BRB No. 02-0557 BLA

CLIFFORD R. SKINNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Ashley M. Harman and William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand - Denying Benefits (99-BLA-0385) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on claimant's request for modification and 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).[2] Most recently, the Board, in *Skinner v. Consolidation Coal Co.*, BRB

[1] This claim is being pursued by claimant's widow, Betty Skinner, who advised the Board by letter dated June 10, 2002 that the miner died in March of 2002.

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

No. 00-0576 BLA (June 14, 2001)(unpublished), vacated the administrative law judge's findings on modification under 20 C.F.R. §725.310 (2000) and on disability causation under 20 C.F.R. §718.204(b) (2000).[3] The Board held that the administrative law judge had not considered all the evidence submitted in connection with claimant's request for modification and that this error was not harmless. The Board instructed the administrative law judge on remand to determine whether the claimant has established that the prior denial contains a mistake in a determination of fact under 20 C.F.R. §725.310 (2000).[4] On remand, the

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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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] 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).

[4] The administrative law judge previously denied benefits by Decision and Order dated November 26, 1997. Director's Exhibit 85. The administrative law judge found therein that claimant failed to establish that his occupational pneumoconiosis contributes to, or causes, his totally disabling respiratory or pulmonary impairment. *Id.* Weighing Dr. Abrahams' opinion that claimant's coal workers' pneumoconiosis contributed to his total disability, the administrative law judge noted Dr. Abrahams' failure to mention claimant's history of adult respiratory distress syndrome (ARDS). *Id.* at 4. Claimant's counsel thereafter asked Dr. Abrahams to review the medical record to address claimant's history of ARDS. Dr. Abrahams issued his ensuing medical opinion on October 21, 1997. Claimant's Exhibit 1. Therein, Dr. Abrahams opined that claimant's severe disabling diffusion impairment is a result of both pneumoconiosis arising from coal and silica dust exposure, emphysema from cigarette smoking and possibly prior ARDS. *Id.* Dr. Abrahams added that claimant's mild obstructive airway disease is a result of industrial bronchitis from coal dust exposure and cigarettes and that coal and silica dust exposures are, at the very least, significant contributing factors to claimant's pulmonary impairment. *Id*. On December 15, 1997, claimant filed a request for modification and submitted Dr. Abraham's October 21, 1997 report in support of his request. Director's Exhibit 86. A hearing was held before the administrative law judge on September 21, 1999. As the Board noted in *Skinner v. Consolidation Coal Co.*, BRB No. 00-0576 BLA (Jun. 14, 2001)(unpublished), the administrative law judge subsequently found that claimant's attempt to correct Dr. Abrahams' previous failure to consider the extensive evidence of claimant's ARDS was an impermissible "back door" attempt to retry the case. *See Skinner*, slip op. at 3. The Board held that the administrative law judge's finding, that Dr. Abrahams' opinion on disability causation was unreasoned because the physician based his opinion on the fact that simple pneumoconiosis was detected on one x-ray in 1995, prior to claimant's bout with ARDS,

administrative law judge denied claimant's request for modification under 20 C.F.R. §725.310 (2000) and the claim. The administrative law judge found that the evidence fails to establish total disability due to pneumoconiosis and thus claimant did not establish a mistake in a determination of fact in the prior denial. On appeal, claimant challenges the administrative law judge's finding that the evidence fails to establish total disability due to pneumoconiosis, and urges the Board to remand the case or, alternatively, to hold that claimant is entitled to benefits as a matter of law. Employer responds, and urges affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal. Claimant has also filed a Motion to Remand to District Director's Office. Employer has filed a letter opposing the Motion to Remand. Claimant has filed a reply.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

Claimant challenges the administrative law judge's finding that Dr. Abrahams' opinion on disability causation, while well reasoned, is insufficient to establish total disability due to pneumoconiosis as it does not outweigh the contrary opinions rendered by Drs. Bush, Fino, Renn, Bellotte, and Morgan. *See* 20 C.F.R. §718.204(c). The administrative law judge on remand found, pursuant to 20 C.F.R. §718.204, "Although I find the opinion of Dr. Abrahams to be well-reasoned, I do not find it to outweigh the contrary conclusions of the other physicians of record, who are equally qualified and whose opinions are equally as well reasoned." Decision and Order on Remand at 7. The administrative law judge found that like Dr. Abrahams, each of the physicians who expressed a contrary opinion, namely Drs. Bush, Fino, Renn, Bellotte and Morgan, fully considered claimant's occupational history, smoking history, adult respiratory distress syndrome (ARDS) history, and the "clear" existence of claimant's impairment in reaching his respective conclusion. *See* Decision and Order on Remand at 7. The administrative law judge indicated, moreover, that

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could not be affirmed. The Board noted that Dr. Abrahams' opinion, most recently expressed at his September 8, 1999 deposition, *see* Claimant's Exhibit 2, was based on a physical examination, medical history and review of the medical evidence, including x-ray and pulmonary function evidence. *Skinner*, slip op. at 7; *see* Claimant's Exhibit 2 at 21, 22.

virtually all of the physicians agreed with Dr. Abrahams' assessment that the etiology of claimant's disability is a result of the impaired diffusion capacity. The administrative law judge determined that the physicians differed in their opinions as to the cause of this impaired diffusion capacity. The administrative law judge stated:

> Drs. Bush, Fino, Renn, Belotte (sic), and Morgan attribute the impairment to the miner's emphysema and chronic bronchitis from smoking, and ARDS. Dr. Abrahams attributes the impairment to emphysema from cigarette smoking, pneumoconiosis, and possibly ARDS. His opinion, however, as to the degree of impairment resulting from pneumoconiosis is not enough to either effectively demonstrate that pneumoconiosis is a contributing cause of the miner's disability or to outweigh the opinions of the other physicians. Therefore, I find that Claimant has not proven by a preponderance of the evidence that his disability is due to pneumoconiosis.
>
> The miner's claim was denied because he failed to establish that he is totally disabled due to pneumoconiosis. After consideration of all the evidence of record, including all of Dr. Abrahams' reports and deposition, I find that Claimant has not met his burden to show a mistake in determination of fact and has not established modification under 20 C.F.R. §725.310 (2000).

Decision and Order on Remand at 7. The administrative law judge thus denied the claim.

Claimant specifically contends that the administrative law judge provided no rationale for his finding that Dr. Abrahams' opinion on disability causation, while well reasoned, does not outweigh the contrary opinions rendered by Drs. Bush, Fino, Renn, Bellotte, and Morgan, and is therefore insufficient to establish total disability due to pneumoconiosis. Claimant, citing *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), also argues that the administrative law judge thereby impermissibly substituted his opinion for those of the medical experts. Claimant also argues that it was contrary to Fourth Circuit case law for the administrative law judge to find that Dr. Abrahams' report is well reasoned but insufficient to carry claimant's burden on disability causation. Claimant also contends that it was reversible error for the administrative law judge not to recognize that Dr. Abrahams had been claimant's treating physician since 1997.

Claimant's contention that the administrative law judge substituted his opinion for those of the medical experts lacks merit. The administrative law judge acted within his discretion in resolving the conflicting medical opinion evidence on the issue of disability causation. 20 C.F.R. §718.204(c); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995). While it was error for the administrative law judge not to have recognized Dr. Abrahams'

status as claimant's treating physician, he was under no obligation to accord Dr. Abrahams' opinion greater weight than the contrary opinions of record, where, as here, he found that Dr. Abrahams' opinion was insufficient "to either effectively demonstrate that pneumoconiosis is a contributing cause of the miner's disability or to outweigh the opinions of the other physicians." Decision and Order on Remand at 4; *Akers*, *supra*; *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). The administrative law judge thereby provided a rationale for his finding regarding the weight of the medical opinion evidence relevant to the issue of disability causation at 20 C.F.R. §718.204(c). We therefore find no reversible error on the administrative law judge's part and affirm his determination that the evidence is insufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c), as it is supported by substantial evidence.

Claimant, acknowledging the fact that the existence of pneumoconiosis has been established in this case, next notes that Dr. Abrahams diagnosed clinical pneumoconiosis by a 1996 biopsy and legal pneumoconiosis insofar as he diagnosed chronic bronchitis due to coal dust exposure and cigarettes. *See* Claimant's Exhibit 1. Claimant argues, with regard to the issue of disability causation at 20 C.F.R. §718.204(c), "Not one of employer's physicians considered legal pneumoconiosis and in fact, all down played the legal pneumoconiosis." Claimant's Brief at 8. Claimant asserts that "there is no doubt" that legal pneumoconiosis played a large part in claimant's condition and thus contends that it was error for the administrative law judge to ignore legal pneumoconiosis when he reviewed the record in this case on disability causation. Claimant's contention lacks merit. At the September 21, 1999 hearing before the administrative law judge, employer stipulated to "the existence of simple coal workers' pneumoconiosis that arose out of coal mine employment." September 21, 1999 Hearing Transcript at 10. Thus, the issue of the existence of pneumoconiosis, either clinical or legal, was not before the administrative law judge when he considered this case on remand from the Board.

Claimant next asserts that he established the presence of pneumoconiosis by a biopsy he underwent in 1996. Citing *Scott v. Mason Coal Co.*, 289 F.3d 263, BLR (4th Cir. 2002), claimant contends that it was error for the administrative law judge to credit, on disability causation at 20 C.F.R. §718.204(c), the opinions of Drs. Bush, Fino, Renn, Bellotte and Morgan, who diagnosed minimal pneumoconiosis and found that claimant's total disability is not due to pneumoconiosis, but to other causes unrelated to his coal mine employment. Claimant also argues that the administrative law judge ignored the newly submitted x-ray evidence which, claimant asserts, establishes the existence of pneumoconiosis in 1991. Claimant's contentions lack merit. The administrative law judge set forth the newly submitted x-ray evidence and did not err by not weighing it to determine the cause of claimant's total disability. Employer previously stipulated to the existence of "simple coal workers' pneumoconiosis that arose out of coal mine employment" and to the

fact that claimant was "totally disabled from a pulmonary disease." September 21, 1999 Hearing Transcript at 10. Consequently, the administrative law judge on remand properly focused his inquiry on the remaining issue of the cause of claimant's totally disabling pulmonary impairment. *See* 20 C.F.R. §718.204(c).

Moreover, contrary to claimant's assertion that the recent decision of the United States Court of Appeals for the Fourth Circuit in *Scott* impacts this case, *Scott* is distinguishable from the instant case. In *Scott*, the Fourth Circuit held that medical opinions finding that claimant's disability was not caused in part by occupational pneumoconiosis may carry, at most, little weight, where they directly contradict the administrative law judge's finding that claimant suffers from pneumoconiosis arising out of coal mine employment. The Fourth Circuit held that such opinions may not suffice as substantial evidence to support a finding that claimant's respiratory impairment is not caused at least in part by pneumoconiosis, where the physician has found that claimant does not have legal or medical pneumoconiosis and has found no symptoms arising out of his coal mine employment. In the instant case, the administrative law judge found that Dr. Abrahams' opinion attributing claimant's impairment to emphysema from cigarette smoking, pneumoconiosis, and possibly ARDS, was insufficient to outweigh the contrary opinions of Drs. Bush, Fino, Renn, Bellotte and Morgan attributing claimant's impairment to smoking related diseases, including emphysema and/or chronic bronchitis, and ARDS. Drs. Bush, Fino, Renn, Bellotte and Morgan each found the presence of pneumoconiosis but indicated that claimant's totally disabling impairment was not due thereto, but was due to other causes unrelated to his coal mine employment. *See* Employer's Exhibit 3 (Dr. Bush); Director's Exhibit 70; Employer's Exhibit 19 (Dr. Fino); Director's Exhibits 71, 103, Employer's Exhibit 18 (Dr. Renn); Director's Exhibit 104 (Dr. Bellotte); Employer's Exhibit 17 (Dr. Morgan). Because these physicians each diagnosed pneumoconiosis and attributed claimant's total disability to causes unrelated to his pneumoconiosis, their opinions are not inconsistent with the findings of the administrative law judge that claimant has established the existence of occupational pneumoconiosis and total disability due to a respiratory or pulmonary impairment. Accordingly, the administrative law judge properly weighed the medical opinions of Drs. Bush, Fino, Renn, Bellotte and Morgan in finding that the evidence fails to establish total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); *Underwood*, *supra*.

Based on the foregoing, we affirm the administrative law judge's denial of claimant's request for modification at 20 C.F.R. §725.310 (2000). Substantial evidence supports the administrative law judge's finding that the evidence fails to establish total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's denial of benefits in the instant claim.[5]

[5] Given our disposition of the instant appeal on its merits, claimant's Motion to Remand to District Director's Office, employer's letter in opposition, and claimant's reply are moot.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge