BRB No. 05-0654 BLA

WILBERT WILLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FLORENCE MINING COMPANY	)	DATE ISSUED: 01/30/2006
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensberg, Pennsylvania, for claimant.

Julie A. Roland (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order-Awarding Benefits (2004-BLA-5579) of Administrative Law Judge Michael P. Lesniak (the administrative law judge), rendered 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 parties stipulated that claimant was a coal miner for thirteen and one-third years, Decision and Order-Awarding Benefits at 3; Hearing Transcript at 14, and, based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. Considering all of the relevant evidence together, the administrative law judge found that it established the existence of pneumoconiosis

pursuant to 20 C.F.R. §718.202(a).[1] The administrative law judge also found that claimant established that his pneumoconiosis arose from his coal mine employment, 20 C.F.R. §718.203(b), and that he was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in his consideration of the opinions of Drs. Pickerill and Karduck and therefore erred in finding that claimant established the existence of legal pneumoconiosis and disability causation.[2] Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 first contends that the administrative law judge erred in discounting Dr. Pickerill's opinion as contrary to the regulations because Dr. Pickerill stated that there must be positive x-ray evidence to diagnose the existence of pneumoconiosis. Employer contends that the existence of legal pneumoconiosis, not clinical pneumoconiosis, was at issue in this case and that Dr. Pickerill acknowledged that chronic obstructive pulmonary disease (copd) can be caused by exposure to coal dust, but that, in this case, claimant's copd was caused by smoking, not coal mine employment. Thus, employer contends that the administrative law judge erred in discrediting Dr. Pickerill's opinion because the

[1] As this was a subsequent claim, and the previous claim was denied because claimant failed to establish the existence of pneumoconiosis, the administrative law judge also found that the new evidence established a change in an applicable condition of entitlement by establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(d); Decision and Order at 13.

[2] The administrative law judge did not find the existence of clinical pneumoconiosis established. Decision and Order at 12-13.

[3] The administrative law judge's findings that the existence of pneumoconiosis was not established at Section 718.202(a)(1)-(3), and that the evidence established total respiratory disability at Section 718.204(b) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

doctor stated that a diagnosis of clinical pneumoconiosis could not be made without a positive x-ray, a statement relevant to the existence of clinical, not legal pneumoconiosis.

The administrative law judge discounted Dr. Pickerill's opinion because Dr. Pickerill opined that claimant must have positive x-ray evidence of pneumoconiosis in order to be diagnosed with the existence of the disease, an opinion contrary to the regulations and case law which state that the existence of pneumoconiosis may be established notwithstanding a negative x-ray. In his report, Dr. Pickerill states:

> it is also my opinion with a reasonable degree of medical certainty that the COPD and pulmonary emphysema are due to previous tobacco smoking and not related to coal workers' pneumoconiosis or occupational lung disease as there is no radiographical evidence of coal workers' pneumoconiosis by my review of multiple chest x-rays of 12/03/90 to 12/13/03.

Employer's Exhibits 1 at 10; Decision and Order at 12.

In deposition testimony, however, Dr. Pickerill states that his diagnosis of chronic obstructive pulmonary disease (copd) is based on pulmonary function abnormalities that are consistent with obstructive lung disease, claimant's clinical history of treatment and hospitalizations for copd, chest x-rays, and CT scans affirming the existence of copd and emphysema, as well as his clinical evaluation of claimant, including a nineteen year coal mine employment history and a twenty-six year smoking history of one and one-half packs daily. The doctor further noted that claimant left coal mine employment in 1988 and stopped smoking in 1990. Employer's Exhibit 6.

Inasmuch as it appears that the administrative law judge discounted Dr. Pickerill's opinion solely by relying on Dr. Pickerill's reference to the lack of x-ray evidence supporting a diagnosis of pneumoconiosis, and did not discuss Dr. Pickerill's opinion in its totality, which is more fully delineated on deposition, and which refers to several factors influencing his finding that claimant's copd is due to smoking not coal mine employment, we vacate the administrative law judge's finding discounting Dr. Pickerill's opinion and we remand the case for the administrative law judge to fully consider all the bases for Dr. Pickerill's opinion. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); 20 C.F.R. §§718.201; *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985).

Employer additionally contends that the administrative law judge erred in discounting Dr. Pickerill's opinion, that claimant's copd was due to smoking, not coal mine employment, because it was based on the doctor's finding that claimant's symptoms had progressed without further exposure to coal dust. The administrative law judge concluded that such a belief was contrary to the regulations which state that pneumoconiosis is a latent and progressive disease. 20 C.F.R. §718.201(c) Employer contends, however, that Dr. Pickerill never stated that pneumoconiosis was not latent and progressive, but merely stated that claimant's symptoms had progressed without further exposure to coal mine employment as a foundation for his opinion that claimant's pulmonary symptoms were consistent with smoking rather than coal mine employment.

As employer contends, Dr. Pickerill conceded that coal workers' pneumoconiosis can progress even after the cessation of coal dust exposure. Employer's Exhibit at 57. We agree with employer that Dr. Pickerill was not using claimant's absence from coal mine employment as the reason for his finding that claimant's chronic obstructive pulmonary disease did not arise out of coal mine employment, but was merely considering that factor, along with the other data he collected *i.e.*, a pulmonary function study showing an obstructive impairment, x-rays showing no evidence of coal worker's pneumoconiosis, clinical findings, and improvement with the use of bronchodilators, as a foundation for his finding that claimant's copd was due to smoking rather than coal mine employment. Accordingly, the administrative law judge's discounting of Dr. Pickerill's opinion for this reason is vacated and the case is remanded for further consideration of the opinion in its totality. *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149.

We next consider employer's challenge to the administrative law judge's consideration of Dr. Karduck's opinion. Employer contends that the administrative law judge erred in relying on Dr. Karduck's opinion solely on the basis that he was claimant's treating physician when: the record does not support the administrative law judge's determination that Dr. Karduck's opinions were well documented and reasoned; Dr. Karduck held no Board-certifications and was only a general family practitioner who had seen claimant for only a year; and the report and testimony of Dr. Pickerill, a pulmonary expert, contradicted Dr. Karduck's findings.

Contrary to employer's argument, the administrative law judge's reasonably accorded greater weight to Dr. Karduck's opinion based on his status as claimant's treating physician. The administrative law judge properly considered the factors specified in Section 718.104(d)(1)-(4), and permissibly determined that Dr. Karduck's opinion was documented and reasoned. 20 C.F.R. §718.104(d)(5); Claimant's Exhibits 8, 11, 13, 17; Decision and Order-Awarding Benefits at 12-13; *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8

(2003).[4] However, inasmuch as we have vacated the administrative law judge's discounting of Dr. Pickerill's opinion and are remanding the case for reconsideration of Dr. Pickerill's opinion, we must also remand this case for the administrative law judge to reconsider Dr. Karduck's opinion in light of any new findings he makes concerning the opinion of Dr. Pickerill, a pulmonary specialist. *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); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 114 (1988).

Finally, employer contends generally that the administrative law judge erred in his consideration of the medical reports of Dr. Karduck and Dr. Pickerill regarding the issue of the cause of claimant's total disability *i.e.* disability causation at Section 718.204(c). Because this case must be remanded for reconsideration of the medical opinion evidence as to the existence of pneumoconiosis, we also vacate the administrative law judge's finding that disability causation was established and we remand the case for reconsideration of the medical opinion evidence relevant to disability causation, if reached.

[4] Dr. Karduck testified, on deposition, that he saw claimant probably "once every four to six weeks, sometimes more often than that," Deposition at 10, and that between January and December of 2004 he had seen claimant "seven times" and that claimant was hospitalized once or twice in the past year for his chronic lung disease. Deposition at 10. Further, the record includes numerous hospitalization reports listing Dr. Karduck as claimant's treating physician, showing that claimant was being treated for chronic lung disease. Moreover, in addition to discussing claimant's abnormal x-ray findings, Dr. Karduck discusses the abnormal physical findings on examination relating to claimant's lung disease, as well as the medications claimant was given to treat his lung disease.

Accordingly, the Decision and Order-Awarding Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion..

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

_____
ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully disagree with my colleagues' decision to vacate the administrative law judge's award of benefits and remand this case for reconsideration of the medical opinion evidence on the issues of legal pneumoconiosis and disability causation. I would affirm the administrative law judge's findings regarding Dr. Pickerill's opinion, as well as his findings regarding Dr. Karduck's opinion.

The Board is charged with reviewing the administrative law judge's decision to determine whether it is reasoned, supported by substantial evidence, and in accord with law. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 313, 20 BLR 2-76, 2-86 (3d Cir. 1995); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 619, 13 BLR 2-226, 2-234 (3d Cir. 1990). It is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988), which I believe it has done in this case.

The record shows that Dr. Pickerill diagnosed the existence of chronic obstructive pulmonary disease due solely to smoking. Employer's Exhibits 1, 6. Dr. Schaaf diagnosed the presence of coal workers' pneumoconiosis by x-ray, and also found chronic obstructive airways disease due to smoking and coal dust exposure. Employer's Exhibit 9; Claimant's Exhibit 12. Dr. Illuzzi, and Dr. Karduck, claimant's treating physician, both diagnosed chronic obstructive pulmonary disease due to smoking and

coal dust exposure. Claimant's Exhibits 13, 17; Employer's Exhibit 7; Director's Exhibit 10. Employer's Exhibits 1, 6. Dr. Schaaf diagnosed the presence of coal workers' pneumoconiosis by x-ray, and also found chronic obstructive airways disease due to smoking and coal dust exposure. Employer's Exhibit 9; Claimant's Exhibit 12.

Based on statements made by Dr. Pickerill in his report and on deposition, I believe the administrative law judge reasonably inferred that Dr. Pickerill's opinion was tainted because Dr. Pickerill relied on negative x-ray readings and the fact that claimant had showed continued pulmonary deterioration despite having left the mines to find that claimant did not have legal pneumoconiosis. These considerations are contrary to the regulations and case law which state that the existence of pneumoconiosis may be established despite the existence of negative x-rays and which state that pneumoconiosis is a latent and progressive disease, *i.e.*, the disease may not become manifest until after the cessation of coal mine employment and may continue to progress after the cessation of coal mine employment. 30 U.S.C. §923(b); 20 C.F.R. §718.201(c); *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S.1047 (1988); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Swarrow*, 72 F.3d 308, 20 BLR 2-76; *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (Motion for Recon.)(*en banc*); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(Motion for Recon.)(*en banc*); *Jones v. Badger Coal Co.*, 21 BLR 2-102 (1998)(*en banc*); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984).

Specifically, the Dr. Pickerill admitted, on cross examination, that in 1995, as part of claimant's earlier claim, he had testified that coal dust exposure could be a minor contribution to claimant's overall lung disease, Employer's Exhibit 6 at 30, and he reiterated his prior testimony that chronic bronchitis is usually exacerbated by coal dust exposure, though the symptoms of bronchitis usually decrease after exposure to coal dust is gone. Employer's Exhibit 6 at 32-33. At the deposition as part of this claim, Dr. Pickerill went on to testify that even though he had earlier testified that claimant's diagnosis of chronic bronchitis was causally related to his industrial exposure, he could not at the present time diagnose industrial bronchitis with a reasonable degree of medical certainty as "[i]t's been too long of a period that [claimant] has not been exposed to the irritant dust." Employer's Exhibit 6 at 33.

Further in his report of February 23, 2003, Dr. Pickerill wrote:

> it is also my opinion with a reasonable degree of medical certainty that the COPD and pulmonary emphysema are due to previous tobacco smoking and not related to coal workers' pneumoconiosis or occupational lung disease as there is no radiographical evidence of coal workers'

> pneumoconiosis by my review of multiple chest x-rays of 12/03/90 to 12/13/03.

Employer's Exhibit 1 at 10 (emphasis added).

Accordingly, based on statements made by Dr. Pickerill on deposition and in his report I believe the administrative law judge permissibly discounted Dr. Pickerill's opinion. I would, therefore, affirm the administrative law judge's finding that the existence of legal pneumoconiosis and disability causation were established on the record before him. 20 C.F.R. §§718.201, 718.202(a)(4), 718.204(c). Consequently, I would affirm the award of benefits.

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BETTY JEAN HALL
Administrative Appeals Judge