BRB No. 03-0324 BLA

BERKLEY CONNER Claimant-Petitioner v. EASTERN ASSOCIATED COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/12/2004 DECISION and ORDER

Appeal of the Decision and Order On Third Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.) Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMTIH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order On Third Remand (96-BLA-1090) of Administrative Law Judge Clement J. Kichuk (administrative law judge) 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).[1] Based on the date of

---

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All

filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. This case is on appeal to the Board for the fourth time. The prior history of this case is set forth in the Board's most recent decision in *Conner v. Eastern Associated Coal Corp.*, BRB No. 00-0875 BLA (May 25, 2001)(unpub.). In that decision, the Board vacated the Decision and Order on Remand awarding benefits of Administrative Law Judge James W. Kerr, Jr. and remanded the case for further consideration under Sections 718.202(a) and 718.204(b), (c). The Board held that Judge Kerr had made errors in finding that the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4): finding that claimant established the existence of pneumoconiosis solely because the majority of the doctors opined that claimant had pneumoconiosis; failing to adequately address whether Dr. Rasmussen's diagnosis of pneumoconiosis was reasoned; failing to address whether Dr. Tuteur's opinion was equivocal; and presuming that Dr. Zaldivar was biased. The Board, therefore, remanded the case for the administrative law judge to reweigh the opinions of Dr. Tuteur, Rasmussen and Zaldivar. Because the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the Board instructed the administrative law judge that if he found on remand that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, he must then consider together all the evidence relevant to the existence of pneumoconiosis at Section 718.202(a) to determine whether claimant established the existence of pneumoconiosis pursuant to the Fourth Circuit's decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The Board also held that the administrative law judge erred in finding that the medical opinion evidence established total respiratory disability, and remanded the case for a reweighing of the opinions of Drs. Tuteur, Rasmussen and Zaldivar on that issue. The Board instructed the administrative law judge that if he found the medical opinion evidence sufficient to establish total respiratory disability, he must then weigh together all the relevant evidence, both like and unlike, to determine whether claimant established the existence of a totally disabling respiratory impairment. Additionally, the Board vacated the administrative law judge's finding that the evidence was sufficient to establish total disability due to pneumoconiosis, instructing the administrative law judge that if he finds the evidence sufficient to establish the existence of pneumoconiosis and total disability, he must then consider whether the evidence is sufficient to establish total disability due to pneumoconiosis.

On remand, the administrative law judge concluded that the medical opinion evidence of record was insufficient to establish either the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a)(4) and 718.204(b)(2)(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the evidence establishes the existence of pneumoconiosis and total disability. Employer responds, urging affirmance of the denial of

---

citations to the regulations, unless otherwise noted, refer to the amended regulations.

benefits. The Director, Office of Workers' Compensation Programs, is not participating 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 order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202(a), 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis solely on consideration of the medical opinion evidence without consideration of other evidence as required by the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The Board, however, instructed the administrative law judge to consider first whether the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4) and if he so found, to then weigh that evidence together with other evidence relevant to the existence of pneumoconiosis pursuant to *Compton*. In this case, however, the administrative law judge found that the medical opinion evidence did not establish the existence of pneumoconiosis. Moreover, the Board noted that Judge Kerr had previously found that the existence of pneumoconiosis was not established at Section 718.202(a)(1)-(3), a finding unchallenged by claimant. *Connor*, slip op. at 2 n.2. Based on these facts, therefore, the administrative law judge did not err when he did not weigh all the evidence together pursuant to *Compton*.

Claimant also contends that Dr. Rasmussen's opinion is sufficient to establish the existence of pneumoconiosis. In finding that the medical opinion evidence did not establish the existence of pneumoconiosis, the administrative law judge found that even though Dr. Rasmussen, a board-certified internist, diagnosed the existence of pneumoconiosis, his opinion was not well-reasoned because his reports were internally inconsistent. Specifically, the administrative law judge discounted Dr. Rasmussen's opinion because the doctor had not sufficiently explained the evolution in his opinion, identifying initially cigarette smoking and coal mine dust exposure as "risk factors" for claimant's respiratory impairment and stating that coal workers' pneumoconiosis was an example of the type of interstitial lung disease shown by claimant's pattern of impairment and then absolutely concluding that claimant had pneumoconiosis caused in large part by coal mine employment. Decision and Order at 3, 6.

This was rational. *U.S. Steel Mining Co., Inc. v. Director, OWCP, [Jarrell]*, 187 F.3d 384, 390, 21 BLR 2-639, (4th Cir. 1999); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'g*, 865 F.2d 916 (7th Cir. 1989). The administrative law judge discounted the opinion of Dr. Tutuer, a board-certified pulmonologist, as equivocal with regard to the existence of pneumoconiosis inasmuch as Dr. Tuteur found the data he reviewed (Dr. Rasmussen's reports) insufficient to confirm a diagnosis of pneumoconiosis. This was rational. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Finally, the administrative law judge credited the opinion of Dr. Zaldivar, a board-certified pulmonologist, who did not find the existence of pneumoconiosis. Dr Zaldivar diagnosed only a very minimal airway obstruction due to smoking and a mild diffusion impairment due to smoking and lung trauma. Dr. Zaldivar concluded that the lung trauma was the result of chest injuries, causing rib fractures, which resulted in a stiffening of claimant's chest thereby reducing his forced vital capacity and total lung capacity. Thus, contrary to claimant's contention, the administrative law judge rationally accorded greater weight to the opinion of Dr. Zaldivar as he found it to be better supported than Dr. Rasmussen's. This was rational. *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); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 31-33 (4th Cir. 1997)("In weighing opinions, the ALJ is called upon to consider their quality," taking into account, among other things, "the opinions' reasoning" and "detail of analysis.") *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *Trent*, *supra*; *Perry*, *supra*. Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established, an essential element of entitlement, we need not address claimant's contention regarding disability. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order On Third Remand - Denying Benefits is affirmed.

SO ORDERED.

____

ROY P. SMITH
Administrative Appeals Judge

____

REGINA C. McGRANERY
Administrative Appeals Judge

____

BETTY JEAN HALL
Administrative Appeals Judge