BRB No. 04-0400 BLA

WILLIAM E. CLARK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RYAN BROTHERS COAL COMPANY, INCORPORATED	)	DATE ISSUED: 12/22/2004
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Raymond F. Keisling (Carpenter, McCadden & Lane, LLP), Wexford, Pennsylvania, for claimant.

Gregory J. Fischer and Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5589) of Administrative Law Judge Daniel L. Leland denying 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). The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, requesting that the Board remand the case to the administrative law judge for further consideration of whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis.[1]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Claimant contends that the administrative law judge, in his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), erred in failing to address whether Dr. Illuzzi's findings are sufficient to support a finding of legal pneumoconiosis.[2] We

[1] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

[2] Claimant also contends that Dr. Strother's opinion is hostile to the Act. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has recognized that an administrative law judge may discredit an expert's conclusion when that expert bases his conclusion on a premise that is fundamentally at odds with the statutory and regulatory scheme. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989). Claimant notes that Dr. Strother testified that, absent a lung tissue sample, he would require a positive x-ray interpretation in order to

agree. A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[3] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Because no party challenges the administrative law judge's finding that

Dr. Illuzzi's diagnosis of clinical pneumoconiosis was entitled to little weight, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). However, as claimant and the Director accurately note, the administrative law judge failed to address whether Dr. Illuzzi's other pulmonary diagnoses are sufficient to support a finding of "legal" pneumoconiosis. In addition to diagnosing clinical pneumoconiosis, Dr. Illuzzi also diagnosed mild restrictive lung disease and hypoxia, both of which he attributed to claimant's coal dust exposure. Director's Exhibit 10. These diagnoses, if credited, are sufficient to support a finding of "legal" pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). We, therefore, vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.[4]

On remand, should the administrative law judge find the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must then weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he must address whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203 and whether the

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render a diagnosis of coal workers' pneumoconiosis. Claimant's Brief at 3 (citing Employer's Exhibit 1 at 29). Dr. Strother also opined that claimant's chronic bronchitis was not related to his coal dust exposure. Employer's Exhibit 1 at 23. Because claimant has not explained how Dr. Strother's opinions are based on a premise that is fundamentally at odds with the statutory and regulatory scheme, and because it is not apparent that his opinions are improperly based upon such a premise, we reject claimant's contention that Dr. Strother's opinions regarding the existence of pneumoconiosis are hostile to the Act.

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[4] On remand, should the administrative law judge find that Dr. Illuzzi's diagnoses are sufficient to constitute a finding of "legal" pneumoconiosis, he must weigh Dr. Illuzzi's opinion, along with all of the other relevant medical opinion evidence, to determine whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

evidence is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge