BRB No. 00-1047 BLA

HAROLD D. PARHAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY 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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

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

Jeffrey S. Goldberg (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, by his representative,[1] appeals the Decision and Order on Remand --

[1] Claimant is Harold D. Parham, the miner, who filed his application for benefits on April 19, 1993. Director's Exhibit 1. Prior to the issuance of the administrative law judge's

Denying Benefits (96-BLA-1208) of Administrative Law Judge Mollie W. Neal 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] This case is before the Board for the second time. In her initial Decision and Order, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000) and credited claimant with thirty-five to thirty-six years of qualifying coal mine employment. The administrative law judge further found that claimant established the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability, but failed to establish total disability due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Subsequently, claimant appealed the denial of benefits. The Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established based on the x-ray evidence of record and, therefore, that it was unnecessary to consider whether the existence of pneumoconiosis was also established by the medical opinion evidence. The Board vacated her determination that total disability due to pneumoconiosis was not demonstrated, since she did not consider the specific findings on causation of all the physicians' opinions of record and whether they support a finding of disability causation under the standard set forth by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *accord Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Accordingly, the Board affirmed in part and vacated in part the denial of benefits, and remanded the case for further proceedings. *Parham v. Peabody Coal Co.*, BRB No. 98-0755 BLA (Jun. 8, 1999)(unpub.).

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initial Decision and Order, the miner died on June 19, 1997. Director's Exhibit 50. The miner's surviving spouse, Joan Parham, is pursuing the decedent's claim.

[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.

Applying the appropriate standard articulated in *Adams* and *Smith* on remand, the administrative law judge reconsidered the medical opinion evidence, found that claimant failed to establish total disability due to pneumoconiosis, and again denied benefits.

On appeal, claimant argues that the administrative law judge erroneously failed to find total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he will not participate 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 Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 23, 2001, to which all the parties have responded. In his brief, filed on May 10, 2001, claimant argues that the revised regulation set forth at 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease) may impact the disposition of this case, and therefore, the case should be held in abeyance. Employer asserts, in its brief dated May 14, 2001, that the revised regulations governing this case will not affect the disposition of this claim. Similarly, in his brief, also dated May 14, 2001, the Director asserts that the outcome of this case will not be affected by application of the revised regulations pursuant to 20 C.F.R. §§718.202(a)(1), 718.201(c), or 718.204(c)(1).

Having considered the briefs submitted by the parties, and reviewed the evidence of record, we hold that the disposition of this case is not impacted by the challenged regulations. Claimant contends that Dr. Anderson's opinion, that a miner's symptoms of bronchitis would no longer be aggravated by coal dust after the miner is no longer exposed to coal dust, contravenes Section 718.201(c). Contrary to claimant's assertion, however, Dr. Anderson's opinion is not inconsistent with the regulation set forth in Section 718.201(c) codifying the applicable cases of the Sixth Circuit,[3] that the disease of pneumoconiosis is progressive and, due to its latency, may become detectable only after the cessation of coal dust exposure. *See Back v. Director, OWCP*, 796 F.2d 169, 9 BLR 2-93 (6th Cir. 1986); *Orange v. Island Creek*

[3] Because the miner's most recent coal mine employment occurred in the Commonwealth of Kentucky, the case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 2.

Coal Co., 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). Hence, our review of the record reveals that there is no evidence implicating Section 718.201(c). In addition, based on our review, we conclude that none of the other challenged regulations affect the outcome of this case. Therefore, we will proceed to adjudicate the merits of this 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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to the issue of total disability due to pneumoconiosis, claimant argues that the administrative law judge impermissibly reconsidered the medical opinion of Dr. Myers because the Board instructed the administrative law judge to consider only the opinions of Drs. Lane, O'Bryan, and Anderson on remand. We disagree. Contrary to claimant's contention that the Board found no error in the administrative law judge's analysis of Dr. Myers's opinion, the Board merely stated, "the administrative law judge pointed out that of the four physicians of record who addressed the issue of causation, only one, Dr. Myers, opined unequivocally that pneumoconiosis was a contributing factor to claimant's total disability." *Parham*, *slip op*. at 4; *see* Director's Exhibits 35, 43. Because the administrative law judge neither discussed the specific findings of Drs. Lane, O'Bryan, and Anderson, nor determined whether their opinions were supportive of a finding of disability causation, the Board vacated the administrative law judge's findings on that issue. The Board affirmed only the administrative law judge's finding that neither Dr. Traughber nor Dr. Gallo addressed the issue of disability causation since this determination was unchallenged on appeal. *Parham*, *slip op*. at 3 n.4. Consequently, the administrative law judge properly reconsidered the medical opinion of Drs. Myers along with the opinions of Drs. Anderson, Lane, and O'Bryan in accordance with the Board's remand instructions, and therefore, we reject claimant's argument in this instance. Decision and Order on Remand at 4-5.

Claimant avers further that the administrative law judge irrationally discredited Dr. Myers's opinion on remand because she had found in her first decision that his opinion constituted substantial and credible evidence of disability causation. We reject claimant's assertion that, in reconsidering the opinion of Dr. Myers on causation, the administrative law judge arrived at the opposite conclusion on remand to her initial decision because the administrative law judge had not previously determined whether Dr. Myers's opinion on causation was credible. *Parham*, slip op. at 4; Administrative Law Judge's first Decision and Order at 14. Further, claimant argues that the administrative law judge's weighing of Dr. Myers's opinion on remand is irrational because Dr. Myers had provided sufficient documentation on which to base his opinion, relied on pulmonary function studies taken in January and June 1993 which yielded qualifying results, and considered claimant's cigarette smoking history.

The administrative law judge noted that in October 1992, Dr. Myers diagnosed pneumoconiosis and a pulmonary impairment due to silicosis and obstructive airways disease but opined that claimant was physically able, from a pulmonary standpoint, to perform his usual coal mine work. Decision and Order on Remand at 4; Director's Exhibit 35. The administrative law judge observed that thereafter, in February 1995, Dr. Myers provided a supplemental opinion, stating that coal dust was a significant contributing factor to the miner's respiratory impairment. The administrative law judge rejected this opinion because it appeared to be based on the representation from claimant's counsel that a "valid," "abnormal" pulmonary function study existed, and it was not clear whether the study referred to was contained in the record or whether Dr. Myers ever saw the test results. Decision and Order on Remand at 4; Director's Exhibit 43; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984).[4] In addition, the administrative law judge rationally accorded less weight to Dr. Myers's opinion because Dr. Myers, while noting claimant's forty-pack year cigarette smoking history, failed to address its impact on claimant's pulmonary impairment, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984). The administrative law judge also discredited Dr. Myers's opinion because it appeared that Dr. Myers based his diagnosis of pneumoconiosis on readings of chest x-rays that were called into question by the interpretations of physicians with greater demonstrated radiological expertise, *see Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Accordingly, we reject claimant's contentions and affirm the administrative law judge's consideration of Dr. Myers's opinion on remand.

Claimant also contends that the administrative law judge failed to determine whether the opinions of Drs. Anderson, Lane and O'Bryan comport with the holding in *Tussey v.*

[4] In response to claimant's counsel's inquiry, Dr. Myers's replied, "Pursuant to your letter of February 21, 1995 in which you indicate that Mr. Parham underwent valid ventilation studies that were abnormal, it would be my opinion that such abnormality is related to this man's years of exposure to coal dust and to his work in the rock quarries as well." Director's Exhibit 43.

Island Creek Coal Co., 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993) that a medical opinion at odds with the administrative law judge's factual findings carries no probative weight. The Board held that because the physicians, whom the administrative law judge credited as opining that pneumoconiosis did not contribute to the miner's total disability, also found that the miner was not suffering from pneumoconiosis, reconsideration of these opinions pursuant to the holding in *Tussey* was required. *Parham*, slip op. at 5.

During his deposition on March 23, 1993, Dr. Anderson diagnosed pulmonary emphysema and chronic bronchitis unrelated to coal mine employment, but testified that "the breathing of [coal] dust may [have] contribut[ed] to the symptoms of bronchitis." Director's Exhibit 12 at 12, 17. Similarly, Dr. Lane was deposed on March 4, 1993 and testified that cigarette smoking was the cause of the miner's chronic obstructive pulmonary disease but that coal dust exposure may have been a contributing factor. Director's Exhibit 12 at 9-11. In addition, Dr. O'Bryan opined that the miner's "history of coal dust exposure would have caused some bronchitic symptoms." Employer's Exhibit 5. Contrary to claimant's argument, therefore, the administrative law judge did not rely on the opinions of Drs. Anderson, Lane and O'Bryan in contravention of the holding in *Tussey*. Rather, she reasonably determined that these opinions were "equivocal" and therefore "legally insufficient," to establish causation. Decision and Order on Remand at 4; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Accordingly, we reject claimant's argument on this issue.

Claimant finally asserts that the administrative law judge mischaracterized the opinion of Dr. O'Bryan as equivocal when Dr. O'Bryan stated that coal dust exposure "would have" caused some bronchitic symptoms, as opposed to "could have" as noted by the administrative law judge. Employer's Exhibit 5. Claimant is correct that the administrative law judge erred in finding that Dr. O'Bryan "indicated a history of coal dust exposure *could [have]* cause[d] some bronchitic symptoms," rather than "*would have*," and therefore concluding that Dr. O'Bryan's opinion of "possible" contribution was legally insufficient because of its equivocal nature. Decision and Order on Remand at 5. However, we disagree with claimant that Dr. O'Bryan's statement that a history of coal dust exposure would have caused some bronchitic symptoms is sufficient to establish the requisite causal nexus at Section 718.204(c). 20 C.F.R. §§718.201(a), 718.204(c); *see Adams, supra*; *Smith, supra*.

Accordingly, we affirm the administrative law judge's determination that claimant failed to establish total disability due to pneumoconiosis inasmuch as this determination is rational, contains no reversible error, and is supported by substantial evidence. 20 C.F.R. §718.204(c); *see Smith, supra*; *Adams, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge