BRB No. 98-1345 BLA

JOHN HENRY ELLISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAMKER COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
CAROLINA WREN COAL PARTNERSHIP	)	
	)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton and Hayes), Bluefield, West Virginia, for claimant.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer CamKer Coal Corp. and its carrier.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer Carolina Wren Coal Partnership.

Jeffrey S. Goldberg (Henry L. Solano, 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 BROWN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer CamKer Coal Corporation (Camker) and its carrier appeal the Decision and Order on Remand (95-BLA-0880) of Administrative Law Judge Thomas M. Burke awarding 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 on appeal before the Board for a second time. In her initial Decision and Order issued on November 7, 1995, Administrative Law Judge Edith Barnett determined that Wren Coal Company (Wren) was liable for payment of benefits, based on its status as the general partner of Carolina Wren Coal Partnership (CWCP), claimant's last employer and the responsible operator herein. Judge Barnett further found that if Wren was no longer in business or was financially incapable of paying benefits, its corporate officers, Nicholas Hobbie and Joseph Brush, would be personally liable for payment unless they were also unable to assume liability, in which event CamKer would be the responsible operator herein pursuant to 20 C.F.R. §§725.492 and 725.493. Judge Barnett credited claimant with 10.6 years of qualifying coal mine employment, and adjudicated the claim, filed on December 20, 1990, pursuant to the provisions at 20 C.F.R. Part 718. Judge Barnett found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded.

On appeal, the Board remanded the case to the administrative law judge for further consideration of the responsible operator issue. Specifically, the Board instructed the administrative law judge to identify the proper responsible operator after determining whether CWCP, Wren and Camker were capable of assuming liability through any of the means set out at 20 C.F.R. §725.492(a)(4)(I)-(iii), and whether Messrs. Hobbie and Brush were financially capable of assuming liability for the payment of benefits. The Board vacated Judge Barnett's findings regarding the length of coal mine employment, and instructed her on remand to explain the basis for her calculations. The Board also vacated Judge Barnett's finding that the evidence established the existence of pneumoconiosis at Section 718.202(a)(4), because she provided invalid reasons for crediting the opinion of Dr. Rasmussen and discounting the opinions of Drs. Tuteur, Hippensteel and Fino; she erroneously found that Dr. Zaldivar's opinion supported a finding of pneumoconiosis; and she failed to consider whether several negative readings of the x-rays relied upon by Drs.

Qazi and Rasmussen in diagnosing pneumoconiosis called into the question the reliability of their opinions. Lastly, the Board vacated Judge Barnett's finding of total respiratory disability pursuant to Section 718.204(c)(4), as she provided an invalid reason for discrediting the opinions of Drs. Fino, Hippensteel and Zaldivar, and failed to consider the opinions of Drs. Tuteur and Endres-Bercher. The Board instructed the administrative law judge on remand to reweigh the medical opinions at Section 718.204(c)(4); to weigh all the relevant evidence together, both like and unlike, in considering whether claimant established total respiratory disability pursuant to Section 718.204(c); and to separately determine whether claimant's disability was due to pneumoconiosis pursuant to Section 718.204(b). *Ellison v. CamKer Coal Corp.*, BRB Nos. 96-0444 BLA and 96-0444 BLA-A (Feb. 21, 1997)(unpublished).

On remand, this case was assigned to Administrative Law Judge Thomas M. Burke. In a Decision and Order issued on June 22, 1998, the administrative law judge found that CWCP, Wren and its officers were unable to assume liability, and thus CamKer was properly designated the responsible operator herein. The administrative law judge credited claimant with 9.75 years of qualifying coal mine employment, and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4), 718.203(c), and total disability due to pneumoconiosis pursuant to Section 718.204. Consequently, the administrative law judge awarded benefits.

In the present appeal, Camker challenges the administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.204(b), (c), and contends that a transfer of liability to the Black Lung Disability Trust Fund (Trust Fund) is appropriate. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that transfer of liability to the Trust Fund is not warranted under the facts of this case. CWCP responds, asserting that the parties, through their failure to raise the issue in a petition for review, have waived the issue of liability on the part of CWCP or its limited partners. Camker replies to the responses of CWCP and the Director, reasserting its argument that a transfer of liability to the Trust Fund is appropriate.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Camker initially maintains that it would not be the responsible operator herein if, during the approximate seven-year period that CWCP was an operator and failed to comply with the provisions at Section 725.492(a)(4), the Director had discharged his duty of ensuring that CWCP was capable of assuming liability for the payment of any black lung award

through enforcement, as required by 20 C.F.R. §725.601, of the penalty provisions at 20 C.F.R. §§725.495 and 725.620. Camker thus contends that its due process rights have been violated, mandating a transfer of liability to the Trust Fund. The Director counters that Congress intended to impose liability on operators rather than the Trust Fund to the maximum extent feasible, *see* 26 U.S.C. §9501(d)(1)(B); *Director, OWCP v. Oglebay Norton Co. [Goddard]*, 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989); and maintains that enforcement of the penalty provisions for CWCP's and Wren's failure to maintain black lung benefits insurance, or to be approved as self-insurers, is not mandatory, but within the Director's discretion. The Director asserts that the broad authority which Congress granted to the Secretary in identifying responsible operators, *see* 30 U.S.C. §932(h), implemented at 20 C.F.R. §§725.491-725.493, when read together with the penalty provisions at Sections 725.495 and 725.620, results in the availability of various options to the Director, who may select the option he deems will best accomplish the purposes of the Act, based on factors within his expertise as administrator of the Act. *See* 20 C.F.R. §725.601(c).

While we sympathize with Camker's position and agree that it is the Director's responsibility, as administrator of the Act, to enforce the penalty provisions outlined in the regulations against uninsured coal companies, thereby providing an incentive to obtain and maintain black lung insurance, the language of the applicable regulations is permissive,[1] thus enforcement of the penalty provisions at Sections 725.495 and 725.620 is discretionary rather than mandatory. *See Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(*recon. en banc*)(McGranery, J., dissenting). Consequently, the Director's election not to pursue penalties against CWCP and Wren for their failure to maintain adequate insurance does not mandate the dismissal of Camker as the responsible operator and transfer of liability to the Trust Fund. Inasmuch as Camker has not otherwise challenged the administrative law judge's findings pursuant to Sections 725.492 and 725.493, we affirm his finding that Camker is properly designated the responsible operator thereunder.

[1] Section 725.495(c) provides that "[a]n action *may* be commenced under this section at any time after information supporting such action becomes known to the Director." 20 C.F.R. §725.495(c)(emphasis added). Similarly, Section 725.495(e) provides that "[a]ny penalty owed under this section shall be paid to the fund and *may* be enforced by the Secretary on behalf of the fund *as appropriate*." 20 C.F.R. §725.495(e)(emphasis added).

Turning to the merits, Camker contends that the administrative law judge erred in failing to perform a *de novo* analysis and weighing of all relevant evidence, instead relying in part on Judge Barnett's prior findings of fact and conclusions of law, in contravention of the Administrative Procedure Act (APA), 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), 30 U.S.C. §932(a), and pertinent case law, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). We agree. In finding the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge merely addressed the medical opinions which the Board previously identified as being incorrectly weighed, and did not address the opinion of Dr. Endres-Bercher or weigh the opinion of Dr. Zaldivar.[2] The administrative law judge also did not acknowledge the relative qualifications of the physicians except in the area of tuberculosis.[3] Moreover, the administrative law judge failed to provide valid reasons for crediting the opinion of Dr. Rasmussen over the contrary opinions of Drs. Fino, Hippensteel and Tuteur. In evaluating these conflicting opinions, the administrative law judge found that Dr. Rasmussen's opinion, that claimant suffered from a blood gas impairment and an exercise intolerance which was most likely caused by pneumoconiosis in view of claimant's occupational history and the pattern of impairment, was the most persuasive because it was based strictly on medical evidence independent of x-ray evidence, whereas Drs. Fino, Hippensteel and Tuteur either disagreed as to the cause of impairment or were unable to determine its cause. Decision and Order on Remand at 7-8. Drs. Fino, Hippensteel and Tuteur, however, agreed that claimant did not have pneumoconiosis and that his impairment was not caused by dust exposure in coal mine employment, and the physicians were not required to determine and agree on an alternative cause of the impairment; rather, the administrative law judge was required to assess the quality of the physicians' reasoning and documentation in support of their conclusions as to whether or not claimant suffered from pneumoconiosis as defined at 20 C.F.R. §718.201. *See Hicks*, *supra*; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). The administrative law judge provided a similarly flawed rationale for his credibility determinations on the issue of disability

[2] The administrative law judge properly found that Dr. Zaldivar's diagnosis of pulmonary fibrosis did not support a finding of pneumoconiosis, Decision and Order on Remand at 8-9, but failed to weigh Dr. Zaldivar's opinion, that claimant did not have pneumoconiosis and that Dr. Rasmussen's conclusions were incorrect, Employer's Exhibits 1, 62, with all other relevant evidence at Section 718.202(a)(4).

[3] Camker correctly asserts that the administrative law judge did not acknowledge Dr. Fino's expertise in the area of tuberculosis, as one of the primary diseases within the board certification specialty of pulmonology, or Dr. Fino's testimony that he frequently treated tuberculosis patients, Employer's Exhibit 70 at 30.

causation at Section 718.204(b). *See* Decision and Order on Remand at 11. We, therefore, vacate the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(b), and remand this case for reconsideration of all relevant evidence thereunder.

Camker additionally challenges the administrative law judge's finding of total respiratory disability at Section 718.204(c)(4). In evaluating the evidence on the issue of total respiratory disability, the administrative law judge determined that claimant's usual coal mine employment involved heavy manual labor, and found that because all four blood gas studies performed during exercise produced qualifying values, claimant suffered from an exercise intolerance. The administrative law judge then gave "dispositive weight to those doctors who opined that the claimant's exercise impairment renders him unfit to return to the heavy manual labor involved in his previous employment," as bolstered by the qualifying results of the blood gas studies on exercise. Decision and Order on Remand at 10. The administrative law judge, however, did not provide any reason for discounting the opinions of Drs. Endres-Bercher, Fino, Hippensteel, Zaldivar and Tuteur that claimant retains the respiratory capacity to perform his usual coal mine employment.[4] Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(c)(4) for reconsideration and weighing of the medical opinions on remand, and a weighing of all relevant evidence together, both like and unlike, in considering whether claimant has established total respiratory disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

[4] The Board previously held that Judge Barnett erred in discrediting the opinions of Drs. Fino, Hippensteel and Zaldivar because they did not find the qualifying blood gas study values supportive of a finding of total disability. On remand, Judge Burke summarized the physicians' ultimate conclusions, but did not assess the quality of their reasoning or provide a reason for rejecting their conclusions. *See Hicks*, *supra*; *Akers*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I Concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring in the result only:

JAMES F. BROWN
Administrative Appeals Judge