BRB No. 97-0646 BLA

LOUIS J. TENTERAMANO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATED RAIL COMPANY	)	
	)	
and	)	
	)	
THE READING COMPANY	)	
	)	
Employers-Respondents	)	
	)	
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 - Denial of Benefits on Remand from the Benefits Review Board of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Louis J. Tenteramano, Wilmington, Delaware, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits on Remand from the Benefits Review Board (92-BLA-1386) of Administrative Law Judge Ralph A. Romano 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). This case is before the Board for the second time. The instant claim was filed on August 18, 1984.[1] Director's Exhibit 1. In his Decision and

[1] Claimant's initial claim for benefits was denied by the claims examiner on March 27, 1981. Director's Exhibit 33.

Order - Denying Benefits, the administrative law judge found the evidence insufficient to establish a material change in conditions The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but determined that claimant was not totally disabled pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On claimant's appeal, the Board held that claimant had established a material change in conditions pursuant to the standard enunciated in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). The Board affirmed the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The Board vacated the administrative law judge's finding that the evidence was insufficient to demonstrate a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1) and (c)(4), and the case was remanded to the administrative law judge for further consideration. *Tenteramano v. Consolidated Rail Corp. and The Reading Co.*, BRB No. 93-2262 BLA (Sept. 26, 1995)(unpub.). The Board advised the administrative law judge, on remand, to determine whether claimant was a "miner" and to determine claimant's length of coal mine employment, inasmuch as these issues are relevant to the overall issue of entitlement. In addition, the Board "direct[ed] the administrative law judge to determine whether or not Dr. Dittman's opinion is hostile" to the Act, noting that "such a finding is relevant to his analysis of causation under 20 C.F.R. §718.204(b)." *Tenteramano*, slip op. at 4, n.10.

On remand, the administrative law judge determined that claimant is totally disabled pursuant to Section 718.204(c). The administrative law judge noted that claimant must establish that his pneumoconiosis is a substantial contributing factor to his total disability, under the standard enunciated by the United States Court of Appeals for the Third Circuit in *Bonessa v. United States Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). The administrative law judge found that claimant failed to establish this element of entitlement, and denied benefits. Decision and Order - Denial of Benefits on Remand from the Benefits Review Board.

Neither of the potentially responsible operators has filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a brief in this appeal.[2]

In an appeal by a claimant filed without the assistance of counsel, the Board will

[2] We affirm the administrative law judge's finding that the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c), as this finding has not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 finding the evidence insufficient to establish that claimant's total disability is due to pneumoconiosis, the administrative law judge considered the opinions of Drs. Dittman, Kraynak and Kruk regarding the cause of claimant's disability. The administrative law judge noted the qualifications of each physician, and the specific findings of their opinions. The administrative law judge found Dr. Dittman's opinion, that any disability claimant had was not due to pneumoconiosis, to be well documented and reasoned. The administrative law judge found that Dr. Kraynak's opinion is "based on a very narrow range of information" and that both Drs. Kraynak and Kruk, who opined that claimant's pneumoconiosis is totally disabling, did not consider the alternate sources of claimant's pulmonary disability, specifically, claimant's smoking history and his obesity. Decision and Order - Denial of Benefits on Remand from the Benefits Review Board at 12-13. The administrative law judge stated:

> Doctor Dittman's professional qualifications in this matter exceed those of Dr. Kraynak, and are equal to those of Dr. Kruk. In light of the full body of evidence, and despite the vide (sic) disparity in each doctor's level of direct patient contact with [claimant], I find that Doctor Dittman's examination, evaluation, and diagnosis of [claimant] to have been more creditable than Doctor Kraynak's in virtually every aspect. Because of his qualifications, and his thorough consideration and treatment of every aspect of [claimant's] medical and social history, I find Dr. Dittman's medical opinion about the etiology of [claimant's] disability to be better reasoned and documented than that of either Dr. Kruk or Dr. Kraynak.

Decision and Order - Denial of Benefits on Remand from the Benefits Review Board at 13.

We vacate the administrative law judge's Section 718.204(b) finding. The administrative law judge did not specifically address whether Dr. Dittman's opinion is hostile to the Act, a finding which the Board previously determined is "relevant to [the] analysis of causation under 20 C.F.R. §718.204(b)," *Tenteramano*, slip op. at 4, n.10. Further, the administrative law judge must make a specific determination regarding claimant's cigarette smoking history. In relying on Dr. Dittman's opinion, the administrative law judge stated that "Dr. Dittman was the only doctor on this record [to] perform a thorough and objective study of [claimant's] social history. He found and noted the record of 35 pack-years of smoking noted" on a hospital admission form. 1996 Decision and Order at 11. The administrative law judge noted that Dr. Kraynak

"took no note of his patient's hospitalization records relative to smoking," 1996 Decision and Order at 12, and that Dr. Kruk "did not take into account any information relative to [claimant's] smoking history," 1996 Decision and Order at 13. However, the administrative law judge has not discussed claimant's testimony at the hearing regarding his smoking history, *see* Hearing Transcript at 92, nor has the administrative law judge specifically considered the smoking histories noted by the physicians in the other medical reports contained in the record. *See* Director's Exhibits 16, 33, 36, 38, 5482, 89; Claimant's Exhibit 9; Employer's Exhibit 8. On remand, the administrative law judge is instructed to consider and resolve the conflicting evidence regarding claimant's smoking history, and the conflicts between Dr. Dittman's reports,[3] prior to relying on Dr. Dittman's opinion. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

In addition, the administrative law judge has not made findings as to whether claimant was a "miner," nor has he made a finding regarding claimant's length of coal mine employment.[4] *See Tenteramano*, slip op. at 3, n.8. On remand, he is instructed to consider these issues.

[3] In his April 21, 1993 opinion, Dr. Dittman noted that claimant never smoked, but he also refers to a hospital admission report that he reviewed which indicates that claimant has a smoking history. Employer's Exhibit 8.

[4] As previously instructed, if claimant is found entitled to benefits, the administrative law judge must resolve the responsible operator issue. *See Tenteramano v. Consolidated Rail Corp. and The Reading Co.*, BRB No. 93-2262 BLA (Sept. 26, 1995)(unpub.), slip op. at 3, n.8.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits on Remand from the Benefits Review Board is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge