that counsel for the Director in *Nat'l Mining Ass'n* conceded at oral argument that the occurrence of latent and progressive pneumoconiosis is rare, does not nullify the administrative law judge's substantive weighing of the x-ray evidence in this case. We, therefore, reject employer's assertion that *Nat'l Mining Ass'n* constitutes intervening precedent mandating that the Board revisit its decision to affirm the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000) in the instant case.

Employer next contends that the Board must revisit its affirmance of the administrative law judge's finding that claimant established a totally disabling respiratory impairment based on the medical opinion evidence, in light of the recent decision in *Groves*, wherein the Sixth Circuit held that an administrative law judge must examine treating physicians' opinions on their merits and make a reasoned judgment about their credibility. Employer argues that the administrative law judge did not consider whether the opinion of Dr. Potter, claimant's treating physician, was documented. Employer asserts that the administrative law judge's decision "no less than the Board's decision to affirm it, reflects a pure, unfounded preference for the treating doctor that even *Groves* does not condone." Employer's Brief at 17. Employer also argues that the administrative law judge did not consider any factors provided in the newly promulgated regulation at 20 C.F.R. §718.104(d). Employer concedes, in the alternative, that the regulation at 20 C.F.R. §718.104(d) does not apply in this case.

Employer's contentions lack merit. The Board, in *Bentley*, noted that the administrative law judge credited the opinions of Drs. Younes, Baker and Potter as they were reasoned opinions and because Dr. Potter was claimant's treating physician. *Bentley*, slip op. at 4. Because the administrative law judge examined Dr. Potter's opinion on its merits and made a reasoned judgment as to its credibility, the administrative law judge's weighing of this evidence, as well as the Board's decision to uphold it, is consistent with the case law of the Sixth Circuit. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, BLR (6th Cir. 2002); *Groves*, *supra*. Further, the newly promulgated regulation at 20 C.F.R. §718.104(d) applies to evidence developed after January 19, 2001 and is thus not applicable to any evidence in the instant case. *See* 20 C.F.R. §718.101(b).

Employer next contends that in affirming the administrative law judge's finding that claimant established total respiratory disability, the Board erred in failing to require that the administrative law judge analyze all the relevant evidence together before making his determination. We decline to address employer's argument. Employer had full opportunity to raise this argument, challenging the administrative law judge's finding of total respiratory disability on this basis, when the case was originally before the Board, but failed to do so. *See* Employer's Brief in Support of Petition for Review dated December 13, 2000. Inasmuch as employer did not avail itself of this opportunity, it has waived the issue. *See Gillen v. Peabody Coal Co.*, BRB No. 16 BLR 1-22 (1991)(Stage, CJ., dissenting).

Lastly, employer contends that the administrative law judge applied the wrong standard in determining the disability causation issue on remand. Employer alleges that the Board instructed the administrative law judge to determine whether pneumoconiosis has a material adverse effect on claimant's condition or whether pneumoconiosis materially worsens claimant's condition, and asserts that the administrative law judge did not comply with the Board's instructions. Employer also argues that the administrative law judge did not identify what "medical data" supports the conclusions of Drs. Younes, Baker and Potter. Employer additionally asserts that the administrative law judge mischaracterized Dr. Younes's opinion by stating that the doctor opined that claimant's impairment was due both to coal mine employment and cigarette smoking. Employer, conceding that Dr. Baker may have reached a conclusion sufficient to establish that pneumoconiosis caused claimant's impairment, further asserts that Dr. Baker's finding is unexplained and unsupported by any evidence. Employer also argues that Dr. Potter's opinion is unreasoned.

Employer's contentions lack merit. As an initial matter, it is within the discretion of the administrative law judge to determine the weight and credibility of the medical opinion evidence. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). The administrative law judge properly determined that the credible medical opinions of record, including the medical reports of Drs. Younes, Baker and Potter, are sufficient to establish that claimant's pneumoconiosis is a substantially contributing factor in his total respiratory disability under the revised regulation at 20 C.F.R. §718.204(c) and to establish that claimant's totally disabling respiratory impairment is due at least in part to his pneumoconiosis under *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Further, contrary to employer's contention, the administrative law judge did not mischaracterize the findings of Dr. Younes by stating that the doctor opined that claimant's impairment was due both to coal mine employment and cigarette smoking. The administrative law judge correctly referred to the fact that Dr. Younes opined that claimant's impairment was primarily due to cigarette smoking and secondarily due to occupational dust exposure. Director's Exhibit 11; Decision and Order on Remand at 2-3. Because the administrative law judge's finding on disability causation is rational, supported by substantial

evidence, and in accordance with law, we affirm it.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge