BRB No. 05-0378 BLA

NICKEY STANLEY	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
MULLINS and STANLEY TRUCKING COMPANY	)	DATE ISSUED: 01/23/2006
	)	
	)	
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 Living Miner's Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph (Wolfe Williams & Rutherford), Norton Virginia, for claimant.

Anne Musgrove, Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits (2004-BLA-05124) of Administrative Law Judge Mollie W. Neal 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). The administrative law judge found that the evidence of record was sufficient to establish the existence of legal pneumoconiosis, *i.e.*, that claimant's respiratory impairment arose out of coal mine employment and that the evidence established total disability due to pneumoconiosis (disability causation). 20 C.F.R. §§718.202(a)(4), 718.204(c). As a finding of total respiratory disability had already been established, the administrative law judge awarded benefits on the claim.

On appeal, employer challenges the administrative law judge's finding of legal pneumoconiosis based on the medical opinion evidence, asserting that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Castle, in crediting the opinions of Drs. Rasmussen and Robinette, and in failing to consider the opinions of Dr. Prince, and other physicians associated with the Medical Associates of Southwest Virginia. Employer also challenges the administrative law judge's finding that the medical opinion evidence establishes disability causation. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter stating that he will not participate in the appeal before the Board, unless specifically requested to do so. In a footnote, however, the Director contends that the administrative law judge failed to enforce the evidentiary limitations set forth at Section 725.414 when she permitted employer to submit evidence in excess of those limitations,[1] *i.e.*, three x-ray readings in support of its affirmative case (Director's Exhibit 31) and one extra rebuttal rereading of the January 15, 2003 x-ray (Employer's Exhibits 5, 6). The Director contends, however, that the error is harmless if the Board affirms the award of benefits, but if the Board vacates the award of benefits and remands the case, the administrative law judge should be instructed to enforce the evidentiary limitations at Section 725.414(a)(3)(i) and (ii).

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).

Employer first challenges the administrative law judge's consideration of the newly submitted medical opinion evidence pursuant to Section 718.202(a)(4), asserting that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Castle, by crediting the opinions of Drs. Rasmussen and Robinette, and by failing to consider the hospital records of Dr. Prince and other physicians associated with the Medical Associates of Southwest Virginia.

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[1] No party challenges the administrative law judge's findings that the evidence establishes total respiratory disability; nor, the administrative law judge's finding that June, 2001 would be the correct date for commencement of benefits. These findings are, accordingly, affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

At the outset, the administrative law judge found that the preponderance of the x-ray evidence did not establish the existence of clinical pneumoconiosis at Section 718.202(a)(1). Decision and Order at 6. Turning to the medical opinion evidence, the administrative law judge concluded: that Dr. Rosenberg found the presence of clinical, but not legal pneumoconiosis; that Dr. Castle found neither the existence of clinical or legal pneumoconiosis, and that Drs. Rasmussen and Robinette concluded that claimant had both clinical and legal pneumoconiosis. Decision and Order at 6-9. The administrative law judge discounted both opinions that the miner did not have legal pneumoconiosis: she found Dr. Robinette's opinion to be equivocal and conclusory and Dr. Castle's opinion to be conclusory. Decision and Order at 9. She also concluded that the findings of Drs. Rasmussen and Robinette, as to the presence of clinical pneumoconiosis, were not supported in the record. On weighing the x-ray evidence together with the medical opinion evidence pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), however, she credited the well-reasoned opinions of Drs. Rasmussen and Robinette regarding the existence of legal pneumoconiosis. Decision and Order at 9-10.

Employer asserts that Dr. Rosenberg's opinion of no legal pneumoconiosis was not equivocal and conclusory when considered in its entirety. Employer's Brief at 4-6. Rather, employer contends that Dr. Rosenberg's opinion is well-explained as he is the only physician to address the presence of clubbing in claimant's fingers, and unlike Dr. Rasmussen and Dr. Robinette, he recognized claimant's sleep apnea, obesity, coronary disease, and significant smoking history, noting the impact of these various conditions on claimant's respiratory impairment.

The record reflects that Dr. Rosenberg noted the conditions to which employer refers and also noted the clubbing of claimant's fingers, which he stated is "probably" indicative of some form of interstitial lung disease. Although Dr. Rosenberg found it "unlikely" that interstitial lung disease was due to coal dust exposure, in light of the fact that claimant stopped his coal mine employment in 1988. The record also reflects that Dr. Rosenberg stated that claimant has a gas exchange abnormality coupled with low diffusing capacity, but that it would be "unlikely" that the gas exchange abnormality related to the presence of coal workers' pneumoconiosis. Director's Exhibit 31 at 12.

Based on what he characterized as the qualified nature of Dr. Rosenberg's findings, the administrative law judge found Dr. Rosenberg's opinion as to the cause of claimant's respiratory impairment to be equivocal. Decision and Order at 12. After reviewing Dr. Rosenberg's twelve page opinion, however, which is based on Dr. Rosenberg's own examination and testing of claimant, in addition to his review of numerous other data, we cannot affirm this finding. Although Dr. Rosenberg stated, in one part of the report, that claimant's lung disease "probably" represented a form of interstitial lung disease, he also

stated that claimant's disabling condition was not due to coal mine employment and that he could state with "a reasonable degree of medical certainty" that claimant did not have a disabling lung disease. The administrative law judge's rejection of Dr. Rosenberg's opinion for the reason given is therefore vacated and the case is remanded for the administrative law judge to consider Dr. Rosenberg's opinion in its totality. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

Employer next challenges the administrative law judge's determination to discredit the opinion of Dr. Castle that claimant did not have legal pneumoconiosis. Employer asserts that the administrative law judge erred in finding that Dr. Castle's opinion was conclusory and lacking in adequate reasoning because the administrative law judge did not consider the entirety of Dr. Castle's twenty page opinion in which the doctor explained why claimant's respiratory condition was consistent with tobacco smoke-induced bullous emphysema (a diagnosis consistent with claimant's x-ray readings and pulmonary function study results) and he explained his reasons for finding claimant's blood gas transfer problems, as demonstrated by arterial blood gas studies, to be due to a combination of tobacco smoke-induced bullous emphysema, obesity, obstructive sleep apnea syndrome, and severe cardiac disease. We agree.

The administrative law judge found Dr. Castle's opinion of no legal pneumoconiosis unpersuasive because Dr. Castle did not offer adequate reasoning in support of his conclusory statements that claimant's respiratory impairment stems from tobacco smoke induced bullous emphysema based on chest x-ray finding, as well as obesity, obstructive sleep apnea syndrome, and severe coronary artery diseases.[2] As employer contends, however, it is not clear why the administrative law judge found Dr. Castle's opinion to be conclusory and not adequately reasoned. In an opinion, which is actually twenty-two pages, Dr. Castle discusses his findings on physical examination, claimant's history and the results of objective studies conducted. Additionally, Dr. Castle reviewed extensive medical evidence, *i.e.*, x-rays, pulmonary function and blood gas studies, and doctor's opinions, dating as far back as 1989 (one medical opinion was from 1975). Dr. Castle discussed the results of all of this evidence and how it supported his finding that claimant's respiratory impairment did not arise out of coal mine employment, but was caused by claimant's smoking and other health conditions. Director's Exhibit 31. Accordingly, we vacate the administrative law judge's finding that Dr. Castle's opinion was conclusory and remand the case for the administrative law judge to consider the opinion in its totality. *Mays*, 176 F.3d

[2] The administrative law judge found that Dr. Castle's opinion of no clinical pneumoconiosis was probative because it was supported by the objective medical testing of record, *i.e.*, preponderantly negative chest x-ray evidence. Decision and Order at 9.

753, 21 BLR 2-587; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Employer also contends that the administrative law judge erred in failing to consider the medical records of Dr. Prince and various physicians from the Medical Associates of Southwest Virginia. Employer asserts that these opinions are relevant because they date from 1998 through 2002, and do not contain a diagnosis of pneumoconiosis, but do contain diagnoses of chronic obstructive pulmonary disease due to smoking and record claimant's other problems, including dyspesia, insomnia, and depression. Thus, employer contends that they support the medical opinion evidence attributing claimant's respiratory impairment to smoking and/or factors other than pneumoconiosis.

A review of the report submitted by Dr. Prince shows that he treated claimant for sleep apnea. Director's Exhibit 51. Although Dr. Prince stated that there was no correlation between pneumoconiosis and sleep apnea and that claimant's sleep apnea was related to his obesity, Dr. Prince did not state that claimant did not have pneumoconiosis. *Id.* In fact, Dr. Prince opined that claimant's worsening hypoxemia during periods of sleep was not consistently associated with episodes of apnea. *Id*. This medical opinion is not, therefore, legally sufficient to defeat a finding that claimant has legal pneumoconiosis because it does not address the presence of legal pneumoconiosis. The administrative law judge did not err, therefore, in not addressing Dr. Prince's opinion. *See Trumbo*, 17 BLR 1-89; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *see also Campbell v. Director, OWCP*, 811 F.2d 302, 9 BLR 2-211 (6th Cir. 1987).

One of the physicians, referred to by employer, who saw claimant during the period reflected in the hospital records, Dr. Renfro, claimant's treating physician, opined that claimant's lung disease was multifactorial and that claimant's coal dust exposure, in addition to smoking and sleep apnea, significantly contributed to his pulmonary disease status. Director's Exhibit 66. (Renfro Letter dated March 11, 1992). This opinion along with claimant's hospital records are relevant to whether claimant established the existence of legal pneumoconiosis. Accordingly, on remand, the administrative law judge is instructed to consider them.

Employer further contends that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Robinette because the physicians relied on claimant's "diminished breath sounds" and qualifying blood gas studies to find that claimant had a respiratory impairment, *i.e.*, legal pneumoconiosis. Employer argues, however, that "diminished breath sounds" and qualifying blood gas studies may just as well be the result of non-respiratory conditions, *e.g.*, obesity and obstructive sleep apnea, which were diagnosed in this case. We agree. The administrative law judge has not adequately explained how

"diminished breath sounds" and qualifying blood gas studies support a finding that claimant's respiratory impairment is the result of claimant's coal mine employment as opposed to the other respiratory problems with which claimant has been diagnosed. *See Morgan v. Bethlehem Steel Corp.*, 7 BLR1-226 (1984). The administrative law judge's reliance on the opinions of Drs. Rasmussen and Robinette to find the existence of legal pneumoconiosis is, accordingly, vacated and the case is remanded for further reconsideration of their opinions. In reconsidering the doctors opinions, the administrative law judge must also consider them along with the x-ray evidence of record pursuant to *Compton*, 211 F.3d 203, 22 BLR 2-162; *see* 20 C.F.R. §725.414(a)(2)(i), (ii).

Finally, employer contends that the administrative law judge erred in finding that the evidence established disability causation pursuant to Section 718.204(c) as the administrative law judge had erroneously relied upon the same evidence to find the existence of legal pneumoconiosis established. Because we vacate the administrative law judge's finding of pneumoconiosis, and remand the case for reconsideration on that issue, we also vacate the administrative law judge's finding of disability causation and remand for reconsideration of that issue, if reached. *See* 20 C.F.R. §718.204(c)(1)(i), (ii).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge