BRB No. 04-0916 BLA

JACKIE W. CLENDENON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 08/10/2005
	)	
Employer-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 of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (1996-BLA-1194) of Chief Administrative Law Judge John M. Vittone awarding living miner's 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). This case is before the Board for the fourth time.[1] When the case was most recently before the Board, the Board vacated the Decision and Order of Administrative Law Judge Stuart A. Levin awarding benefits and remanded the case to the Office of Administrative Law Judges for reassignment to another

[1] The history of this case is set forth in the Board's most recent Decision and Order. *Clendenon v. Westmoreland Coal Co.*, BRB No. 02-0809 BLA (Oct. 6, 2003) (unpub.).

administrative law judge and for reconsideration of the medical reports of record relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and disability causation at 20 C.F.R. §718.204(c). The Board specifically directed: that the administrative law judge reconsider the opinions of Drs. Dahhan, Sargent, Tuteur, Castle, Morgan and Fino regarding the reversibility of claimant's respiratory impairment; that the administrative law judge reconsider the opinions of Drs. Fino and Tuteur, that the miner's respiratory impairment was solely due to smoking; that the administrative law judge reconsider the opinions of Drs. Fino, Tuteur, Dahhan, Sargent, Morgan and Castle regarding the nonexistence of legal pneumoconiosis; that the administrative law judge consider the qualifications of physicians in assessing the weight to accord their opinions; that the administrative law judge weigh together the x-ray and medical opinion evidence in determining whether pneumoconiosis was established; that the administrative law judge reconsider the opinions relevant to disability causation, especially the qualified nature of Dr. Paranthaman's opinion; and that the administrative law judge reconsider the onset date. *Clendenon v. Westmoreland Coal Co.*, BRB No. 00-0131 BLA (Oct. 6, 2003) (McGranery, J., dissenting). In considering the case on remand, Chief Administrative Law Judge John M. Vittone (the administrative law judge) addressed the concerns of the Board and found the evidence of record sufficient to establish the presence of coal workers' pneumoconiosis pursuant to Section 718.202(a)(4), and disability causation, *i.e.*, total disability due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the evidence relevant to the existence of pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not participate in 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 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*).

Pursuant to Section 718.202(a)(4) and Section 718.204(c), employer contends that the administrative law judge erred by failing to accord determinative weight to the medical reports of Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan, that claimant was totally disabled due to smoking, that he did not have coal workers' pneumoconiosis, and that he was not disabled as a result of his coal dust exposure. Employer's Exhibits 3, 4, 7, 8, 10, 11, 16, 18, 21, 23-25.

In finding that the existence of pneumoconiosis and disability causation were established, the administrative law judge accorded little weight to the above opinions because he found that their emphasis on claimant's negative x-ray readings and the obstructive nature of claimant's respiratory impairment showed that they were focused on the presence of clinical, not legal pneumoconiosis, and that they relied on medical literature which indicated that smoking, not coal dust exposure causes obstructive lung disease and pulmonary emphysema which is contrary to the law of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, and the position of the Department of Labor (DOL) as reflected in the rulemaking proceedings to the revised regulations. Decision and Order on Remand at 10-12; 20 C.F.R. §718.201; 65 Fed. Reg. 79,938-79,944 (Dec. 20, 2000); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 175, 19 BLR 2-265, 2-269 (4th Cir. 1995)(chronic obstructive lung disease is encompassed with the definition of pneumoconiosis for purposes of entitlement under the Act; doctor's assumption to the contrary undermines his conclusion). Further, the administrative law judge gave less weight to these opinions because they relied on the partial reversibility of claimant's impairment after the administration of bronchodilators on pulmonary function testing. The administrative law judge found, however, that pulmonary function testing resulted in values which indicated the presence of total disability both before and after the use of bronchodilators. Decision and Order on Remand at 13. The administrative law judge thus concluded that the opinions of the above physicians were not well documented and reasoned. Decision and Order on Remand at 9-16.

Further, contrary to employer's contention, the administrative law judge permissibly rejected the opinions of the aforementioned physicians because he found them to be primarily concerned with the presence of clinical pneumoconiosis, as they relied principally on claimant's negative x-ray readings as well as the obstructive nature of claimant's impairment, which they found to be demonstrated by the results of claimant's pulmonary function testing. Decision and Order on Remand at 10-12; 65 Fed. Reg. 79,938-79,944 (Dec. 2000); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Warth*, 60 F.3d 173, 175, 19 BLR 2-265, 2-269; *see Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Moreover, the record reveals that Drs. Dahhan, Sargent, Morgan, Castle and Tuteur stated that coal workers' pneumoconiosis does not cause a purely obstructive defect, and Dr. Fino indicated that an obstructive defect due to pneumoconiosis does not occur without significant fibrosis visible on x-ray, which is contrary to the law of the Fourth Circuit and the regulatory definition of pneumoconiosis. Employer's Exhibits 3, 4, 8, 10, 11,

16, 18, 21, 23-25; 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,938-79,944 (Dec. 2000); *Fuller*, 180 F.3d 622, 21 BLR 2-654; *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth*, 60 F.3d 173, 19 BLR 2-265; *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-266 (7th Cir. 2001).[2] Thus, the administrative law judge acted within his discretion in according less weight to these opinions based on their reliance on medical literature which indicates a disagreement with the regulatory definition of pneumoconiosis and the applicable circuit court law. Decision and Order on Remand at 10-12; *see Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985)(a medical opinion based on generalities, rather than specifically focusing on the miner's condition may be accorded less weight).

We reject employer's assertion that because Dr. Fino's current belief is that pneumoconiosis can cause an obstructive impairment, the administrative law judge erred by according less weight to his opinion on the ground that it contradicted the findings of DOL during its rulemaking process for the revised regulations. *See* Employer's Exhibits 3, 18; Decision and Order on Remand at 10-12; 20 C.F.R. §718.201; *Fuller*, 180 F.3d 622, 21 BLR 2-654; *Warth*, 60 F.3d 173, 19 BLR 2-265. Moreover, the Decision and Order does not indicate that the administrative law judge accorded less weight to the opinions of Drs. Dahhan, Sargent, Tuteur, Castle, and Morgan based on Dr. Fino's opinion. Decision and Order at 10-12.

We also reject employer's contention that the administrative law judge erred by failing to accord determinative weight to the above opinions based on the doctors' qualifications in the field of pulmonary medicine. Following the Board's remand instructions, the administrative law judge thoroughly considered the relative qualifications of each physician, finding that all of the physicians, with the exception of Dr. Forehand, were highly qualified and that Dr. Forehand's opinion was well-documented and well-reasoned and consistent with the opinion of Dr. Paranthaman, a better qualified physician. The administrative law judge, therefore, reasonably chose not to accord greater weight to the opinions of employer's physicians on the basis of qualifications. Decision and Order on Remand at 14; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-53 (2004) (*en banc*); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Trumbo*, 17 BLR 1-85; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Further, the administrative law judge also did not err by according less weight to these opinions based on their reliance on the partial reversibility of claimant's impairment after the

[2] Section 718.201(a)(2) provides in pertinent part that the definition of legal pneumoconiosis includes chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

administration of bronchodilators, since the administrative law judge rationally found that pulmonary function studies indicated total disability both before and after bronchodilators were administered, indicating more than one cause of claimant's disability. Decision and Order on Remand at 13; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Gross v. Dominion Coal Corp.*, 23 BLR at 1-18. As it is within the administrative law judge's discretion to determine whether a medical report is adequately reasoned and persuasive, we find no error in the administrative law judge's consideration of the opinions of Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan. *Lane*, 105 F.3d 166, 21 BLR 2-34; *Billips v. Bishop Coal Co.*, 76 F.3d 371, 20 BLR 2-130 (4th Cir. 1996); *Trumbo*, 17 BLR 1-85; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

In contrast, the administrative law judge permissibly credited the opinions of Drs. Paranthaman and Forehand, that claimant had obstructive lung disease due to smoking and coal dust exposure, as the administrative law judge found that these opinions were better documented and reasoned and more persuasive than the contrary opinions of employer's physician's. Claimant's Exhibits 1, 2; Director's Exhibits 13, 14; Decision and Order on Remand at 13-16; *Lane*, 105 F.3d 166, 21 BLR 2-34; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149. We reject employer's argument that the opinion of Dr. Paranthaman is equivocal, as the administrative law judge rationally found that this physician's January 19, 1996 report clearly diagnosed the presence of legal pneumoconiosis, and indicated that it contributed to claimant's total respiratory disability. Director's Exhibit 13; Decision and Order on Remand at 13-14; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

Similarly, the administrative law judge did not err by crediting Dr. Forehand's opinion regardless of his reliance, in part, on a positive x-ray reading, contrary to the administrative law judge's finding that the x-ray evidence as a whole was negative for the presence of pneumoconiosis, as Dr. Forehand diagnosed the existence of legal pneumoconiosis and his finding is supported by a preponderance of the medical data. Claimant's Exhibits 1, 2; Decision and Order on Remand at 13-16; 20 C.F.R. §718.201; *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 895, 22 BLR 2-411, 2-426-27 (7th Cir. 2002); *Trumbo*, 17 BLR 1-85; *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985). The administrative law judge permissibly credited the reports of these physicians as reasoned as they were based on, and supported by, the results of their examinations and objective test results, even though the doctors had not reviewed all the record evidence. Claimant's Exhibits 1, 2; Director's Exhibits 13, 14; Decision and Order on Remand at 13-16; *Lane*, 105 F.3d 166, 21 BLR 2-34; *Fields*, 10 BLR 1-19.

In addition, pursuant to the Board's remand instructions, the administrative law judge considered the medical opinion evidence along with the x-ray evidence and concluded that, on balance, the existence of legal pneumoconiosis was established. *Island Creek Coal Co. v.*

Compton, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Further, in considering the onset date the administrative law judge reconsidered the evidence and found that because the specific onset date could not be determined from the medical evidence, benefits were payable from September 1995, the month in which the miner's claim was filed.

The administrative law judge has, therefore, addressed the concerns expressed by the Board in its decision remanding the case, and substantial evidence supports the administrative law judge's findings on remand. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 947, 21 BLR 2-25, 2-28 (4th Cir. 1997); *Doss v. Director, OWCP*, 53 F.3d 654, 658, 19 BLR 2-181, 2-190 (4th Cir. 1995); *Clark*, 12 BLR at 1-155; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *see also* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Consequently, we affirm those findings and the award of benefits.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding living miner's benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge