BRB No. 99-0367 BLA

DONALD G. TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JAMES COAL COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Stephen E. Crist (West Virginia Employment Programs Litigation Unit), Charleston, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (98-BLA-0246) of Administrative Law Judge Stuart A. Levin awarding 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). The administrative law judge noted the parties' stipulation to at least nineteen years of coal mine employment. Decision and Order at 1. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that claimant established coal mine employment-related pneumoconiosis at 20 C.F.R. §§718.202(a)(1) and 718.203, total disability due to a respiratory or pulmonary impairment at 20 C.F.R. §718.204(c)(1) and (c)(4), and disability causation at 20 C.F.R. §718.204(b). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge's discrediting of Dr. Zaldivar's opinion on disability causation at Section 718.204(b) is contrary to the decision of the United States Court of Appeals for the Fourth Circuit in *Hobbs v. Clinchfield Coal Co.,* 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Employer urges the Board to reverse the administrative law judge's award of benefits. Claimant responds, and seeks affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief on appeal.

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).

In order to establish entitlement to benefits under Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that his pneumoconiosis is a contributing cause of his disability. 20 C.F.R. §§718.202, 718.203, 718.204; *Hobbs, supra; Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to establish any one element of entitlement will preclude a finding of entitlement.

Employer challenges the administrative law judge's finding at Section 718.204(b). Considering the opinions of the two physicians of record, Drs.

Rasmussen and Zaldivar,[1] the administrative law judge accorded Dr. Zaldivar's disability causation assessment diminished weight because he failed to diagnose pneumoconiosis. The administrative law judge added, "Since the x-ray evidence establishes the presence of the disease, Dr. Zaldivar's failure to diagnose it tends to lessen the probative value of his assessment of the etiology of claimant's impairment. Obviously he could not attribute claimant's breathing difficulties to a disease he believes claimant does not present." Decision and Order at 6. The

[1]Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on claimant's twenty-one years of coal mine employment and "x-ray changes of pneumoconiosis." He also diagnosed chronic obstructive pulmonary disease due to coal mine dust exposure and cigarette smoking. Dr. Rasmussen opined that claimant's coal mine dust exposure must be considered a significant and major contributing factor to his disabling respiratory insufficiency. Director's Exhibits 11, 12; Claimant's Exhibit 5.

Dr. Zaldivar found no radiographic evidence of pneumoconiosis and opined that claimant does not have coal workers' pneumoconiosis. He found a disabling restrictive pulmonary impairment due to obesity and mild reversible airway obstruction caused by asthma unrelated to claimant's occupation. Employer's Exhibits 1, 3. In his January 1998 report, Dr. Zaldivar added, "Even assuming Mr. Taylor had early coal workers' pneumoconiosis which in my opinion he does not have, my opinion regarding the cause of his pulmonary impairment would be the same as give (sic) here." Employer's Exhibit 1 at 2.

administrative law judge accorded Dr. Rasmussen's opinion, that claimant's pneumoconiosis is a significant contributing factor in his impairment, "the greatest weight in respect to this issue. His report is well reasoned, supported by clinical data, and considers claimant's medical condition and environmental exposures. I find his discussion of the etiology of claimant's impairment cogent and persuasive, and I accord it greater weight than Dr. Zaldivar's contrary opinion." *Id.* Employer argues that administrative law judge's's discrediting of Dr. Zaldivar's opinion is contrary to *Hobbs, supra,* wherein the Fourth Circuit approved the administrative law judge's decision to credit physicians' opinions on disability causation, who found that the miner's disability was due to obesity and arthritis, when their diagnoses of no coal workers' pneumoconiosis were not inconsistent with the administrative law judge's finding of legal pneumoconiosis. Employer notes that critically, in the instant case, Dr. Zaldivar assumed hypothetically that claimant has coal workers' pneumoconiosis and indicated that his opinion on disability causation would be the same. Employer's Exhibit 1 at 2.

We hold that the administrative law judge erred in determining that Dr. Zaldivar's opinion that claimant does not have coal workers' pneumoconiosis conflicts with his finding that the x-ray evidence establishes the presence of the disease at Section 718.202(a)(1). The Fourth Circuit has recognized that the Act contemplates both clinical and legal pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000); *Hobbs, supra.* The fact that Dr. Zaldivar found no coal workers' pneumoconiosis does not conflict with the administrative law judge's finding of clinical pneumoconiosis by x-ray evidence. Moreover, and with critical significance in the instant case, the administrative law judge did not address the fact that Dr. Zaldivar assumed hypothetically the existence of the disease and opined that his opinion on disability causation would remain the same. *Compton,* 211 F.3d at 214. Given the physician's hypothetical assumption, it cannot be said that Dr. Zaldivar's disability causation opinion was premised on an erroneous finding contrary to the administrative law judge's conclusion. *Id.,* citing *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 BLR 2-304, 319 (4th Cir. 1995). Inasmuch as the administrative law judge committed reversible error in according diminished weight to Dr. Zaldivar's opinion, we vacate the administrative law judge's finding at Section 718.204(b).

Further, we note that the administrative law judge found the existence of pneumoconiosis established at Section 718.202(a)(1) and did not consider the record under 20 C.F.R. §718.202(a)(2) through (a)(4). The administrative law judge's consideration of the record does not satisfy the decision in *Compton, supra*, holding that all types of relevant evidence at Section 718.202(a) must be weighed together to determine whether the existence of pneumoconiosis is established.

Accordingly, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis in the instant case, and further remand the case for redetermination of this issue at Section 718.202(a) pursuant to the mandate of *Compton, supra*.

If, on remand, the administrative law judge finds the existence of pneumoconiosis established at Section 718.202(a), then the administrative law judge must consider whether the evidence is sufficient to meet claimant's burden at Section 718.204(b) to establish that his pneumoconiosis is a contributing cause of his disability under *Hobbs, supra*. If, alternatively, the administrative law judge finds that the existence of pneumoconiosis is not established at Section 718.202(a), then a finding of entitlement to benefits would be precluded in the instant case. 20 C.F.R. §718.201; *Trent, supra*.

Accordingly, the administrative law judge's Decision and Order is vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge