BRB No. 01-0400 BLA

ERVIN YATES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SPRING HOLLOW COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Robert Austin Vinyard), Abingdon, Virginia, for claimant.[1]

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

[1] After filing claimant's brief, in this case, claimant's counsel filed a Motion to Withdraw as Claimant's Counsel. We grant counsel's motion. 20 C.F.R. §802.219.

Claimant appeals the Decision and Order on Remand (90-BLA-1865) of Administrative Law Judge Richard T. Stansell-Gamm denying 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).[2] This case is

[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 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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 court's

before the Board for the fourth time. The case was first considered by Administrative Law Judge Glenn Robert Lawrence, who credited claimant with thirty-four years of coal mine employment. Judge Lawrence found the evidence sufficient to establish the existence of pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b) (2000), and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Judge Lawrence also found that the presumption contained in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by Section 718.305 (2000), was invoked and not rebutted. Accordingly, benefits were awarded, commencing September 1, 1981. 1991 Decision and Order.

On employer's appeal, the Board vacated Judge Lawrence's Section 718.202(a)(4) (2000) finding and his 718.204(c)(4) (2000) finding inasmuch as he had mechanically applied the true-doubt rule. Therefore, the Board vacated Judge Lawrence's Section 718.204(c) (2000) finding and his finding that claimant established invocation of the Section 718.305 (2000) presumption. The Board also vacated Judge Lawrence's Section 718.305 (2000) rebuttal findings because he failed to provide a rationale for determining that the conflicting x-ray readings and medical opinions were equally probative. *See Yates v. Spring Hollow Coal Co.*, BRB No. 91-2146 BLA (Feb. 18, 1993)(unpub.).

On remand, Judge Lawrence found that claimant established total respiratory disability pursuant to Section 718.204(c) (2000), and therefore found invocation of the rebuttable presumption pursuant to Section 718.305 (2000) established. Judge Lawrence also found that employer failed to rebut this presumption pursuant to Section 718.305(d) (2000), and again awarded benefits. 1993 Decision and Order.

Employer appealed a second time, and the Board affirmed Judge Lawrence's finding of total respiratory disability pursuant to Section 718.204(c) (2000), and his finding of invocation of the rebuttable presumption pursuant to Section 718.305 (2000). The Board also affirmed Judge Lawrence's finding that employer failed to establish rebuttal of this presumption, and further affirmed the award of benefits. However, the Board vacated Judge Lawrence's finding regarding the date of entitlement and remanded the case for him to reconsider this issue. *See Yates v. Spring Hollow Coal Co.*, BRB No. 93-2035 BLA (June 23, 1995)(unpub.). Subsequently, employer filed a motion for reconsideration, which the Board denied. *See Yates v. Spring Hollow Coal Co.*, BRB No. 93-2035 BLA (Dec. 31, 1996)(unpub.)(Order on Reconsideration).

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decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On remand, the case was transferred to Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge). The administrative law judge indicated that he was unable to determine the exact date of onset of total disability due to pneumoconiosis from the evidence of record, and therefore, he found the date of entitlement to be August 1981, the filing date of the claim. 1997 Decision and Order.

On employer's third appeal, the Board declined employer's request to reconsider its earlier holdings pursuant to Sections 718.204(c) (2000) and 718.305 (2000). The Board also affirmed the administrative law judge's finding concerning the date of claimant's entitlement to benefits. *See Yates v. Spring Hollow Coal Co.*, BRB No. 98-0151 BLA (Oct. 14, 1998)(unpub.). Employer requested reconsideration of the Board's Decision and Order. In view of changes in the law, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the Board vacated Judge Lawrence's credibility determinations regarding the medical opinions of Drs. Fino, Rasmussen, Dahhan and Robinette, and Judge Lawrence's findings pursuant to Sections 718.204(c) (2000) and 718.305 (2000). The Board also vacated the administrative law judge's finding regarding the date of entitlement. *See Yates v. Spring Hollow Coal Co.*, BRB No. 98-0151 BLA (May 17, 1999)(unpub.)(Decision and Order on Reconsideration).

On remand, the administrative law judge reviewed the medical evidence of record and determined that claimant did not establish total disability by a preponderance of the medical opinion evidence pursuant to Section 718.204(c)(4) (2000). Further, the administrative law judge found that since the preponderance of the pulmonary function studies and blood gas studies did not demonstrate total disability, claimant failed to establish total respiratory or pulmonary disability. Therefore, the administrative law judge denied benefits. 2000 Decision and Order.

In the current appeal, claimant asserts that the administrative law judge's finding that claimant has not established total disability is not supported by substantial evidence. Employer responds urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In weighing the evidence regarding total disability,[3] the administrative law judge

reviewed the pulmonary function study and blood gas study evidence, and he considered the opinions of Drs. Berry, Modi, Rasmussen, Dahhan, Fino, Robinette and Stewart. 2000 Decision and Order at 11-20. The administrative law judge determined that Dr. Berry's opinion did not address whether claimant is disabled, and found that this opinion was not relevant to the question of total disability.[4] The administrative law judge accorded little probative weight to Dr. Modi's opinion because of his criminal conviction and loss of medical license. 2000 Decision and Order at 20. The administrative law judge also gave little weight to Dr. Rasmussen's opinion due to the limited documentation for his opinion, which was based solely on the objective medical evidence developed during his examination of claimant, including the results of a pulmonary function study which Dr. Rasmussen admitted were "relatively poor in quality." 2000 Decision and Order at 20. Similarly, the administrative law judge accorded little weight to Dr. Robinette's opinion because it was limited to the results of objective tests administered during his examination of claimant and because the physician did not sufficiently explain his opinion in view of the results of the tests he administered. 2000 Decision and Order at 20-21. The administrative law judge found Dr. Stewart's opinion regarding disability to be of little value because Dr. Stewart opined that claimant had the respiratory capacity to perform moderate manual labor, while the administrative law judge found that claimant's last coal mine employment required heavy manual labor. Further, the administrative law judge found Dr. Stewart's statement that claimant would experience shortness of breath when performing heavy labor conflicts with the physician's opinion that claimant is not totally disabled. 2000 Decision and Order at 21. The administrative law judge determined that the opinions of Drs. Dahhan and Fino are the best documented and reasoned opinions of record, and that the opinions of these physicians are the most probative medical reports of record, noting that these opinions are consistent with the preponderance of the objective tests of record. 2000 Decision and Order at 22.

On appeal, claimant asserts that the opinions of Drs. Fino and Dahhan should be accorded little weight because these physicians based their opinions on the erroneous assumptions that coal dust exposure does not cause an obstructive impairment and that claimant does not have pneumoconiosis. Further, claimant maintains that the pulmonary function study administered by Dr. Robinette supports his finding of a respiratory disability. Claimant also asserts that the administrative law judge failed to weigh the pulmonary function study evidence, and contends that this omission requires remand.

We affirm the administrative law judge's finding that the opinions of Drs. Dahhan and Fino are entitled to greater weight because they are better supported by the objective evidence of record, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985), and his finding that Dr. Robinette's opinion is not entitled to determinative weight because it is not supported by the underlying objective evidence, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19

(1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985), as these findings are supported by substantial evidence. *See also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In addition, contrary to claimant's assertion, the evidence of record does not contain any statement by Dr. Fino or Dr. Dahhan that pneumoconiosis can never cause an obstructive impairment.[5] *See* Employer's Exhibits 2, 7. The issue before the Board concerns only the degree of any respiratory or pulmonary impairment claimant suffers, and, therefore, the question of whether pneumoconiosis causes an obstructive impairment is not at issue. *See* 20 C.F.R. §§718.204(b); 718.204(c)(4) (2000); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). Further, since the existence of pneumoconiosis and the existence of total respiratory disability are separate elements of entitlement and require independent assessments of the evidence, *see* 20 C.F.R. §§718.202, 718.204(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987), the findings by Drs. Fino and Dahhan that claimant does not suffer from pneumoconiosis are independent of their opinions regarding the degree, if any, of claimant's disability. Accordingly, we reject claimant's assertions regarding the administrative law judge's weighing of these medical opinions and affirm the administrative law judge's finding that the medical opinion evidence is insufficient to demonstrate total disability. *See* 20 C.F.R. §718.204(b); 718.204(c)(4) (2000).

We also reject claimant's assertion that the administrative law judge erred by failing to weigh the pulmonary function study evidence. The Board previously affirmed Judge Lawrence's weighing of the pulmonary function study and blood gas study evidence, and his finding that this evidence does not demonstrate total disability, *see* 1991 Decision and Order at 10; *Yates v. Spring Hollow Coal Co.*, BRB No. 91-2146 BLA slip op. at 2, n.1 (Feb. 18, 1993)(unpub.). Because we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to demonstrate total disability, there is no contrary probative evidence to weigh pursuant to the mandate of *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987).

In view of the foregoing, we hold that invocation of the presumption contained in Section 718.305 cannot be established, *see* 20 C.F.R. §718.305(c). Further, since we affirm the administrative law judge's finding that claimant has not established total respiratory or pulmonary disability, one of the essential elements of entitlement pursuant to Part 718, *see Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we also affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge