BRB No. 03-0419 BLA

CARL J. COBB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHREWSBURY COAL COMPANY	)	DATE ISSUED: 02/25/2004
	)	
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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

James M. Talbert-Slagle (Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM

Claimant appeals the Decision and Order Denying Benefits (01-BLA-0877) of Administrative Law Judge Richard A. Morgan rendered 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).[1] The administrative law judge found that

[1] Claimant initially filed a claim for benefits on December 18, 1973, which was finally denied by the Department of Labor on October 31, 1980. Director's Exhibit 22. Claimant filed a second claim on December 28, 1988, which was dismissed by Administrative Law Judge Peter McC. Giesey on December 22, 1992 for failure to prosecute the claim. Director's Exhibit 22. Claimant filed a third claim on July 22, 1996.

claimant established a coal mine employment history of thirty-two years and that the only issue presented in this duplicate claim was whether claimant's totally disabling respiratory impairment was due to pneumoconiosis. Decision and Order at 3, 11-13. The administrative law judge considered the newly submitted evidence, *i.e.*, the evidence submitted since the most recent denial of benefits, and concluded that it failed to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his disability causation analysis. Claimant asserts that the weight of the newly submitted evidence supports a finding of total disability due to pneumoconiosis and that the administrative law judge failed to consider the proper legal standard in his analysis of that evidence. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief.[2]

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

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Director's Exhibit 22. On April 8, 1998, Administrative Law Judge Richard A. Morgan issued a Decision and Order denying benefits. Judge Morgan found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and thus found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Judge Morgan then proceeded to find that the evidence of record established the presence of a totally disabling respiratory impairment, but failed to establish that the totally disabling respiratory impairment was due to pneumoconiosis. Accordingly, benefits were denied. Subsequent to an appeal by claimant, and a cross-appeal by employer, the Board affirmed the denial of benefits. *Cobb v. Shrewsbury Coal Co.*, BRB Nos. 98-1113 BLA and 98-1113 BLA-A (May 20, 1999)(unpub.). Claimant took no further action until filing the instant claim on July 12, 2000. Director's Exhibit 1. On June 1, 2002, a hearing was held and, on February 12, 2003, Judge Morgan issued the Decision and Order denying benefits from which claimant now appeals.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, as no specific challenge has been made to the determination that claimant has established the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment, these findings are also affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

may not be disturbed. 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).

Claimant contends that in concluding that the newly submitted evidence of record failed to establish disability causation pursuant to Section 718.204(c), the administrative law judge erred in crediting the opinions of Drs. Zaldivar, Hippensteel, Fino, Crisalli and Branscomb, who concluded that claimant did not suffer from a totally disabling respiratory impairment due to pneumoconiosis, Employer's Exhibits 4-6, 9, 11, 18, 19, because they also concluded that claimant did not have pneumoconiosis, in direct contradiction of the administrative law judge's finding that claimant suffered from both clinical and legal pneumoconiosis.[3] Claimant contends that to assign some weight to these opinions the administrative law judge must state specific and persuasive reasons for doing so. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

In *Toler*, the Fourth Circuit held that in cases where an administrative law judge has determined that claimant suffers from pneumoconiosis and also suffers from a totally disabling respiratory impairment, the administrative law judge may not credit a medical opinion that the pneumoconiosis did not cause the totally disabling respiratory impairment, unless the administrative law judge "can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates in the causal chain," and that even if such a finding were made by the administrative law judge, the opinion could carry "little weight" at most. *Toler*, 43 F.3d at 116, 19 BLR at 2-83.

In *Scott*, the court concluded that where the administrative law judge had found clinical and legal pneumoconiosis established, opinions of physicians who directly contradicted him could not be used to show that disability causation was not established even though they opined that their opinions would not change if claimant had suffered from pneumoconiosis. *See Scott*, 289 F.3d at 269, 22 BLR at 2-383-384.

In the instant case, the administrative law judge credited the opinions of Drs. Zaldivar, Hippensteel, Fino, Crisalli and Branscomb, that claimant did not suffer from pneumoconiosis and that pneumoconiosis did not cause disability, because he found them to be the most thorough and well-reasoned of record, and because Drs. Fino, Crisalli,

[3] In order to establish disability causation pursuant to Section 718.204(c), claimant must show that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment. 20 C.F.R. §718.204(c); *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Zaldivar and Branscomb stated that even if claimant had pneumoconiosis, it would not have contributed to disability. Decision and Order at 15.

In light of the court's holdings in *Scott* and *Toler*, however, this qualification by Drs. Fino, Crisalli, Zaldivar, and Branscomb does not, contrary to the administrative law judge's finding, constitute a specific and persuasive reason for crediting those physicians' opinions. *See Scott*, 289 F.3d at 269, 22 BLR at 2-383-384. Accordingly, because the administrative law judge failed to provide a valid rationale for his weighing of the medical evidence on the issue of disability causation, this case must be remanded for the administrative law judge to reconsider the medical opinions pursuant to *Scott* and *Toler*.

Claimant further argues that the administrative law judge: materially misconstrued the opinions of Drs. Ward, Koenig, and Rasmussen who concluded that claimant's totally disabling respiratory impairment was due to pneumoconiosis; and improperly relied on these misrepresentations to find that claimant failed to establish disability causation. Specifically, claimant asserts that the administrative law judge mischaracterized Dr. Ward's opinion when he stated that the physician opined that claimant could return to his coal mine employment, when, in fact, Dr. Ward specifically found that claimant could not return to his previous coal mine employment. The record reflects that the administrative law judge initially stated that Dr. Ward opined that claimant "could return to his regular coal mining job," Decision and Order at 7, but he subsequently stated that Dr. Ward found that claimant suffered from a "disabling lung disease." Decision and Order at 14. In any event, the issue before the administrative law judge was not whether claimant had a totally disabling respiratory impairment, which had already been decided in claimant's favor, but whether claimant's pneumoconiosis substantially contributed to his disability. 20 C.F.R. §718.204(b), (c).

Additionally, claimant contends that the administrative law judge mischaracterized the opinions of Drs. Koenig and Rasmussen as to whether claimant had asthma. Specifically, claimant contends that the administrative law judge erred in giving little weight to Dr. Koenig's opinion because he failed to diagnose claimant's longstanding history of asthma; when, in fact, Dr. Koenig fully addressed the issue of claimant's asthma, acknowledged the diagnosis of asthma by claimant's treating physician, but expressly stated that he did not believe that claimant had asthma and explained his reasoning. Likewise, claimant contends that, contrary to the administrative law judge's finding, Dr. Rasmussen took claimant's history of asthma into account, but nevertheless found that claimant's totally disabling respiratory impairment was more likely due to coal mine dust and cigarette smoke.

In rejecting the opinions of Drs. Koenig and Rasmussen, the administrative law judge acknowledged that Dr. Rasmussen had noted claimant's history of asthma on his most recent examination of claimant but failed to rule out the effect, if any, of asthma on

claimant's total respiratory disability. As to Dr. Koenig's opinion, the administrative law judge accorded it little weight because Dr. Koenig was the only physician of record who failed to diagnose asthma and because he stated that there was no evidence of asthma.

The administrative law judge erred in discrediting Dr. Koenig's opinion for failing to diagnose asthma without explaining why his failure to diagnose asthma undermines his opinion that claimant's totally disabling respiratory impairment results from chronic obstructive pulmonary disease due to both coal mine employment and smoking, and that even if claimant had asthma which contributed to his pulmonary impairment, he would still be totally and permanently disabled from chronic obstructive pulmonary disease. The administrative law judge also erred in according little weight to Dr. Rasmussen's opinion because he did not "rule out the effect, if any, of asthma on [claimant's] disabling pulmonary disability." Decision and Order at 14. Claimant is not required to "rule out" the causes of his disability, he is only required to establish that pneumoconiosis or coal mine employment is a substantially contributing cause of his total disability. 20 C.F.R. §718.204(c). Dr. Rasmussen, who noted a history of asthma, nonetheless stated that claimant's "coal mine dust exposure [was] a significant contributing factor of his total respiratory disability." Director's Exhibit 6. Since the administrative law judge has failed to provide a valid rationale for his decision to accord little weight to the opinions of Drs. Koenig and Rasmussen, his finding that claimant has failed to establish causation must be vacated and the case remanded for reconsideration of the relevant medical evidence of record.

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

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