BRB No. 98-0891 BLA

JOHN L. COUSINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PENN ALLEGHENY COAL CO., INC.	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 8/18/99
	)	
Party-in-Interest	)	DECISION and ORDER

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

Debra Henry (United Mine Workers of America), Belle Vernon, Pennsylvania , for claimant.

Raymond F. Keisling (Keisling, Schmitt, Coletta & Deitrick, P.C.), Carnegie, Pennsylvania, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-BLA-0913) of Administrative Law Judge Richard A. Morgan 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 awarded benefits pursuant to 20 C.F.R. Part 718. Specifically, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), by relying

upon the medical opinions of Drs. Paul and Rajupet, in conjunction with the positive x-ray readings of Drs. Mieckowski and Navani. The administrative law judge also found that claimant established that his pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203, concluding that he was entitled to the causality presumption at 20 C.F.R. §718.203(b) because he established over 10 years of coal mine employment, and that employer failed to successfully rebut the presumption. Then, after noting that claimant's total disability pursuant to 20 C.F.R. §718.204(c) was conceded by the parties in this case, the administrative law judge concluded that claimant established that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) as claimant established that his pneumoconiosis was a substantially contributing cause of his total disability, pursuant to the standard articulated by the United States Court of Appeals for the Third Circuit in *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), relying upon the medical opinions of Drs. Paul and Rajupet over the contrary opinion of Dr. Fino. Consequently, as the administrative law judge found that claimant successfully established all requisite elements of entitlement pursuant to Part 718, benefits were awarded. Employer appeals, contending that the administrative law judge erred in finding total disability due to pneumoconiosis pursuant to Section 718.204(b) established under the *Bonessa* standard, and in finding Dr. Fino's opinion to be incredible under Section 718.204(b) because it was hostile to the Act. Claimant responds, requesting affirmance of the decision below. The Director, Office of Workers' Compensation Programs, filed a letter indicating non-participation in this appeal.

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 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 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order cannot be affirmed, inasmuch as employer has raised meritorious arguments regarding the administrative law judge's finding that claimant established that his total disability was due to pneumoconiosis pursuant to Section 718.204(b)[1]. In so finding, the administrative law judge noted

[1]We affirm the administrative law judge's findings that claimant has established the existence of pneumoconiosis arising from coal mine employment pursuant to Sections 718.202 and 718.203, and total disability pursuant to Section 718.204(c) as unchallenged in this appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

that, inasmuch as this case arises within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit, claimant must establish that his pneumoconiosis was a substantial contributing cause of his total disability, pursuant to the holding of the Third Circuit court in *Bonessa.* Then, the administrative law judge found that Dr. Fino's opinion that claimant did not suffer from an occupationally acquired pulmonary disease, but was totally disabled due to a smoking induced lung disease, to be entitled to little weight, because his opinion was hostile to the Act and because the physician's conclusion that claimant did not suffer with pneumoconiosis was contrary to the findings of the administrative law judge at Section 718.202. Thus, the administrative law judge credited the medical opinions of Drs. Paul and Rajupet to find that causation was established.

Employer argues on appeal that, although the administrative law judge properly acknowledged that claimant was required to establish that pneumoconiosis was a substantial contributing cause under *Bonessa*, he did not properly apply the standard, inasmuch as he relied upon the medical opinions of Drs. Paul and Rajupet, which, employer argues, are legally insufficient to establish total disability under the *Bonessa* standard. Upon consideration of the evidence we hold that the administrative law judge erred in crediting the opinions of Drs. Paul and Rajupet without considering the legal sufficiency of the opinions under *Bonessa*. Dr. Rajupet opined that claimant suffered with severe chronic obstructive lung disease, severe bullous emphysema, and interstitial lung disease as evidenced by chest x-ray findings, and diagnosed claimant with a disabling respiratory impairment, but found that "the etiologies for the above problems are multiple, possibly smoking, his long exposure to coal dust and his predisposition to develop emphysema. How much each one of them contributed to his present status would be difficult to say." Claimant's Exhibit 1. Dr. Paul found that claimant suffers with chronic bronchitis, severe chronic airways obstruction, restrictive lung disease, coal worker's pneumoconiosis 1/1, and exercise desaturation, and that the airways obstruction and restrictive lung disease caused severe disability, but characterized claimant's coal worker's pneumoconiosis as "mild", and did not attribute the airways obstruction or restrictive lung disease to coal mine employment or coal dust inhalation. Director's Exhibit 22. The administrative law judge found the opinions of Dr. Paul and Rajupet to be supportive of claimant's burden of proof because the physicians "state that both coal mine dust exposure and smoking contributed to the miner's totally disabling condition", Decision and Order at 13, but the administrative law judge did not state, in analyzing the opinions, that the physicians' conclusions were sufficient to demonstrate that pneumoconiosis was a *substantially* contributing cause to claimant's disability; and did not explain how the opinions were sufficient to meet claimant's burden of proof under *Bonessa*. *See* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C.

§919(d) and U.S.C. §932(a); *Ridings v. C& C Coal Co.,* 6 BLR 1-227 (1984). As the administrative law judge did not consider the legal sufficiency of these two opinions under the *Bonessa* standard, we vacate his finding pursuant to Section 718.204(b) and remand for the administrative law judge to do so.

Furthermore, employer is correct that the administrative law judge erred in finding that Dr. Fino's opinion was not credible pursuant to Section 718.204(b) because it was hostile to the Act.[2] Specifically, the administrative law judge found

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[2]Dr. Fino, in a medical opinion authored on November 12, 1996, based on his examination of claimant on October 17, 1996, found that claimant suffers with severe bullous emphysema due to smoking, and reversible airways disease due to smoking. He based this opinion on claimant's occupational history, symptoms, past medical history, physical examination, chest x-ray, spirometry, blood gas studies and electrocardiogram. The physician opined that claimant's x-ray demonstrated significant bullous emphysema but not pneumoconiosis, and that the spirometric evaluation showed an obstructive ventilatory abnormality based upon the reduction in the FEV1/FVC ratio, that the obstruction showed involvement in the small airways, and that the small airway flow is more reduced than the large airway flow. Dr. Fino stated that this type of finding on spirometry is indicative of smoking induced emphysema rather than a coal dust related condition. He also concluded that, on blood gas studies, the TLC was not reduced, thus ruling out the presence of restrictive lung disease and significant pulmonary fibrosis. Director's Exhibit 33. Dr. Fino reiterated his findings and explanations therefor on deposition taken June 2,

that Dr. Fino's opinion that claimant did not suffer with pneumoconiosis because he demonstrated improvement on pulmonary function studies after bronchodilator, thus indicating that claimant suffered with an obstructive rather than restrictive impairment, *see* Employer's Exhibit 1 at 11, to be hostile to the Act. The administrative law judge concluded that Dr. Fino's opinions regarding improvement on bronchodilator were inconsistent with the premise of the Act that pneumoconiosis was a progressive disease, citing the holding of the United States Court of Appeals for the Fourth Circuit in *Badger Coal Co. v. Director, OWCP*, *[Kittle]*, 83 F.3d 414, 20 BLR 2-265 (4th Cir. 1996). In *Kittle*, the Court, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), held that an obstructive impairment may be sufficient to fall within the definition of legal pneumoconiosis at 20 C.F.R. §718.201.

1997, also noting at that time that simple pneumoconiosis can be totally disabling. Employer's Exhibit 1 at 11, 20.

Dr. Fino's opinion that claimant's pulmonary impairment was obstructive, and thus not clinical pneumoconiosis, did not render his opinion hostile to the Act. Legal pneumoconiosis is a finding of fact to be made by the administrative law judge, while clinical pneumoconiosis, which Dr. Fino found to be precluded in this case, is a medical determination to be made by the physician. *Nance v. Benefits Review Board,* 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988). Thus, since Dr. Fino's premise that claimant demonstrated an obstructive impairment based upon his performance on pulmonary function studies after a bronchodilator is administered is not at odds with the statutory and regulatory scheme, and since the physician did not opine that simple pneumoconiosis is never disabling or otherwise rely on medical assumptions which are contrary to the Act, we hold that the administrative law judge's finding is not in accord with law, and thus it is vacated[3]. *See Searls v. Southern Ohio Coal Co.,* 11 BLR 1-161 (1988). On remand, the administrative law judge should reconsider Dr. Fino's opinion along with the other medical opinions of record in reaching his determination as to whether claimant has established that his pneumoconiosis was a substantial contributing cause of his total disability pursuant to *Bonessa*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[3]Furthermore, we note that the administrative law judge found that Dr. Fino's opinion was entitled to little weight because his underlying premise that claimant did not have pneumoconiosis was contrary to the fact finder's determination at Section 718.202. In so finding, the administrative law judge chose to apply the holdings of the United States Court of Appeals for the Fourth Circuit in *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), in this case arising within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit. We note that, to date, the Third Circuit has not commented upon the holdings of the Fourth Circuit in *Toler*, but the Fourth Circuit has further commented upon its holding in *Toler* in its recent decisions in *Dehue Coal Co. v Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). The administrative law judge should consider the entire body of precedent in the Fourth Circuit if he chooses on remand to apply Fourth Circuit case law to this case arising within the appellate jurisdiction of the Third Circuit court.

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge