BRB No. 92-1481 BLA

GAYLORD WILSON)
)
Claimant-Respondent)
)
v.)
)
HARMAN MINING COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE) DATE ISSUED:
COMPANY)
)
Employer/Carrier-)
Petitioners)
))
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-In-Interest) DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

John D. Maddox (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (85-BLA-2883) of Administrative Law Judge Frederick D. Neusner awarding 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). This case is before the Board for the

second time. The miner filed a claim for benefits on August 27, 1980. In his first Decision and Order, the administrative law judge found that claimant established thirteen years of coal mine employment and failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. On appeal, the Board held that the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) was supported by substantial

evidence, and that this finding by the administrative law judge was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). Accordingly, the administrative law judge's Decision and Order denying benefits was affirmed. *See Wilson v. Harming Mining Co.*, BRB No. 87-3195 BLA (May 16, 1989)(unpub.). The United States Court of Appeals for the Fourth Circuit, the circuit in which this claim arises, vacated the Board's Decision and Order and remanded the case for decision pursuant to 20 C.F.R. Part 727. *See Wilson v. Harman Mining Co.*, No. 89-3281 (4th Cir. May 29, 1990)(unpub.). On remand, the administrative law judge found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4) and that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. The administrative law judge also determined that the onset date was August 1980, the month in which the claim was filed. Employer contends that the administrative law judge erred in weighing the evidence of record pursuant to 20 C.F.R. §727.203(a)(4), (b)(3) and (4). Employer also contests the administrative law judge's determination of the onset date. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), have chosen to respond to this appeal.[1]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer argues that the administrative law judge erred in weighing the medical opinion evidence of record pursuant to 20 C.F.R. §727.203(a)(4). In the Decision and Order on Remand, the administrative law judge initially determined, based on claimant's testimony, that claimant's most recent coal mine duties consisted of shoveling coal at the tipple for seven to eight hours per day and occasionally carrying supplies that weigh up to 100 pounds up and down flights of stairs. *See* Decision and Order on Remand at 3. The administrative law judge then considered the four medical opinions of record pursuant to 20 C.F.R. §727.203(a)(4). Dr. Abernathy, in a report dated December 12, 1984, diagnosed

[1]The administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1)-(3), (b)(1) and (2) are affirmed as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

1)chronic bronchitis; 2)reversible bronchospasm; 3)hypertensive cardiovascular disease, normal sized heart, regular sinus rhythm, compensated, class 1-A; and 4)findings suggestive of some emphysema with mild restrictive ventilation. Dr. Abernathy further stated that "it would appear that he has sustained some respiratory disease which would preclude him from doing very active walking or very much labor...He could quite likely do mild work about the mine but I doubt that he could anything anymore vigorous." In his report, Dr. Abernathy listed "worked at the tipple" as claimant's most recent coal mine employment. *See* Director's Exhibit 16. In a Supplemental Report dated March 6, 1987, Dr. Abernathy stated:

> In summary, I think he is able to perform the duties in which he was last employed and he, perhaps, could even return to being a motorman and a brakeman, but it is doubtful that he could do vigorous activities over any length of time. I do not believe that Mr. Wilson is totally disabled by a chronic respiratory impairment arising from his history of coal mine employment.

See Employer's Exhibit 4.

The administrative law judge found that Dr. Abernathy's opinions established that claimant is disabled by a respiratory or pulmonary disease to an extent that his performance of his usual coal mine employment involving vigorous physical activity is materially impaired. *See* Decision and Order on Remand at 5. However, as employer argues on appeal, in summarizing Dr. Abernathy's two reports, the administrative law judge failed to discuss the statements in Dr. Abernathy's second report, that he thinks claimant is able to perform the duties in which he was last employed and that he does not believe that claimant is totally disabled by a chronic respiratory impairment arising from his history of coal mine employment. *See* Decision and Order on Remand at 4; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Remand of this case is therefore required for the administrative law judge to discuss the inconsistencies in Dr. Abernathy's reports.

Dr. Buddington also examined claimant and, in a report dated March 10, 1987, found that claimant would be unable to perform any kind of heavy physical labor. *See* Claimant's Exhibit 2. Dr. Endres-Bercher performed a record review on March 9, 1987 in which he states that claimant's pulmonary function testing at rest and after exercise does not support a disabling chronic respiratory impairment at all. *See* Employer's Exhibit 4. Dr. Endres-Bercher performed a comprehensive examination on March 25, 1987 in which he diagnoses chronic bronchitis secondary to tobacco usage with atherosclerotic heart disease and evidence for past "TB" infection on chest x-ray. *See* Employer's Exhibit 6. The administrative law judge erroneously

substituted his opinion for that of the physician by giving Dr. Endres-Bercher's conclusions concerning the presence of tuberculosis less weight because he failed to administer the diagnostic test that would have verified that claimant in fact suffered from this disease. *See* Decision and Order on Remand at 5; *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). However, any error is harmless as the administrative law judge did not discredit Dr. Endres-Bercher's opinion regarding the results of claimant's pulmonary function testing. *See* Decision and Order on Remand at 5; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Dr. Castle performed a record review on March 9, 1987 in which he opines that claimant is not permanently and totally disabled as a result of coal workers' pneumoconiosis and that claimant very likely can return to the mines and perform his usual coal mine employment duties. *See* Employer's Exhibit 5. The administrative law judge, upon considering the four opinions, permissibly assigned the greatest weight to the examining physicians, Drs. Abernathy, Buddington and Endres-Bercher, and found that the preponderance of the evidence clearly supports an inference that claimant is totally disabled due to a chronic respiratory or pulmonary impairment pursuant to 20 C.F.R. §727.203(a)(4). *See* Decision and Order on Remand at 5; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). As a result, the administrative law judge's treatment of the opinions of Drs. Buddingtion, Endres-Bercher, and Castle is therefore affirmed as supported by substantial evidence. The administrative law judge's finding of invocation pursuant to 20 C.F.R. §727.203(a)(4), however, is vacated and the case is remanded for the administrative law judge to reconsider Dr. Abernathy's opinions and reweigh the medical opinions pursuant to subsection (a)(4).

Employer next contends that the administrative law judge erred in weighing the medical opinions of record pursuant to 20 C.F.R. §727.203(b)(3). In making his finding at subsection (b)(3), the administrative law judge stated that the greater weight of relevant evidence does not support the finding that pneumoconiosis has been ruled out as the cause of claimant's total disability. The administrative law judge further stated that the numerical majority of examining doctors' opinions is that claimant's pulmonary or respiratory impairment is the cause of his vocational incapacity and that "neither the report of Dr. Endres-Bercher's examination nor the consultative report by Dr. Castle persuasively addressed this issue at all." *See* Decision and Order on Remand at 6. However, in making the above findings, the administrative law judge failed to discuss the inconsistencies in Dr. Abernathy's two opinions, *Fagg*, *supra*, and mischaracterized the reports of Drs. Endres-Bercher and Castle by stating that the physicians failed to address the issue of whether claimant's pneumoconiosis caused his total disability.[2] *See* Director's Exhibit 16; Employer's

[2]In his report of March 9, 1987, Dr. Endres-Bercher stated that "claimant's pulmonary function testing at rest and at exercise does not support a disabling

Exhibits 4-6; *Borgenson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989); *Strother v. Republic Steel Corp.*, 6 BLR 1-1298 (1984). As a result, the administrative law judge's finding that employer failed to establish rebuttal pursuant to Section 727.203(b)(3) is vacated and the case remanded for further findings on this issue.

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chronic respiratory impairment at all." *See* Employer's Exhibit 4. In his report dated March 9, 1987, Dr. Castle opined that claimant is not permanently and totally disabled as a result of coal workers' pneumoconiosis and that claimant does not suffer from coal workers' pneumoconiosis in any form. *See* Employer's Exhibit 5.

Employer further contends that the administrative law judge erred in weighing the medical opinion evidence at Section 727.203(b)(4). In his Decision and Order on Remand, the administrative law judge erroneously found that the opinions of Drs. Endres-Bercher and Castle do not venture beyond the medical definition of pneumoconiosis in excluding claimant's symptoms as evidencing that disease. The administrative law judge also erroneously stated that "specifically, Dr. Endres-Bercher found claimant to suffer from chronic bronchitis, but did not rule out the significant relationship between this condition and a history of coal dust exposure in coal mine employment, while Dr. Castle's consultative diagnosis appears limited in scope to the medical definition of coal workers' pneumoconiosis and, as such, was too narrow to be persuasive under all of the facts of this case." *See* Decision and Order on Remand at 7; *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986). As the administrative law judge again mischaracterized the reports of Drs. Endres-Bercher and Castle, and failed to consider all relevant evidence on this issue, the administrative law judge's findings at subsection (b)(4) are vacated and the case remanded for further findings at subsection (b)(4).[3]

Finally, employer contends that the administrative law judge erred in determining the date of onset of total disability. In his Decision and Order on Remand, the administrative law judge stated only that he found the onset date to be August 1980, the month when the application for benefits was filed because the evidence does not establish the month of onset of the miner's total pulmonary disability. *See* Decision and Order on Remand at 7. However, as employer argues, the administrative law judge failed to consider all of the relevant evidence of record in determining the onset date and he did not assess the credibility of that evidence. *See Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). As a result, if the administrative law judge again finds claimant entitled to benefits, the administrative law judge must reconsider the evidence regarding the onset of total disability.

Accordingly, the administrative law judge's Decision and Order Granting Benefits on Remand is vacated in part and remanded for further consideration consistent with this opinion.

[3]Dr. Abernathy diagnosed chronic bronchitis and stated that the source of claimant's difficulty should be attentively ascribed to exposure to coal dust. *See* Director's Exhibit 16. Dr. Buddington stated that it is medically reasonable to assume that claimant's primary pulmonary disorder is coal workers' pneumoconiosis. *See* Claimant's Exhibit 2.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge