BRB No. 99-1265 BLA

RONALD FRED FOX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
MANALAPAN MINING COMPANY, INC.	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand - Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Antony L. Saragas, (Huff Law Offices), Harlan, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (97-BLA-1356) of Administrative Law Judge Thomas F. Phalen, Jr., 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*. This case is on appeal before the Board for a second time. In his initial Decision and Order issued on March 9, 1998, the administrative law judge accepted the parties' stipulation that the miner had at least ten years of qualifying coal mine employment, and adjudicated this claim, filed on August 25, 1994, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish that the miner was totally disabled due to pneumoconiosis arising out of his coal mine employment, and consequently awarded benefits. On appeal, the

Board agreed with employer's argument that Dr. Branscomb's supplemental report was improperly excluded from the record, thereby prejudicing employer's case. The Board thus vacated the administrative law judge's award of benefits, and remanded the case for the administrative law judge to admit Dr. Branscomb's supplemental report into the record and reconsider the merits of the case based on the record as a whole. *Fox v. Manalapan Mining Co., Inc.*, BRB No. 98-0892 BLA (Mar. 23, 1999)(unpub.). On remand, the administrative law judge found the evidence sufficient to establish 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(b), (c). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4), and asserts that there is no substantial evidence in the record to sustain claimant's burden that his total disability is due to pneumoconiosis pursuant to Section 718.204(b). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

Employer initially challenges the administrative law judge's finding that the weight of the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Employer asserts that the administrative law judge failed to critically evaluate the relative qualifications of the physicians and the bases for their conclusions, and erred in crediting the opinions of Drs. Woolum, Baker and Clarke, who diagnosed pneumoconiosis, over the contrary opinions of the most highly qualified physicians of record, Drs. Dahhan and Branscomb. Employer's arguments lack merit. In evaluating the conflicting medical opinions at Section 718.202(a)(4) in his initial Decision and Order, the administrative law judge reasonably gave little weight to the opinion of Dr. Clarke, who diagnosed pneumoconiosis, because the physician did not discuss chronic obstructive pulmonary disease (COPD), which was diagnosed by every other physician, and failed to sufficiently explain how his objective test results supported his conclusions. Decision and Order at 8; Claimant's Exhibit 3; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge

[1] We affirm as unchallenged on appeal the administrative law judge's findings that the evidence establishes the existence of a total respiratory disability at Section 718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

determined that Drs. Woolum and Baker diagnosed claimant as suffering from pneumoconiosis and COPD, based on positive x-rays, pulmonary function study and blood gas study results, and physical examinations. Claimant's Exhibits 2, 4. While the administrative law judge found the weight of the x-ray evidence was negative for pneumoconiosis, he permissibly accorded Dr. Woolum's treatment notes some weight because the physician treated claimant over a period of time, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); and gave greater weight to the opinion of Dr. Baker, who is Board-certified in Internal Medicine and Pulmonary Diseases and a B reader, which the administrative law judge found consistent with its underlying documentation and supported by the objective testing of Drs. Dahhan and Kabani. Decision and Order at 8; Director's Exhibits 12, 34; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 21 BLR 2-(6th Cir. 2000); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also determined that Drs. Kabani and Dahhan, examining physicians, and Dr. Branscomb, a reviewing physician, diagnosed COPD, and that while Dr. Kabani attributed the condition to both smoking and dust exposure in coal mine employment, Drs. Dahhan and Branscomb attributed it solely to smoking. Director's Exhibits 12, 34; Employer's Exhibit 1. The administrative law judge acted within his discretion as trier-of-fact in giving less weight to the opinions of Drs. Dahhan and Branscomb on the ground that these physicians would not diagnose a coal dust related condition in the absence of a restrictive component, which the administrative law judge found inconsistent with the Act and regulations, and because Dr. Dahhan did not explain how he could determine that claimant's dust exposure played no role in his obstructive impairment. Decision and Order at 8; 20 C.F.R. §718.201; *see generally Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). On remand, after reviewing Dr. Branscomb's supplemental report which included criticisms of the reports of Drs. Clarke, Woolum and Baker, Employer's Exhibit 2, the administrative law judge, within his discretion, was not persuaded to change his prior credibility determinations, as he found the opinions of Drs. Clarke, Woolum and Baker

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[1]While acknowledging that Dr. Woolum was not highly qualified with respect to pulmonary diseases, the administrative law judge found that his treating physician status entitled his opinion to some weight since he observed and evaluated claimant's pulmonary condition first hand on several occasions, and his opinion was supported by claimant's pulmonary function study results. The administrative law judge permissibly rejected Dr. Branscomb's argument that Dr. Woolum's interchangeable usage of the terms "chronic obstructive airway disease," "chronic obstructive pulmonary disease" and "coal workers' pneumoconiosis" invalidated his opinion, as the administrative law judge found that legal pneumoconiosis encompassed various chronic lung diseases and that these terms were not mutually exclusive diagnoses. Decision and Order on Remand at 5. The administrative law judge again found that Dr. Clarke's opinion was entitled to some weight, albeit not significant weight, because the physician's conclusions were supported by his physical examination findings, pulmonary function study results, and the progressive nature of

supported by their underlying documentation and entitled to the weight previously assigned to them, *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic, supra*, whereas the administrative law judge again found that Dr. Branscomb relied on medical generalities which were inconsistent with the Act and regulations, *e.g.*, "the evidence that coal mine dust causes airways obstruction is speculative and not established in general medical understanding," Employer's Exhibit 2. Decision and Order on Remand at 4-6; *Warth, supra*. The administrative law judge's findings and inferences are supported by substantial evidence, and we may not substitute our judgment. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4) by a preponderance of the evidence.

Employer next contends that the administrative law judge applied the wrong legal standard in finding the evidence sufficient to establish that claimant's disability was due at least in part to pneumoconiosis pursuant to Section 718.204(b). Employer maintains that the best qualified physicians, Drs. Branscomb and Dahhan, opined that claimant's disability was unrelated to dust exposure in coal mine employment, and that the reports submitted by claimant's physicians do not establish more than a *de minimis* or infinitesimal contribution by pneumoconiosis to his total disability, but rather document disability due to a variety of health conditions irrespective of any involvement with pneumoconiosis. Employer thus asserts that the record contains no medical opinion which comports with the standard enunciated in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997), by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, that the miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment. Employer's arguments are without merit. The administrative law judge reasonably accorded the opinions of Drs. Dahhan and Branscomb little weight because these physicians did not diagnose pneumoconiosis and did not persuasively explain their exclusion of coal dust as a contributing cause of disability but relied on the medical generality that a pure obstructive impairment was not related to dust exposure in coal mine employment. Decision and Order on Remand at 7; *see generally Warth, supra*; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990). The

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claimant's symptoms. Decision and Order on Remand at 6. Similarly, the administrative law judge again found that Dr. Baker's opinion was entitled to greater weight, as it was supported by its underlying documentation and the objective testing of Drs. Kabani and Dahhan, whereas Dr. Branscomb's criticisms were based on medical generalities which were inconsistent with the Act and regulations. Decision and Order on Remand at 5.

administrative law judge acted within his discretion in crediting the contrary opinions of Drs. Kabani and Baker, that claimant's disability was due to coal dust exposure as well as smoking, which he found supported by the objective test results, physical examination findings, coal mine employment history, and the progressive nature of claimant's condition. Decision and Order on Remand at 7-8; *see Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997); *Hill, supra*; *Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 683 (1994); *Lucostic, supra.* Inasmuch as the opinions of Drs. Kabani and Baker are consistent with *Smith, supra*, *see also 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); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), and the administrative law judge's findings pursuant to Section 718.204(b) are supported by substantial evidence, we affirm his findings thereunder and affirm the award of benefits.

[3]Dr. Baker testified in his deposition that claimant's disabling obstructive impairment was due to both smoking and dust exposure in coal mine employment, and while he could not apportion the percentage that each exposure contributed to the impairment, claimant's coal dust exposure would be a substantial contributor to his disability. Claimant's Exhibit 2 at 13-14. Dr. Kabani opined that claimant's airways obstruction was mainly caused by smoking, but that claimant's exposure to coal dust caused a worsening of his respiratory status. Director's Exhibits 12, 13.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge