BRB No. 00-1019 BLA

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| FLOYD E. DUNCAN | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| DIXIE FUEL COMPANY | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
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| BITUMINUS CASUALTY CORPORATION | ) | |
| | ) | |
| Employer/Carrier-Petitioner | ) | |
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| 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Smith & Ford), Harlan, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Award of Benefits (96-BLA-821) of Administrative Law Judge Daniel J. Roketenetz 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).[1] This case is before the Board for the third time.

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

In the Board's most recent Decision and Order it delineated the lengthy procedural history of this case. *See Duncan v. Dixie Fuel Co.*, BRB No. 98-0879 BLA (Apr. 5, 1999)(unpub.). In that case, the Board affirmed the administrative law judge's finding that the evidence was sufficient to establish total disability, but vacated the administrative law judge's findings that the existence of pneumoconiosis and therefore a material change in conditions was established and that disability causation was established and remanded the case for reconsideration of those issues.[2] The Board further held that should benefits be awarded on remand, they should commence as of April 1, 1995, the month the claim was filed inasmuch as the administrative law judge properly found that the onset date of disability was not ascertainable from the record. On remand, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding established the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Appeals, has not filed a brief in this appeal.

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 and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a

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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.

[2] The prior claim was denied because claimant failed to establish the existence of pneumoconiosis. *See* Board's Decision and Order at 2.

briefing schedule by order issued on April 20, 2001, to which all parties have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs of the parties and our review of the record, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erred in finding that Dr. Baker's opinion satisfied the legal definition of pneumoconiosis pursuant to 20 C.F.R. §718.201 and erred in finding that it was a reasoned opinion. We disagree. Dr. Baker diagnosed the existence of coal workers' pneumoconiosis in a report dated June 1, 1995, and in a later opinion, dated August 17, 1995, stated that he believed "[claimant] has pneumoconiosis, 1/0, although the preponderance of evidence suggest that he may not." Director's Exhibits 11, 12. Dr. Baker further added that claimant had a "significant respiratory impairment which is, at least in part, related to his coal dust exposure." Director's Exhibit 12. The administrative law judge correctly determined that Dr. Baker's opinion was "clearly a clinical diagnosis of the disease" and satisfies the legal definition of pneumoconiosis. Decision and Order on Remand at 3; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, BLR 2- (6th Cir. 2000). Further, in weighing Dr. Baker's opinion the administrative law judge permissibly found it "reasoned" as it was based on an examination, x-ray evidence, a 39-year underground coal mining history and other objective evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In addition, the administrative law judge permissibly found the opinions of Drs. Broudy and Dahhan, who both found no pneumoconiosis, entitled to less weight as their opinions failed to adequately explain their conclusions and to consider contradictory evidence. *Peabody v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *see Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Seals v. Glen Coal Co.*, 19 BLR 1-80

(1995)(*en banc*)(Brown, J. concurring.); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). Additionally, contrary to employer's argument, it is clear from the administrative law judge's discussion of the evidence and references to his prior findings and the Board's holdings that he did consider both old and new evidence in finding the existence of pneumoconiosis established. Decision and Order on Remand at 3-5. We therefore affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a).

Employer next contends that the administrative law judge erred in finding total disability established on the basis of Dr. Baker's opinion without weighing all the evidence relevant to the issue of total disability, *i.e.*, pulmonary function and blood gas study evidence. Employer also contends that Dr. Baker's opinion is not a reasoned opinion. Contrary to employer's argument it has not demonstrated an exception to the law of the case, in this instance. As the Board previously held, contrary to employer's contention, the administrative law judge considered both the relevant medical opinion evidence and the objective evidence of record in reaching his finding on total disability. Board's Decision and Order at 6. Accordingly, we will not revisit the issue of total disability. *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Moreover, contrary to employer's contention, the Board affirmed the administrative law judge's finding that Dr. Baker's opinion established total disability in light of claimant's usual coal mine employment which involved heavy manual labor. *See Cornett*, *supra*; *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *see also Aleshire v. Central Coal Corp.*, 8 BLR 1-70 (1985).

Finally, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis. Dr. Baker stated that claimant's significant respiratory impairment was "at least in part, related to his coal dust exposure," and that coal dust exposure, smoking and possible heart disease all "fully" contributed to his impairment. Director's Exhibit 12. Dr. Dahhan found no disability, while Dr. Broudy found no significant pulmonary disease or respiratory impairment arising from coal mine employment. Employer's Exhibits 1, 2. The administrative law judge permissibly accorded less weight to the opinion of Dr. Dahhan because he found no pneumoconiosis. *Tussey*, *supra*; *Bobick*, *supra*; *Trujillo*, *supra*; *see Hutchens*, *supra*. The administrative law judge also accorded less weight to Dr. Broudy's opinion, as he failed to address or explain what effect claimant's lengthy coal mine employment would have on his disability. *Stark*, *supra*; *Hutchens*, *supra*. Moreover, the administrative law judge permissibly accorded greater weight to Dr. Baker's opinion, as it was well reasoned and documented. *Hill*, *supra*; *Rowe*, *supra*; *Church*, *supra*; *Seals*, *supra*; *Carson*, *supra*. As the administrative law judge acted rationally in according greater weight to Dr. Baker's opinion, he properly found it sufficient to establish total disability due to pneumoconiosis. 20 C.F.R. §718.204(c); *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Peabody Coal Co. v.*

*Smith*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997). We therefore affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge