BRB No. 01-0377 BLA

JOHNNY B. TURNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD 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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Robert Austin Vineyard), Abingdon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Rita Roppolo (Eugene Scalia, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (00-BLA-0473) of Administrative Law Judge Richard A. Morgan awarding benefits on a duplicate 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] Claimant sought modification of the

[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 47 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 March 22, 2001, the Board received a brief from the Director, Office of Workers' Compensation

Board's Decision and Order in *Turner v. Clinchfield Coal Co.*, BRB No. 98-1089 BLA (Sept. 10, 1999)(unpublished). Director's Exhibit 142. The Board, in *Turner*, affirmed Administrative Law Judge Daniel L. Stewart's Decision and Order on Remand Denying Benefits dated April 21, 1998, Director's Exhibit 133.[2] *Id.* Judge Stewart had denied benefits based on claimant's failure to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000). Judge Stewart, in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) (2000), had accorded less weight to Dr. Robinette's finding that claimant had pneumoconiosis because the physician had relied on a 40 pack-year smoking history whereas claimant had reported a 63 pack-year smoking history to Dr. Dahhan, and thereby undermined the credibility of Dr. Robinette's report. Director's Exhibit 133 at 29, 31, 33. The Board, in affirming Judge Stewart's weighing of the evidence at 20 C.F.R. §718.202(a)(4) (2000), stated:

> The administrative law judge accorded less weight to Dr. Robinette's opinion on the ground that he was unaware of claimant's more extensive history of cigarette smoking. *Id.* at 31. We reject claimant's assertion that the administrative law judge acted improperly in reconsidering Dr. Robinette's

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Programs (the Director), in which he reviewed the case in light of the District Court's order. On April 3, 2001, the Board received claimant's letter in which he indicated his agreement with the Director's position on this issue. 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). The District Court's decision renders moot those arguments made by the Director and claimant regarding the impact of the challenged regulations.

[2]The Board, in *Turner v. Clinchfield Coal Co.*, BRB No. 98-1089 BLA (Sept. 10, 1999)(unpublished), set forth the relevant procedural history. Director's Exhibit 142.

> opinion on remand. [] Moreover, the administrative law judge acted within his discretion in discounting Dr. Robinette's opinion on the basis that his finding with regard to claimant's smoking history was inaccurate in light of Dr. Dahhan's testimony that claimant admitted that he had approximately a 63 pack[-] year history. *See Gouge v. Director, OWCP*, 8 BLR 1-307 (1985).

Board's Decision and Order at 3-4. On November 4, 1999, claimant timely requested modification of the claim and submitted additional medical evidence. Director's Exhibit 143. The district director denied claimant's request for modification, and a hearing was held before Administrative Law Judge Richard A. Morgan (the administrative law judge) on August 18, 2000.

In his Decision and Order Awarding Benefits dated December 8, 2000, which is the subject of the instant appeal, the administrative law judge found that Judge Stewart had erred in determining the extent of claimant's smoking history and thus, the prior denial contained a mistake in a determination of fact under 20 C.F.R. §725.310 (2000). The administrative law judge thus determined that claimant established a basis for modification of the prior denial. The administrative law judge further found, based on the newly submitted evidence which he considered in conjunction with the old evidence, that claimant established the elements of entitlement which were previously adjudicated against him, and thus established a "material change in conditions" under 20 C.F.R. §725.310 (2000). Specifically, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) - (3) (2000), but that the medical opinions were sufficient to establish the existence of the disease under 20 C.F.R. §718.202(a)(4) (2000). In considering the weight and credibility of the medical opinion evidence, the administrative law judge accorded greatest weight to Dr. Robinette's opinion because he had been claimant's treating physician since 1991, he had seen claimant every six months since 1991, and he had observed claimant's "changing condition over an extended period of time." *Id.* at 25. The administrative law judge also noted that Dr. Robinette was well-qualified as he was Board-certified in internal medicine with a subspecialty in pulmonary diseases and was also a B reader. *Id.* The administrative law judge added that although he found that the x-ray evidence did not establish the existence of pneumoconiosis, Dr. Robinette's opinion, supported by the majority of physicians diagnosing chronic obstructive pulmonary disease, was sufficient to establish the existence of "legal" pneumoconiosis under 20 C.F.R. §718.202(a)(4) (2000). *Id.* at 25, 28.

The administrative law judge next found that claimant established that his pneumoconiosis arose from his coal mine employment under 20 C.F.R. §718.203(b) (2000) and that he was totally disabled under 20 C.F.R. §718.204(c)(1) and (c)(4) (2000).[3]

[3]The provision pertaining to total disability, previously set out at 20 C.F.R.

Considering the cause of claimant's disability, the administrative law judge found that claimant established that his pneumoconiosis was a contributing cause of his disability under 20 C.F.R. §718.204(b) (2000) pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). The administrative law judge found:

> Although Dr. Robinette was not able to assign a percentage to the amount of cigarette smoking and coal dust exposure which contributed to [the miner's] disability, Dr. Robinette found occupational lung disease significantly contributed to his respiratory symptoms.
>
> As stated above, I found the pulmonary function studies established total disability and that a majority of the medical reports established claimant has a totally disabling pulmonary or respiratory impairment due to COPD. The physicians disagreed on the cause of claimant's pulmonary problems. However, as discussed above, I found Dr. Robinette's opinion the most persuasive. Dr. Robinette found claimant had CWP and COPD which was caused, in part by coal dust exposure. Dr. Robinette opined that claimant was totally disabled due to his lung disease and that occupational lung disease significantly contributed to his respiratory symptoms. Therefore, I find that pneumoconiosis is a contributing cause of claimant's total disability.

Decision and Order at 32. Accordingly benefits were awarded.

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§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).

On appeal, employer contends that the administrative law judge erred in finding that Judge Stewart made a mistake in a determination of fact in finding that claimant had a 63 pack-year smoking history and that this error resulted in the administrative law judge erroneously finding that claimant established the existence of pneumoconiosis. Employer further contends that the administrative law judge selectively analyzed the evidence, and failed to consider all the relevant evidence, in finding that claimant established the existence of pneumoconiosis. Lastly, employer challenges the administrative law judge's weighing of the evidence on disability causation. Neither claimant[4] nor the Director, Office of Workers' Compensation Programs, has filed a brief in response to employer's appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer challenges the administrative law judge's determination that Judge Stewart erred in finding that claimant had a 63 pack-year smoking history. Employer asserts that claimant's testimony establishes the 63 pack-year smoking history relied upon by Judge Stewart, and that the administrative law judge erred in failing to consider claimant's testimony in finding a mistake in a determination of fact in Judge Stewart's prior denial. In this regard, employer relies on claimant's testimony at the April 1, 1993 hearing before Judge Joel R. Williams, that he smoked from "probably" as early as age 15 until the "first part" of 1985, and smoked an average of one and one-half packs per day. 1993 Hrg. Tr. at 27-28, 30, Director's Exhibit 90. Employer thus calculates that claimant smoked from 1942 to early 1985 - 42 years at least, smoking an average of one and one-half packs per day, resulting in a total, 63 pack-year smoking history. Employer thus argues that the record supports Judge Stewart's finding of a 63 pack-year smoking history and that Judge Stewart made no error in so finding, contrary to the determination of the administrative law judge. Employer further argues that it was error for the administrative law judge to consider the smoking histories contained in the medical reports without also considering claimant's sworn testimony. Employer seeks a remand of the case on this basis alone.

The administrative law judge concluded that Judge Stewart made a mistake in a determination of fact in finding that claimant had a 63 pack-year smoking history and in using this 63-pack year smoking history to discredit the opinions of Drs. Robinette, Smiddy

[4]By Order dated April 12, 2001, the Board indicated that it considered unwarranted claimant's request for additional time to file a response brief. The Board afforded claimant 10 days to file a response brief. Claimant, however, did not file a response brief.

and Kanwal, because these physicians did not consider claimant's actual, and more extensive, smoking history in reaching their conclusions.

We vacate the administrative law judge's findings and remand the case for him to consider all the relevant evidence and redetermine whether the prior denial contains a mistake in a determination of fact under 20 C.F.R. §725.310 (2000).[5] The record reveals that in finding a mistake in a determination of fact, the administrative law judge did not consider claimant's testimony, relied upon by employer on appeal. Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a). On remand, the administrative law judge must address all the relevant evidence of record, including claimant's testimony, and determine its credibility. If the administrative law judge finds that claimant has established a basis for modification under 20 C.F.R. §725.310 (2000), he must then consider the merits of the case. *See* discussion, *infra*.

Employer next contends that, based on the administrative law judge's incorrect finding that Judge Stewart made a mistake in determining the extent of claimant's smoking history, the administrative law judge improperly found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4) (2000). Employer argues that since claimant's testimony establishes a 63 pack-year smoking history, the administrative law judge's rejection of Judge Stewart's consideration of Dr. Robinette's opinion was erroneous. Employer adds that the administrative law judge's erroneous finding of a 40 pack-year smoking history "infects all his reasoning and decision making concerning the existence of pneumoconiosis. The ALJ's finding of pneumoconiosis must be vacated and remanded for proper consideration." Employer's Brief at 5.

Contrary to employer's contention, the administrative law judge did not err in considering *de novo* the credibility of the evidence and was not obliged to follow Judge Stewart's findings regarding the weight and credibility of Dr. Robinette's opinion in considering the modification issue. 20 C.F.R. §725.310 (2000); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). However, in light of our decision to vacate the administrative law judge's finding regarding the extent of claimant's smoking history, and given the fact that this finding affected the administrative law judge's weighing of the

[5]The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

medical opinions regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000), we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) (2000). In order to avoid any repetition of error on remand, we shall address employer's remaining contentions of error.

Employer contends that the administrative law judge improperly considered and selectively analyzed the newly submitted evidence relevant to the existence of pneumoconiosis and that he erred in crediting Dr. Robinette's opinion at 20 C.F.R. §718.202(a)(4) (2000). Employer argues that the administrative law judge ignored the fact that Dr. Robinette relied on a positive x-ray in diagnosing pneumoconiosis, where the administrative law judge found the x-ray evidence to be negative, and failed to consider Dr. Robinette's testimony regarding the role of claimant's smoking history in causing his conditions.

Employer's contentions lack merit. The administrative law judge properly considered all the evidence relevant to claimant's burden at 20 C.F.R. §718.202(a) (2000) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000)(the administrative law judge must weigh all types of relevant evidence together in determining whether the existence of pneumoconiosis is established at 20 C.F.R. §718.202(a) (2000)). Decision and Order at 19. In crediting Dr. Robinette's opinion at 20 C.F.R. §718.202(a)(4) (2000), the administrative law judge found:

> Although I found the x-ray evidence did not establish the existence of medical pneumoconiosis, Dr. Robinette's consistent observations of crackles, wheezes, diminished breath sounds and diagnosis of COPD, emphysema and bronchitis are sufficient to establish the existence of "legal" CWP under the Act. Dr. Robinette has consistently considered claimant's smoking history, finding in excess of 40 pack-years. Considering claimant's smoking history and 38 years of coal mine employment, Dr. Robinette found coal dust exposure significantly contributed to his respiratory symptoms. Dr. Robinette found coal dust exposure caused claimant's restrictive and part of his chronic airflow obstruction. Dr. Robinette was unable to separate the amount of damage caused by cigarette smoking as compared to the damage caused by coal dust exposure. Dr. Robinette is not required to assign an amount to the damage caused by coal dust exposure.[footnote omitted] Considering that claimant smoked for approximately the same number of years he worked in the coal mines, that claimant has obstructive and restrictive ventilatory defects and numerous respiratory problems, I find Dr. Robinette's opinions the most consistent with claimant's smoking history, coal mine employment history, physical findings, and pulmonary function studies...

Decision and Order at 25. The administrative law judge further found:

> Crediting Dr. Robinette's observations over an extended period of time in conjunction with the majority of physicians diagnosing COPD and Dr. Sargent's opinion, I find the claimant has met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

Decision and Order at 28. The administrative law judge thereby properly considered that the weight of the x-ray evidence was negative in finding the medical reports established the existence of pneumoconiosis. *See Compton, supra.* Further, the administrative law judge thereby fully considered Dr. Robinette's opinion regarding the role claimant's smoking history played in causing his respiratory and pulmonary conditions. We thus reject employer's assertions that the administrative law judge did not "deal with" the issue of the import of the negative x-ray evidence and did not fully consider Dr. Robinette's opinion regarding the role played by claimant's smoking history. However, because employer's argument raises the issue of the import of claimant's smoking history on the administrative law judge's analysis of the medical opinion evidence, on remand he must address that issue.

Employer next asserts that since the latest measurement of claimant's total lung capacity (eighty percent of predicted normal) exceeded Dr. Robinette's last measurement (fifty percent of predicted normal), it shows an improved lung capacity and rules out any permanent restriction. Employer argues that this improved lung capacity, when considered with Dr. Robinette's testimony that restriction based on a *reduced* lung capacity was the only factor differentiating claimant's lung disease from a lung disease caused by smoking, proves that claimant's lung disease is not related to his coal mine employment and is not pneumoconiosis. Employer asserts that the administrative law judge ignored this "evidence." Employer's Brief at 8. Employer's argument that the administrative law judge ignored relevant evidence lacks merit. Employer's argument is an improper attempt to interpret medical data and to call this interpretation "evidence." The interpretation of medical data is for the medical experts. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). We thus reject employer's argument.

Employer next contends that the administrative law judge selectively analyzed Dr. Hippensteel's opinion. Employer argues that the administrative law judge stated that Dr. Hippensteel diagnosed a severe restrictive abnormality, whereas Dr. Hippensteel actually found that the pulmonary function study *suggested* severe restriction which was not confirmed by the later lung volume test, which showed no restriction. We disagree. The administrative law judge fully addressed Dr. Hippensteel's findings. He specifically noted Dr. Hippensteel's opinion that claimant's pulmonary function study suggested severe restriction while a later lung volume capacity test showed a total lung capacity within normal

range, no actual restriction, and a problem with how air moved in and out which was consistent with claimant's diaphragm, *see* Employer's Exhibit 30 at 18-19, 26-28. Decision and Order at 14, *see also* pp. 13, 27-28.

Employer contends that the administrative law judge erroneously credited Dr. Robinette's opinion that claimant's elevated hemidiaphragm did not account for the *progressive* volume loss that Dr. Robinette had observed over the years. Employer argues that the administrative law judge failed to appreciate that claimant's total lung capacity was normal in April 2000. Employer argues that since claimant's total lung capacity actually improved, he did not have progressive volume loss or permanent restriction as would have been expected, if claimant's lung disease was caused by coal dust. Employer asserts, "[s]ince claimant's total lung capacity behaved precisely as Dr. Hippensteel stated it would if cause[d] by claimant's elevated hemidiaphragm, the ALJ had no rational basis to discount Dr. Hippensteel's opinion." Employer's Brief at 9.

We agree with employer that the administrative law judge erred in according less weight to Dr. Hippensteel's opinion at 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge stated:

> I do not find Dr. Hippensteel's opinions persuasive. Although he found the pulmonary function studies did not rule out an obstruction, Dr. Hippensteel does not diagnose COPD, which the majority of physicians diagnosed. Dr. Hippensteel attributes claimant's pulmonary problems to an elevated diaphragm and atelectasis. The majority of physicians found claimant's pulmonary problems related to COPD. Furthermore, I find Dr. Robinette's opinion more persuasive. Dr. Robinette explained that claimant's elevated hemidiaphragm could affect lung function, but does not account for the progressive volume loss Dr. Robinette has observed over the years. Therefore, I do not afford Dr. Hippensteel's opinion great weight.

Decision and Order at 27-28. Employer correctly argues that it was irrational for the administrative law judge to discredit Dr. Hippensteel's opinion because he did not use the term "chronic obstructive pulmonary disease" where he found that additional medical records he reviewed showed "a significant pulmonary dysfunction of an obstructive type that is aggravated by [claimant's] obesity and decreased function of left diaphragm." Employer's Exhibit 13 at 16.[6] On remand, the administrative law judge must reconsider Dr. Hippensteel's opinion in its totality along with the other opinions of record, including the opinion of Dr.

[6]Dr. Hippensteel testified on deposition that because of the "reduction in flows" it was not possible to exclude the existence of an obstructive impairment. Employer's Exhibit 30 at 29; *see* Decision and Order at 27.

Robinette. APA, *supra*. The administrative law judge must redetermine whether claimant has met his burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and render findings consistent with the mandate of *Compton*. If, on remand, the administrative law judge finds that claimant has met his burden at 20 C.F.R. §718.202(a), he must then reconsider whether claimant has established that his pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203.

Lastly, employer challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to *Robinson*. Employer contends that the administrative law judge cited to many relevant cases but did not indicate whether or not he was applying them. Employer also argues that the administrative law judge's crediting of Dr. Robinette's opinion on the issue of disability causation cannot stand as the administrative law judge failed to address the opinions of the other physicians of record, including Dr. Hippensteel's contrary opinion. Employer repeats its argument that the administrative law judge erred when he relied on Dr. Robinette's opinion to find the existence of pneumoconiosis and argues that, likewise, his reliance on Dr. Robinette's opinion to determine the disability causation issue was erroneous. We agree with employer's contention that the administrative law judge's consideration of the evidence in determining the issue of disability causation at 20 C.F.R. §718.204(b) (2000) was inadequate, and we vacate that finding. APA, *supra*.

Further, the administrative law judge duly applied the standard articulated by the Fourth Circuit in *Robinson* in finding that claimant met his burden under 20 C.F.R. §718.204(b) (2000). Decision and Order at 31-32. The Department of Labor, however, recently revised the regulation concerning disability causation, 20 C.F.R. §718.204(c), which is applicable to all pending cases. The revised regulation at 20 C.F.R. §718.204(c)(1) requires that claimant establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). If, on remand, the administrative law judge finds the existence of pneumoconiosis established under 20 C.F.R. §718.202, he must then determine whether the credible evidence establishes that claimant's pneumoconiosis is a substantially contributing cause of his respiratory or pulmonary impairment pursuant to the revised regulation at 20 C.F.R. §718.204(c)(1).[7] The

[7]We affirm the administrative law judge's finding that claimant is totally disabled due to a respiratory or pulmonary impairment under 20 C.F.R. §718.204(c) (2000) as it is unchallenged on appeal. *See* 20 C.F.R. §718.204(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge must render findings, based on all the relevant evidence, in accordance with the APA. In this regard, we note that while an administrative law judge may credit a treating physician's opinion, he may not do so mechanically but must offer a proper reason. *See Akers, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge