BRB No. 01-0376 BLA

JOSEPH E. MASSIE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL 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 on Remand of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy and Ann B. Rembrandt (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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:

Employer appeals the Decision and Order on Remand (98-BLA-0855) of Administrative Law Judge Daniel F. Sutton 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*. (the Act).[1] This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with twenty-three years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge also noted that employer conceded that claimant is totally disabled. Although the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000), he 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) (2000) and 718.203 (2000). Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[2] Accordingly, the administrative law judge awarded benefits. In response to employer's appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(3) (2000). However, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) (2000), 718.203 (2000), and 718.204(b) (2000), and remanded the case for further consideration. The Board instructed the administrative law judge to weigh all evidence relevant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000) together in determining whether claimant suffers from pneumoconiosis in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 303, BLR

[1]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

(4th Cir. 2000). *Massie v. Consolidation Coal Co.*, BRB No. 99-0973 BLA (June 30, 2000)(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) (2000) and 718.203(b) (2000). The administrative law judge also found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Claimant responds to employer's appeal, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to respond to employer's appeal.[3]

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 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).

[3]Although the Director, Office of Workers' Compensation Programs, declined to respond to the issues raised by employer, he submitted a letter opining that the outcome of the case will not be affected by the revised regulations.

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Whereas Drs. Forehand and Rasmussen opined that claimant suffers from pneumoconiosis, Director's Exhibit 10; Claimant's Exhibits 1, 3, Drs. Castle, Fino, Jarboe, Loudon and Zaldivar opined that claimant does not suffer from pneumoconiosis, Employer's Exhibits 4, 8, 10, 14-16. The administrative law judge permissibly discredited Dr. Forehand's diagnosis of pneumoconiosis because he found the doctor's diagnosis to be a restatement of x-ray readings.[4] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see generally Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). With regard to the remaining opinions, the administrative law judge concluded, "I find that the opinions offered by Drs....Fino, Loudon and Castle...do not outweigh the reasoned medical opinion from Dr. Rasmussen who attributed the [c]laimant's severe pulmonary impairment to coal dust exposure based on his review of the objective medical evidence including his own examination and testing, medical literature and his extensive experience in examining miners for the presence of pneumoconiosis." Decision and Order on Remand at 9.

Employer asserts that the administrative law judge impermissibly substituted his opinion for that of Dr. Fino. The administrative law judge stated that "[Dr. Fino] concluded that he was unable with reasonable certainty to diagnose coal workers' pneumoconiosis as

[4]The administrative law judge observed that "Dr. Forehand diagnosed medical pneumoconiosis based on positive x-ray interpretations by several radiologists." Decision and Order on Remand at 3. The administrative law judge also observed that "[Dr. Forehand] did not discuss the negative interpretations of these same x-rays by equally qualified radiologists, and he did not cite any medical evidence in addition to the chest x-rays to support his diagnosis." *Id*. The administrative law judge concluded, "[i]n view of my finding that the x-ray evidence is inconclusive and insufficient, standing alone, to establish the presence of pneumoconiosis, I find that Dr. Forehand's medical opinion is not a reasoned medical opinion based on objective medical evidence as required by subsection (a)(4) to support a diagnosis of pneumoconiosis." *Id*.

the cause of the [c]laimant's pulmonary abnormality because the significant impairment in oxygen transfer demonstrated in 1997 and 1998 was not shown during an exercise study conducted in 1994, the year the [c]laimant left coal mine employment." *Id*. at 5. The administrative law judge stated that "Dr. Fino compared the measurements of the [c]laimant's arterial blood oxygen taken in August 1994 when he was examined by the West Virginia Occupational Pneumoconiosis Board with the measurements recorded during Dr. Rasmussen's testing in August 1997 and Dr. Zaldivar's testing in May 1998." *Id*. The administrative law judge stated that "[t]he problem with comparison is that the record reflects that the testing conducted by the Occupational Pneumoconiosis Board indicates that the [c]laimant's arterial blood gas was measured by oximetry at rest and at one minute intervals over a five minute period of exercise when his pulse rate increased from 72 to 106." *Id*. The administrative law judge concluded, "[s]ince the level to which the [c]laimant was exercised in 1994 was markedly lower than the exercise levels achieved in 1997 and 1998 when a significant impairment in oxygen transfer was detected, I find that Dr. Fino's reliance on the 'normal' results from the 1994 study to surmise that the [c]laimant's impairment developed too rapidly after 1994 to be consistent with a disease related to coal mine dust inhalation is not well-reasoned." *Id*. at 6. Hence, to the extent that the administrative law judge exceeded his expertise by commenting on the level to which claimant exercised during the 1994 arterial blood gas study and the level to which claimant exercised during the 1997 and 1998 arterial blood gas studies, we hold that the administrative law judge improperly substituted his opinion for that of the physician. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Based upon the foregoing, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000), and remand the case for further consideration of the evidence.

Employer also asserts that the administrative law judge erred in finding Dr. Rasmussen's opinion better reasoned than the opinions of Drs. Castle, Fino, Jarboe, Loudon and Zaldivar. The administrative law judge stated that "[w]hile there appears to be a discrepancy in the information the [c]laimant provided to Dr. Rasmussen regarding his smoking history, I find that this discrepancy [is] not material." *Id*. The administrative law judge observed that "Dr. Rasmussen explained at his deposition that his opinion on the cause of the [c]laimant's pulmonary impairment would be the same even if he assumed that the [c]laimant had been a cigarette smoker because one would expect cigarette smoking to produce an obstructive impairment which is not present in the [c]laimant."[5] *Id*. The

[5]The administrative law judge observed that "[t]he history taken by Dr. Rasmussen from the [c]laimant indicates that the [c]laimant never smoked." Decision and Order on Remand at 9 n.4. The administrative law judge stated that "[t]his is inconsistent with the [c]laimant's testimony at the hearing where he acknowledged smoking about one pack of cigarettes per day from 1963 to 1969." *Id*.

administrative law judge also stated that "Dr. Zaldivar similarly testified at his deposition that the [c]laimant does not have a lung impairment related to cigarette smoking..., and no other physician has suggested otherwise." *Id*. However, the record reflects that in a report dated August 12, 1998, Dr. Jarboe opined that the most likely cause of claimant's mild airflow obstruction is cigarette smoking and not dust exposure. Employer's Exhibit 8. Similarly, during a deposition dated October 16, 1998, Dr. Castle opined that it is very likely that claimant's obstruction is related to his tobacco abuse. Employer's Exhibit 16 (Dr. Castle's Deposition at 22). Thus, in view of the administrative law judge's mischaracterization of the medical opinion evidence, we hold that the administrative law judge erred in finding Dr. Rasmussen's opinion better reasoned and entitled to more weight than the contrary opinions of record.[6] *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

[6]Employer argues that the administrative law judge erred in according greater weight to the opinion of Dr. Rasmussen than to the contrary opinions of Drs. Castle and Loudon because Dr. Rasmussen considered the differences between legal pneumoconiosis and clinical pneumoconiosis. In finding Dr. Rasmussen's opinion well reasoned, the administrative law judge observed that "[u]nlike...several of the other physicians, Dr. Rasmussen clearly recognized the distinction between medical pneumoconiosis, a diagnosis which he would not make based on his assessment of the x-ray evidence, and legal pneumoconiosis." Decision and Order on Remand at 9. The administrative law judge stated, "I find that Dr. Castle's conclusory dismissal of legal pneumoconiosis as a cause of the [c]laimant's pulmonary abnormalities is not sufficiently reasoned and supported by

On remand, the administrative law judge must determine whether Dr. Rasmussen's opinion is reasoned and provide a reasonable explanation for his findings. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *see also Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988).

Employer further asserts that the administrative law judge erred in discrediting Dr. Zaldivar's opinion because his opinion is in conflict with the holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). The administrative law judge stated, "Dr. Zaldivar's conclusion that the [c]laimant does not suffer from coal workers' pneumoconiosis is based on his assumption that the disease produces an obstructive rather than a restrictive impairment." Decision and Order on Remand at 4. Citing *Warth*, the administrative law judge further stated, "Dr. Zaldivar repeated this assumption during his deposition testimony, Employer's Exhibit 15 at 40-41, and he cited no medical studies or literature to support this assumption which I find suspect as it is similar to the type of reasoning which has been traditionally rejected as hostile to the Act." *Id*. In *Warth*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an assumption that an obstructive disorder, rather than a restrictive disorder, cannot be caused by coal mine employment, is erroneous. Subsequently, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit observed that the physicians in *Warth* relied upon the erroneous assumption that coal mine employment can never cause a chronic obstructive pulmonary disease. The Fourth Circuit further explained

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discussion of the objective evidence to constitute a reasoned medical opinion under section 718.202(a)(4) opposing a finding of legal pneumoconiosis." *Id*. The administrative law judge also stated that "Dr. Loudon appears to have used the 'medical' or 'clinical' definition of pneumoconiosis rather than the substantially broader 'legal' definition of the pneumoconiosis which includes 'any pulmonary impairment related to or aggravated by dust exposure in the mines.'" *Id*. at 7. Contrary to the administrative law judge's finding, the determination of whether a diagnosed condition is encompassed within the legal definition of pneumoconiosis is for the fact-finder, and not for the physician. *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990).

that, unlike the medical opinions it examined in *Warth*, in *Stiltner* none of the challenged physicians assumed that coal mine employment can never cause chronic obstructive pulmonary disease. In the instant case, Dr. Zaldivar did not assume that coal mine employment can never cause chronic obstructive pulmonary disease. To the contrary, Dr. Zaldivar stated that "[c]oal workers' pneumoconiosis produces an obstructive and not a restrictive nor interstitial impairment." Employer's Exhibit 4. Dr. Zaldivar also stated that "[i]n this case all though (sic) there is a mild airway obstruction, the main impairment is one of a diffusion impairment and hypoxemia during exercise" and that "[s]uch is not the pattern exhibited by coal workers' pneumoconiosis." *Id*. Thus, as employer argues, the administrative law judge erred in discrediting Dr. Zaldivar's opinion because it is in conflict with the holding in *Warth*. On remand, the administrative law judge must consider the evidence in accordance with *Stiltner* as well as *Warth*.

In addition, employer asserts that the administrative law judge erred in discrediting Dr. Jarboe's opinion because it is hostile to the Act. The administrative law judge stated, "I find that Dr. Jarboe's analysis, like Dr. Zaldivar's opinions, is tainted by reliance on an assumption that is antithetical to the Act." Decision and Order on Remand at 5. The administrative law judge further stated, "[t]hat is, Dr. Jarboe in part based his opinion that the [c]laimant does not suffer from coal workers' pneumoconiosis on an assumption that individuals suffering from simple pneumoconiosis 'rarely, if ever, have physiological changes during exercise of a magnitude to cause respiratory limitation of work capacity.'" *Id*. The administrative law judge concluded, "[i]n my view, the inescapable meaning of this statement is that Dr. Jarboe apparently believes that simple pneumoconiosis rarely, if ever, causes a respiratory impairment which places his opinion squarely in conflict with the Act." *Id*. However, Dr. Jarboe's opinion does not foreclose all possibility that simple pneumoconiosis can be disabling. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). Thus, as employer argues, we hold that the administrative law judge erred in discrediting Dr. Jarboe's opinion because it is hostile to the Act.

If the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), he must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether claimant has established the existence of pneumoconiosis. *See Compton, supra*; *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Additionally, in view of our disposition of the case at 20 C.F.R. §718.202(a)(4) (2000), we vacate the administrative law judge's findings at 20 C.F.R. §§718.203(b) (2000) and 718.204(b) (2000), and remand the case for further consideration, if reached. *See* 20 C.F.R. §§718.203(b); 718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded for further proceedings consistent with this

opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge