BRB No. 03-0421 BLA

GERNADE H. RUSSELL (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 02/25/2004
	)	
and	)	
	)	
ACORDIA EMPLOYERS SERVICES	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 – Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Elizabeth G. Farber (Garrett & Farber), Gassaway, West Virginia, for claimant.

Kathy L. Snyder, Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (90-BLA-2413) of Administrative Law Judge Gerald M. Tierney on a duplicate claim[1] filed pursuant to

[1] Claimant, Gernade H. Russell, filed his first application for benefits on April 18, 1979. That claim was finally denied on August 28, 1980. Director's Exhibits 1, 25. Claimant filed a duplicate claim on December 21, 1984, which is presently pending.

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).[2] This case is before the Board for the fifth time. The procedural history of the case is contained in the Board's most recent decision. *Russell v. Westmoreland Coal Co.*, BRB No. 01-0511 BLA (Mar. 14, 2002)(Hall, J., concurring and dissenting)(unpub.). In that decision, pursuant to employer's appeal, the Board vacated the administrative law judge's determination that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4) based on Dr. Rasmussen's opinion. The Board held that the administrative law judge erroneously relied on Dr. Rasmussen's status as a treating physician to accord his opinion the greatest weight, without providing additional explanation. The Board also held that the administrative law judge improperly found that Dr. Rasmussen possessed superior qualifications to the other doctors, and that the administrative law judge erred in failing to comment on the additional qualifications of Drs. Fino and Renn. In addition, the Board declined to address employer's contentions of error regarding the administrative law judge's onset date determination inasmuch as the Board had previously affirmed that finding, which constituted the law of the case. Accordingly, the Board vacated the administrative law judge's Decision and Order awarding benefits and remanded the case for further consideration.[3]

After considering the medical opinion evidence on remand, the administrative law judge found that Dr. Rasmussen's opinion that claimant suffers from coal workers' pneumoconiosis outweighed the opinions of the other physicians and was, therefore, entitled to determinative weight under Section 718.202(a)(4). On weighing all the relevant evidence of record, the administrative law judge determined that claimant established, by a preponderance of the evidence, the existence of pneumoconiosis at to Section 718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Accordingly, benefits were awarded. The administrative law judge awarded attorney fees in

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Director's Exhibit 2.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Although concurring with the majority's decision regarding the onset date of claimant's entitlement to benefits, Administrative Appeals Judge Betty Jean Hall dissented from the majority's holding vacating the administrative law judge's finding at Section 718.202(a)(4) and remanding the case for reconsideration of the medical opinion evidence. Judge Hall stated that she believed that the administrative law judge acted within his discretion in according the greatest weight to Dr. Rasmussen's opinion. *Russell v. Westmoreland Coal Co.*, BRB No. 01-0511 BLA, *slip op.* at 8-9 (Mar. 14, 2002)(Hall, J., concurring and dissenting)(unpub.).

the amount of $2,160.00 representing eighteen hours at $120.00 per hour to claimant's counsel. Amended Supplemental Decision and Order Granting Attorney Fees at 1.

On appeal, employer/carrier again challenges the administrative law judge's reliance on Dr. Rasmussen's opinion to find that claimant established the existence of pneumoconiosis and total respiratory disability due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to participate in this appeal. In addition, employer has filed an Advisory of New Precedent noting that, subsequent to the filing of briefs in this case, the United States Court of Appeals for the Sixth Circuit issued *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003), in which that court discussed the treatment of the opinions of treating physicians pursuant to Section 718.104(d).[4]

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 the applicable law, they are binding upon this Board and 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the administrative law judge erred in failing to adhere to the Board's remand instructions when he credited the opinion of Dr. Rasmussen based on his treating physician status, absent a more sufficient explanation, and when he merely relied on

[4] The United States Court of Appeals for the Sixth Circuit addressed Section 718.104(d) and the legal precedent regarding the "treating physician rule," and held that "[t]he regulation says *nothing* about prioritizing a treating physician's perspective; rather, the regulation expects ALJs to analyze the nature and duration of the doctor-patient relationship along with the frequency and extent of treatment." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, BLR (6th Cir. 2003) [emphasis in original]. The court explained that the decision by the adjudication officer to accord deference to a treating physician's opinion, only after weighing the report of a treating physician in comparison to all other relevant evidence in the record, is predicated on the premise that "the opinions of treating physicians get the deference they deserve based on their power to persuade" and are to be considered just as the opinions of other experts. *Ibid; see Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-188, BLR (4th Cir. 2002); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993); *accord Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Freeman United Coal Mining Co. v. Director, OWCP* [*Forsythe*], 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984).

his "previous decisions" to set forth his rationale for crediting Dr. Rasmussen's opinion. The Board held previously that the administrative law judge "erred in crediting Dr. Rasmussen's opinion based upon his status as treating physician without providing any explanation as to how his physical examinations assisted him in rendering his diagnosis of pneumoconiosis." *Russell*, *slip op.* at 6. On remand, the administrative law judge stated that, contrary to the Board's holding, he had not mechanically credited the opinion of Dr. Rasmussen over those of the other doctors solely because he was claimant's treating physician. Rather, the administrative law judge accepted Dr. Rasmussen's deposition testimony that while a consulting physician may be able to obtain as thorough a picture of a patient's condition based on diagnostic tests results as an examining physician, the benefit of "hands-on experience between doctor and patient" is nonetheless a critical element absent in a consulting physician's opinion. Decision and Order on Remand at 2. Hence, the administrative law judge found that "that benefit was realized in this case by Dr. Rasmussen's frequent and regular visits with Claimant" starting as early as December 1984 for an initial pulmonary evaluation and another examination conducted in October 1987, after which claimant became Dr. Rasmussen's patient for, up to the time of his deposition, a period of three and one-half years. Furthermore, the administrative law judge explained that Dr. Rasmussen's physical examinations, consisting of monthly visits to Dr. Rasmussen where Dr. Rasmussen recorded claimant's symptoms, listened to claimant's chest, heart and lungs, conducted additional pulmonary testing, and prescribed claimant pulmonary medication, assisted him in rendering his diagnosis of pneumoconiosis. More importantly, however, the administrative law judge found Dr. Rasmussen's opinion worthy of greater weight based on Dr. Rasmussen's observation of the gradual progressive deterioration of Claimant's respiratory functions and his intimate understanding of claimant's medical condition unique to a treating physician-patient relationship. Decision and Order on Remand at 2.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in weighing medical opinions, the administrative law judge is called upon to consider their quality, *i.e.*, the quality of the experts, the opinion's reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudices. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). Inasmuch as employer has not shown, nor does it appear from the record, that the administrative law judge's determination of the relative credibility of the evidence is irrational, we will not disturb the administrative law judge's finding. *See Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 303, 9 BLR 2-221, 2-223 (6th Cir. 1987); *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983); *Anderson v. Valley Camp Coal Co.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

Employer also asserts that the administrative law judge erred in finding the credentials

of Dr. Rasmussen to be superior to those of Drs. Fino and Renn since his finding that Dr. Rasmussen "devoted his practice to treating patients with pulmonary disease" was unsupported and since the record shows that the medical practices of Drs. Fino and Renn also involved the treatment of patients with pulmonary disease. Additionally, employer asserts that unlike Dr. Rasmussen, Drs. Fino and Renn were board-certified in the subspecialty of pulmonary disease. Thus, employer argues that the curriculum vitaes of Drs. Fino and Renn demonstrate equal, if not more, expertise in the area of treating and diagnosing pulmonary diseases than does Dr. Rasmussen's.

In accordance with the Board's directive to consider the additional expertise of Drs. Fino and Renn in the area of pulmonary disease, the administrative law judge examined their curriculum vitaes and noted that while Dr. Fino's experience included teaching courses in pulmonary disease medicine, his publications dealt with the area of sclerosis. Similarly, the administrative law judge found that Dr. Renn's expertise was demonstrated by his pursuit of continuing education in pulmonary diseases, treating coal miners in his private practice, and discussing pertinent medical literature. Nonetheless, the administrative law judge again found, after comparing the level of expertise attained by Drs. Fino and Renn with that of Dr. Rasmussen, that Dr. Rasmussen's experience in the field of pulmonary disease medicine greatly exceeded that of Drs. Fino and Renn. The administrative law judge found that a review of Dr. Rasmussen's curriculum vitae revealed the doctor's enduring, dedicated interest to the specific study of pneumoconiosis and the effects of coal mine dust, as demonstrated by the multitude of his publications as a result of his long term experience and research; his special appointments and testimony before government committees; and his specific knowledge of medical literature both in accord with and contrary to his own opinions. Decision and Order on Remand at 3. Accordingly, since the administrative law judge carefully considered the credentials of Drs. Fino, Renn, and Rasmussen, and rationally found that Dr. Rasmussen's extensive experience in the specific area of pneumoconiosis and the effects of coal mine dust exceeded the experience obtained by Drs. Fino and Renn, we affirm the administrative law judge's finding that Dr. Rasmussen's pneumoconiosis diagnosis was more persuasive than the contrary opinions of Drs. Fino and Renn. *See Hicks*, 138 F.3d at 537; 21 BLR at 2-341; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*)(It is within the administrative law judge's discretion to determine whether a physician's opinion is reasoned.); *Anderson*, 12 BLR at 1-113 (The Board is not empowered to reweigh evidence or substitute its inferences for those of the administrative law judge.).

Employer avers further that the administrative law judge erred in failing to address the fact that Dr. Rasmussen relied on a positive x-ray interpretation to make a diagnosis of pneumoconiosis contrary to the administrative law judge's finding that the x-ray evidence was insufficient to establish the presence of pneumoconiosis. This argument, however, was previously raised and rejected by the Board three times and, even more recently by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Westmoreland*

Coal Co., Inc. v. Russell, No. 99-1411, *slip op.* at 3 (4th Cir. Jun. 28, 2000)(unpub.); *Russell v. Westmoreland Coal Co.*, BRB No. 98-0236 BLA, *slip op*. at 4 (Feb. 11, 1999)(unpub.).

Likewise, we will not address employer's argument that the administrative law judge failed to resolve the conflicts between Dr. Rasmussen's opinion and the other physicians' opinions concerning the issue of disability causation, an element of entitlement previously found in claimant's favor and a determination that was affirmed by the Board. *Russell*, BRB No. 92-0391 BLA, *slip op*. at 6. Further, in its most recent decision in this case, the Fourth Circuit held, "[i]f the ALJ again finds pneumoconiosis, it is not necessary, as employer asserts, for him to revisit the issue of whether the miner's total disability was 'due to' pneumoconiosis. The errors discussed do not taint the ALJ's causation finding," *Russell*, No. 99-1411 (4th Cir.), *slip op.* at 4. Hence, we affirm the administrative law judge's finding that claimant satisfied his burden of establishing all of the requisite elements of entitlement to benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[5]

In addition, employer does not challenge the Amended Supplemental Decision and Order Granting Attorney Fees. The administrative law judge, noting that there was no objection to the fee petition, awarded attorney fees in the amount of $2,160.00 representing eighteen hours at $120.00 per hour to claimant's counsel, to be paid by employer. Since employer has raised no issue with regard to the administrative law judge's award of attorney fees, it is affirmed. 20 C.F.R. §§725.366, 725.367; *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

[5] Citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), employer asserts that this case, which is before the Board for the fifth time, has reached the point of "administrative gridlock, which may necessitate reassignment to a different ALJ." Employer's Brief in Support of Petition for Review at 14. We deny employer's request that the case be reassigned to a new administrative law judge, however, inasmuch as employer has not shown nor does the record reveal that "review of this claim requires a fresh look at the evidence," *Hicks*, 138 F.3d at 537, 21 BLR at 2-343, and we have affirmed the administrative law judge's finding of entitlement.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge