BRB No. 98-0691 BLA

RAY VARNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Robert T. Noone (Robert T. Noone Legal Services), Logan, West Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly), Charleston, West Virginia, for employer.

Edward Waldman (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, Co-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, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (92-BLA-1447) of

Administrative Law Judge Samuel J. Smith 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*. A claimant becomes entitled to benefits under the Act by establishing that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by the disease. 30 U.S.C. §901; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 BLR 2-1, 2-5 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Doss v. Director, OWCP*, 53 F.3d 654, 658, 19 BLR 2-181, 2-190 (4th Cir. 1995).

This claim is before the Board for the second time. In our original Decision and Order,[1] we affirmed findings with respect to the length of claimant's qualifying

[1]The procedural history of this claim has been set out in the Board's previous decision in this case. *Varney v. Buffalo Mining Co.*, BRB No. 94-2553 BLA (Oct. 26, 1995)(unpub.). The Board affirmed as uncontested the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis on the basis of x-ray evidence, 20 C.F.R. § 718.202(a)(1), that claimant proved a coal mine employment history of 15 years, that claimant suffered from a totally disabling pulmonary or respiratory impairment and a benefits onset date of August 1, 1991. The Board also observed that no party questioned whether claimant established a material change in condition in this duplicate claim. *See C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 1116, 28 BRBS 84, 87 (CRT) (11th Cir. 1994)(assuming as

coal mine employment, as well as the presence of total respiratory disability and the failure of the x-ray evidence to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(1). The Board vacated, however, the administrative law judge's findings that claimant established the existence of pneumoconiosis and disability causation pursuant to Sections 718.202(a)(4) and 718.204(b), and remanded the case to the administrative law judge for a reconsideration of entitlement on those issues.[2] *Varney v. Buffalo Mining Co.*, BRB No. 94-2553 BLA (Oct. 26, 1995)(unpub.).

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correct findings not contested on appeal); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

[2]In view of its disposition of the appeal, the Board also vacated the administrative law judge's Decision on Motion for Reconsideration with respect to the benefits onset date, but directed that the administrative law judge may, in the event of an award on remand, reinstate that determination. *See* 20 C.F.R. § 725.503(b). *Varney v. Buffalo Mining Co.*, BRB No. 94-2553 BLA, slip op. at 7 (Oct. 26, 1995)(unpub.).

On remand, Administrative Law Judge Smith[3] found that claimant had met his burden of establishing both the existence of coal worker's pneumoconiosis and disability causation, and claimant was again found entitled to benefits. Applying the Secretary's onset regulation, Section 725.503(b), 20 C.F.R. § 725.503(b), the administrative law judge also ruled that claimant's entitlement should commence on August 1, 1991, the first day of the month in which this claim was filed. This appeal followed.

On appeal, employer challenges the administrative law judge's evaluation of the medical evidence of record to find that claimant established the existence of pneumoconiosis on the basis of medical opinion evidence and disability causation.[4] Employer further assigns as error the administrative law judge's finding that August 1, 1991 constitutes the benefits onset date in this instance, and contests the validity of Section 725.503(b), 20 C.F.R. § 725.503(b). Claimant responds to employer's appeal, urging that the Board affirm the Decision and Order awarding benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a response to employer's challenge to the Secretary's onset regulation.

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

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[3]This matter was reassigned to Administrative Law Judge Samuel J. Smith because Judge Amery was no longer with the Office of Administrative Law Judges.

[4]A claimant may establish the existence of pneumoconiosis on the basis of a reasoned medical opinion notwithstanding a negative x-ray. 20 C.F.R. § 718.202(a)(4); *see Nance v. Benefits Review Board*, 861 F.2d 68, 70-71, 12 BLR 2-31, 2-34-35 (4th Cir. 1988). To meet the disability causation standard, a claimant must prove that his pneumoconiosis is at least a "contributing cause" of his total respiratory disability. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990).

evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

On appeal, employer initially contests the administrative law judge's findings that the medical opinions of its experts, particularly Drs. Castle, Fino, Tuteur and Zaldivar, were based on an incorrect assumption that coal mine dust exposure can never result in the development of an obstructive lung disease. In the Board's prior Decision and Order, we instructed the administrative law judge to assess on remand the probative value of the medical opinions that may be grounded in significant part on the assumption that coal worker's pneumoconiosis does not cause an obstructive impairment or pulmonary condition.[5] *Varney I*, slip op. 6 n. 4, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 175, 19 BLR 2-265, 2-269 (4th Cir. 1995).

Subsequent to the Board's decision in this case, the Fourth Circuit decided a number of cases which have a significant impact on the evaluation of this claim. In *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 341, 20 BLR 2-246, 2-253 (4th Cir. 1996), the Fourth Circuit appears to have withdrawn somewhat from its decision in *Warth*, and sanctioned reliance on experts, who opined that the miner's total respiratory disability was due to cigarette abuse, but who did not assume that coal mine employment can never cause chronic obstructive pulmonary disease. The court of appeals noted that the employer's opinions in that case were not grounded solely on the assumption that was found to be objectionable by the administrative law judge here, but also on a "review of Stiltner's entire medical history[.]" *Id*.

In this instance, the administrative law judge found that the opinions of Drs. Fino, Castle, Tuteur, Wiot and Zaldivar are based "in very substantial part" on the assumption that claimant's obstructive pulmonary impairment could not have arisen out of dust exposure from his coal mine employment. Decision and Order on Remand at 24-25, 29. He also determined that Dr. Zaldivar's opinion, that claimant's obstructive disease and emphysema was due solely to his cigarette

[5]The Act and its implementing regulations define the term "pneumoconiosis" broadly to encompass any pulmonary or respiratory disease that is significantly related to or substantially aggravated by claimant's coal mine dust exposure. *See* 30 U.S.C. § 902(b); 20 C.F.R. §718.20; *see also Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). The reasoning behind cases such as *Warth* is that an opinion as to the presence *vel non* of "clinical" pneumoconiosis may not adequately account for the broad legal definition of the disease, and that appropriate weight should be assigned accordingly.

smoking, rested significantly on the absence of positive radiological evidence of pneumoconiosis, and thus found that this physician's conclusions merited less weight. Decision and Order on Remand at 29.

Employer asserts that the administrative law judge failed to account for the qualifications of the medical experts of record. This constitutes error. In evaluating the medical opinion evidence, the administrative law judge should assess "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). We note that both *Akers* and *Underwood* were decided subsequent to the Board's decision in this matter.

The administrative law judge is charged with the evaluation and weighing of the medical evidence and may draw appropriate inferences therefrom, *see Doss v. Director, OWCP*, 53 F.3d 654, 658, 19 BLR 2-181 (4th Cir. 1995); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962)("fact-finders are not bound to decide according to doctors' opinions if rational inferences lead in the other direction"); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Nevertheless, in light of the administrative law judge's failure to consider the credentials of the physicians of record, and in view of subsequent case law from the court of appeals, we vacate the administrative law judge's findings of pneumoconiosis and disability causation, and remand to the administrative law judge for a full review of the record as a whole in light of these authorities.[6]

Employer last challenges the Secretary's onset regulation, which provides in part that "[w]here the evidence does not establish the month of onset, benefits shall be payable ... beginning with the month during which the claim was filed ... [,]" 20 C.F.R. § 725.503(b), and the administrative law judge's application thereof. Decision

[6]We disagree with employer's averment that the administrative law judge's reliance on the award from the West Virginia Occupational Pneumoconiosis Board is misplaced. The determinations and findings of a state agency are not binding on the administrative law judge in a federal black lung case, but should be evaluated and weighed like any other evidence, as was done in this case. 20 C.F.R. §718.206; *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 361 n. 7, 8 BLR 2-22, 2-26 n. 7 (6th Cir. 1985); *accord Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-23 n. 1 (1987).

and Order on Remand at 41. Employer insists that the regulation violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c), because it relieves claimant of his burden of establishing the date on which his benefit payments shall commence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). In view of our disposition of this appeal, we decline employer's invitation to invalidate Section 725.503(b).[7]

Accordingly, we affirm the Decision and Order on Remand Awarding Benefits is vacated, and this case is remanded to the administrative law judge for a reconsideration of the evidence consistent with this opinion..

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[7]We note that, in the proceedings prior to remand, employer did not object to the Director's Motion for Reconsideration, which was confined to this specific issue, and, pursuant to which the first administrative law judge modified his order to provide that benefits should commence on August 1, instead of October 1, 1991. Decision on Motion for Reconsideration (May 20, 1994). Nor did employer raise this issue in its first appeal to the Board.