BRB No. 04-0581 BLA

JOHN BILL FOLEY	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
P & M COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/01/2005
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
and	)	
	)	
LAST CHANCE TRUCKING COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF INSURANCE FUND	)	
	)	
Employer/Carrier-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 – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Sidney B. Douglas, Harlan, Kentucky, for claimant.

Phillip J. Reverman, Jr., Sarah K. McGuire (Boehl, Stopher & Graves, LLP),

Louisville, Kentucky, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand – Award of Benefits (01-BLA-0304) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) on a duplicate 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). This case is before the Board for the second time. Pursuant to claimant's first appeal, the Board affirmed the administrative law judge's finding that the newly submitted evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and thereby, established a material change in conditions. 20 C.F.R. §725.309(d)(2000). Considering the administrative law judge's findings on the merits, the Board affirmed the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and the administrative law judge's finding that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2), (3) as unchallenged on appeal. The Board, however, vacated the administrative law judge's findings that the medical opinion evidence of record did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that it failed to establish disability causation at 20 C.F.R. §718.204(c). Accordingly, the Board vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge for further consideration of these issues. *Foley v. P & M Coal Co.*, BRB No. 02-0742 BLA (May 30, 2003)(unpub.). On remand, the administrative law judge found that the evidence established the existence of pneumoconiosis, as defined by the Act, at Section 718.202(a)(4) and disability causation at Section 718.204(c). The administrative law judge, therefore, awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding the opinions of Drs. Eubanks and Myers to be the only well-documented and reasoned opinions of record, thereby, finding the existence of pneumoconiosis and disability causation established based on these opinions. Employer asserts that the administrative law judge erred in rejecting the opinions of Drs. Anderson, Powell, Baker, Lockey, Vuskovich, Fino and Branscomb (that claimant did not have pneumoconiosis) on remand, when he had found them to be well-docuemtned and reasoned in his prior decision. Additionally, employer argues that the administrative law judge violated the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), by failing to address all the relevant evidence and failing to provide sufficient explanations for his findings on remand. Claimant responds, urging

affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In his earlier decision, the administrative law judge found the opinions of Drs. Anderson, Powell, Baker, Lockey, Vuskovich, Fino and Branscomb to be well-reasoned because their findings of no pneumoconiosis were in accord with the negative x-ray evidence. Additionally, the administrative law judge accorded greater weight to the opinions of Drs. Anderson, Powell, Baker, Lockey and Fino because they were dually qualified in internal and pulmonary disease. The administrative law judge also found that the opinions of Drs. Powell and Lockey deserved greater weight as they had the broadest picture of claimant's health because they had the advantage of considering other evidence of record in addition to their own findings. The administrative law judge rejected the opinion of Dr. Eubanks as internally inconsistent because, while she diagnosed a chronic obstructive pulmonary disease due, in part, to coal mine employment, she did not diagnose coal workers' pneumoconiosis.

In vacating the administrative law judge's earlier decision denying benefits, however, the Board held that the administrative law judge erred in rejecting Dr. Eubanks' opinion as internally inconsistent because Dr. Eubanks found both that claimant had a chronic obstructive pulmonary disease and that claimant did not have coal workers' pneumoconiosis. The Board held that since a finding of either clinical or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis, Dr. Eubanks's diagnosis of chronic obstructive pulmonary disease attributable, in part, to coal dust exposure was not internally inconsistent with her finding that claimant did not suffer from coal workers' pneumoconiosis. 20 C.F.R. §718.201; *see Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). Accordingly, the Board vacated the administrative law judge's finding of no pneumoconiosis

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[1] As no party challenges the administrative law judge's findings that the evidence establishes that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) or that it establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), those findings are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

at Section 718.202(a)(4) and remanded the case for the administrative law judge to address whether Dr. Eubanks's opinion, when considered with the other medical opinion evidence of record, was sufficient to establish the existence of legal pneumoconiosis as defined by the Act. *Foley*, BRB No. 02-0742 BLA at 5-6. The Board also held that the administrative law judge must consider whether the opinion of Dr. Eubanks was entitled to greater weight because he was claimant's treating physician.

In weighing the medical opinion evidence on remand, the administrative law judge permissibly relied upon the opinions of Drs. Eubanks and Myers which he found to be reasoned and documented, to find that the evidence established the existence of pneumoconiosis within the meaning of the Act. *See* 20 C.F.R. §§725.101(a)(25); 718.201(a)(2); *Southard*, 732 F.2d 66, 6 BLR 2-26. The administrative law judge found that the opinions of Drs. Eubanks and Myers were better supported by documentation than the opinions of Drs. Powell, Branscomb, and Fino. Specifically, the administrative law judge found that the opinion of Dr. Eubanks was based on an accurate account of claimant's coal mine employment and smoking history and that she had considered claimant's occupational exposure to other irritants, while Drs. Anderson, Powell, Fino, Branscomb, Lockey, and Vuskovich failed to explain adequately why they attributed all of claimant's severe pulmonary impairment to cigarette smoking and concluded that none of it was due to coal dust exposure. Further, the administrative law judge found that the opinions of Drs. Wicker, Marshall, and Lane did not support or weigh against a finding of legal pneumoconiosis because they did not address the etiology of claimant's chronic obstructive pulmonary disease. Additionally, the administrative law judge also relied on the fact that Dr. Eubanks had treated claimant since 1992. Thus, the administrative law judge concluded that even though Drs. Powell, Branscomb and Fino were Board-certified pulmonologists, their opinions were not as probative as the opinions of Drs. Eubanks and Myers. Accordingly, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Eubanks, claimant's treating physician, as corroborated by the opinion of Dr. Myers, a Board-certified internist, in finding that claimant established the existence of pneumoconiosis as defined by the Act and that claimant's disability was due to pneumoconiosis. *See Martin v. Ligon Preparation Co.*, F.3d , 2005 WL 492241 (6th Cir. Mar. 4, 2005); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-624 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-162 (6th Cir. 2000); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos.88-3531, 88-3578 (6th Cir. May 11, 1989) (unpub.); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988)(Ramsey, CJ, concurring).

Additionally, contrary to employer assertion, the administrative law judge did address all of the evidence adequately and did explain his reasons for crediting the opinions of Drs. Eubanks and Myers over the other opinions of record pursuant to the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). We reject, therefore, employer's contention based on APA grounds.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

_____
ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with the majority that the administrative law judge's decision awarding benefits should be affirmed. In my view, employer raises two arguments, neither of which has merit.

First, employer argues, without citation to authority, that the administrative law judge failed to explain sufficiently his rejection of his prior findings. The law is clear, however, that he has no such duty; his only duty is ultimately, to be correct. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997).

Second, employer argues, without any specificity: "the failure of the Administrative Law Judge to address all relevant evidence, explain his rationale, or clearly indicate the specific statutory or regulatory provisions involved in his decision, requires remand." Brief for Employer at 7. In so doing, employer has failed to raise a substantial question of law or

fact to invoke the Board's review. *See* 33 U.S.C. §921(b)(3). Because employer has not identified any error in the administrative law judge's decision, it must be affirmed.

Accordingly, I concur in the majority's decision to affirm the administrative law judge's decision awarding benefits.

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REGINA C. McGRANERY
Administrative Appeals Judge