BRB No. 00-0959 BLA

EDGAR MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LIGON PREPARATION COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order and Decision and Order Denying Motion for Reconsideration of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Inc.), Prestonsburg, Kentucky, for claimant.

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

Michelle S. Gerdano (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order and Decision and Order Denying Motion for Reconsideration (98-BLA-1166) of Administrative Law Judge Daniel J. Roketenetz with respect to 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] This claim is before the Board for the third time. In the initial Decision and Order, Administrative Law Judge Mollie W. Neal credited claimant with sixteen years of coal mine employment and determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000). Accordingly, benefits were denied. On appeal, the Board affirmed Judge Neal's findings under Section 718.202(a)(1)-(3) (2000), but vacated her determination under Section 718.202(a)(4) (2000) and remanded the case for reconsideration of the medical opinions of record. *Martin v. Ligon Preparation Co.*, BRB No. 94-2594 BLA (Mar. 10, 1995)(unpub.).

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[1]Claimant is Edgar Martin, the miner, who filed a claim for benefits on June 22, 1986. Director's Exhibit 1.

[2]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On remand, Judge Neal again found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). Accordingly, benefits were denied. The Board affirmed this finding and the denial of benefits on appeal. *Martin v. Ligon Preparation Co.*, BRB No. 96-0853 BLA (Feb. 25, 1997)(unpub.). Claimant filed a petition for modification pursuant to 20 C.F.R. §725.310 (2000).

Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) determined that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c)(4) (2000) and, consequently, a change in conditions pursuant to Section 725.310 (2000). The administrative law judge further found, however, that claimant failed to establish the existence of pneumoconiosis under Section 718.202 (2000) or that his disability was attributable, at least in part, to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were denied. Upon claimant's motion for reconsideration, the administrative law judge addressed the opinion of Dr. Sundaram, which he had not explicitly weighed in his Decision and Order, and reaffirmed his determination that the evidence was insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Accordingly, claimant's motion for reconsideration was denied.

On appeal, claimant contends that the administrative law judge did not properly weigh the opinions of Drs. Broudy, Fino, Rasmussen, Potter and Sundaram. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not responded to the merits of claimant's appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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

[3]We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.204(c) (2000), and his determination that claimant established a change in conditions under 20 C.F.R. §725.310 (2000) by proving that he is totally disabled pursuant to 20 C.F.R. §718.204(c)(4), as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S. 359 (1965).

Claimant initially argues that the administrative law judge accorded inappropriate weight to the opinions of Drs. Rasmussen, Broudy, and Fino. The record indicates that Dr. Rasmussen examined claimant and opined that he has x-ray changes consistent with pneumoconiosis . Claimant's Exhibit 1. Dr. Broudy examined claimant on several occasions, reviewed the evidence of record, and opined that claimant does not have pneumoconiosis and is not totally disabled. Director's Exhibits 48, 65, 77, 82; Employer's Exhibits 1, 10, 11. Dr. Fino reviewed the evidence of record and concluded that claimant does not have pneumoconiosis and is not suffering from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 101; Employer's Exhibits 9, 12, 14. In considering whether claimant established the existence of pneumoconiosis, the administrative law judge found that "in terms of rationale," Dr. Rasmussen's opinion was entitled to the same weight as the opinions of Drs. Broudy and Fino. Decision and Order at 8. The administrative law judge also concluded that the opinions of Drs. Broudy and Fino were ultimately entitled to greater weight because Drs. Broudy and Fino had more complete medical histories available to them as they assessed claimant's condition. *Id*.

Claimant contends specifically that the administrative law judge erred in finding that Drs. Broudy and Fino relied upon more complete medical histories than Dr. Rasmussen, as Drs. Broudy and Fino did not explicitly address an exercise blood gas study and a diffusing capacity test obtained by Dr. Rasmussen during his examination of claimant on January 22, 1999. Claimant's contention has merit. Pursuant to 20 C.F.R. §718.201, any chronic pulmonary disease resulting in a respiratory or pulmonary impairment significantly related to or substantially aggravated by dust exposure in coal mine employment is considered to be pneumoconiosis. The results of the arterial blood gas study and diffusing capacity test are probative, therefore, of the issue of whether claimant is suffering from a respiratory or pulmonary impairment that meets the legal definition of pneumoconiosis.[4] Moreover, claimant notes correctly that both Drs. Broudy and Fino referred to the values produced on the type of tests performed by Dr. Rasmussen

[4]Employer asserts that the pulmonary function and blood gas studies obtained by Dr. Rasmussen in January of 1999 are not probative of the existence of pneumoconiosis, as they produced nonqualifying results. Employer's argument is without merit, as for the purposes of determining whether a miner has pneumoconiosis as defined in 20 C.F.R. §718.201, whether an objective study exceeds the table values set forth in Appendices B or C to Part 718 is not relevant. *See* 20 C.F.R. §718.201. Moreover, an administrative law judge is not required to discredit a physician's diagnosis of an impairment, whether totally disabling or of a lesser degree, solely on the ground that the objective studies upon which the physician relies did not produce qualifying values. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

as being supportive, in general, of a diagnosis of interstitial disease that could be related to dust exposure in coal mine employment. Employer's Exhibits 11, 14. Inasmuch as the administrative law judge did not consider the significance of this data when weighing Dr. Broudy's and Dr. Fino's opinions, we must vacate the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(b) and remand the case to the administrative law judge for reconsideration of the reports of Drs. Rasmussen, Broudy, and Fino. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Claimant next contends that the administrative law judge erred in failing to assign controlling weight to the opinions of Drs. Potter and Sundaram, both of whom treated claimant and diagnosed pneumoconiosis. The administrative law judge acknowledged Dr. Potter's status as claimant's treating physician and found his opinion "to be of virtually no probative value" because the report proffered after claimant requested modification contains "conclusions without rationale or reference to objective findings." Decision and Order at 7; Decision and Order on Reconsideration at 2; Director's Exhibit 141. Although the administrative law judge was not required to accord greatest weight to Dr. Potter's diagnosis, based upon his status as a treating physicians without first assessing the degree to which Dr. Potter's opinion is reasoned and documented, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6thCir. 1993); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994), the administrative law judge's characterization of Dr. Potter's opinion is not supported by the record. *See Tackett*, *supra*. The administrative law judge indicated that he considered both the evidence submitted in conjunction with claimant's request for modification and the previously submitted evidence of record. Decision and Order at 8. However, in assessing Dr. Potter's opinion, the administrative law judge did not explicitly address the reports Dr. Potter submitted prior to the request for modification. Director's Exhibits 17, 75, 76, 77, 103. In addition, Dr. Potter appears to have cited x-ray readings, claimant's symptoms, and pulmonary function study results in rendering his diagnoses. *Id*. Accordingly, we vacate the administrative law judge's finding with respect to Dr. Potter's opinion. The administrative law judge must consider all of Dr. Potter's medical reports on remand in determining the probative value of Dr. Potter's opinion regarding the issues of the existence of pneumoconiosis and total disability due to pneumoconiosis.

Finally, we affirm the administrative law judge's decision to accord little weight to the opinion of Dr. Sundaram. The administrative law judge acted within his discretion in finding that the credibility of Dr. Sundaram's diagnosis of pneumoconiosis was diminished by the fact that his opinion was based upon positive x-ray readings when the administrative law judge had previously determined that the preponderance of the x-ray evidence is negative for the existence of pneumoconiosis. Decision and Order on

Reconsideration at 2; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration denying benefits are vacated and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge