BRB No. 01-0794 BLA

PAUL E. LEMASTERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCOPORATED	)	DATE ISSUED:
	)	
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 on Remand - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Perry McDaniel (Crandall, Pyles & Haviland), Charleston, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (97-BLA-1752) of Administrative Law Judge Gerald M. Tierney 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] This case has been before the Board

[1]The Department of Labor has amended the regulations implementing the Federal

previously.[2] On remand, the administrative law judge found that claimant established that he has a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20

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, 725, 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]In its prior decision in this case, the Board affirmed the administrative law judge's findings regarding length of coal mine employment, that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202 (a) (2002) and 718.203 (2000), and that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000). The Board vacated the administrative law judge's findings at 20 C.F.R. §718.204(c)(4), instructed the administrative law judge to reconsider Dr. Repsher's medical opinion, and instructed the administrative law judge to weigh the like and unlike evidence at 20 C.F.R. §718.204(c) (2000) to determine whether the totality of the evidence establishes total disability. The Board also vacated the administrative law judge's findings at 20 C.F.R. §718.204(b) (2000), instructed the administrative law judge to make further findings regarding claimant's smoking history and to reconsider all of the medical opinions in light of these findings. *LeMasters v. Hobet Mining Inc.*, BRB No. 00-0104 BLA (Oct. 31, 2000)(unpub.).

C.F.R. §718.204 (b), (c). Accordingly, benefits were awarded. On appeal, employer challenges the administrative law judge's findings. Claimant has not responded to this appeal. The Director, Office of Worker's Compensation Programs (the Director) has indicated that he will not participate 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).

Employer first contends that the administrative law judge erred in his consideration of the evidence at Section 718.204(c)(4) (2000) by "counting heads" and relying on the majority of medical opinions, which found claimant to be suffering from a totally disabling respiratory impairment. Employer's brief at 5 - 6. We disagree. On remand, the administrative law judge first reconsidered Dr. Repsher's opinion and found that the physician's assessment of a mild to moderate pulmonary impairment did not support a finding of total disability. Decision and Order at 2. The administrative law judge then found that Dr. Fino concluded that there was no objective evidence of respiratory impairment and that Drs. Gaziano, Dahhan, Castle and Rasmussen opined that claimant is totally disabled from a respiratory or pulmonary impairment. The administrative law judge found that Drs. Repsher, Fino, Gaziano, Dahhan and Castle are board-certified pulmonary specialists and that Dr. Rasmussen, though not similarly qualified, practices in that area. The administrative law judge further found that Drs. Dahhan and Castle reviewed later objective testing conducted by Dr. Rasmussen and continued to find that claimant is totally disabled. In crediting the opinions by Drs. Dahhan, Castle and Gaziano, which were supported by Dr. Rasmussen's opinion, the administrative law judge permissibly relied on the numerical weight of the better qualified physicians, some of whom had a more comprehensive view of claimant's health. *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). Thus, as the administrative law judge's finding that claimant established total respiratory disability at Section 718.204(c)(4) (2000) is supported by substantial evidence, we affirm his determination. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Employer also contends that the administrative law judge erred in his consideration of the like and unlike evidence at Section 718.204(c) (2000). Contrary to employer's assertion, the administrative law judge committed no error in finding that despite his finding that claimant did not establish total disability at Section 718.204(c)(1)-(3) (2000),

claimant could nevertheless establish this element of entitlement by the medical opinion evidence, which the administrative law judge found to be more probative as it is based on a totality of factors. *See Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Such a determination is rational and within the administrative law judge's discretion, and we therefore affirm the finding that claimant established total disability at Section 718.204(c) (2000).

Employer next contends that the administrative law judge's findings regarding disability causation at Section 718.204(b) (2000) are erroneous. The administrative law judge considered only the opinions of the physicians diagnosing a totally disabling respiratory impairment. Decision and Order at 3-4. In crediting Dr. Rasmussen's opinion over the opinions of Drs. Dahhan and Castle, that claimant's total disability was due to his smoking, the administrative law judge acknowledged the superior credentials of the latter two physicians as board-certified pulmonary specialists, but found that Dr. Rasmussen's "years of experience and research in the area of coal workers' lung diseases" entitled the physician's opinion to "special consideration." The administrative law judge credited Dr. Rasmussen's opinion over the opinions of Drs. Dahhan and Castle and found that by a preponderance of the evidence, claimant established that his pneumoconiosis is a significant or major contributing factor to his totally disabling respiratory impairment.

Employer contends that the administrative law judge erred by failing to consider the opinions by Drs. Fino and Repsher regarding causation. Employer's argument has merit. The record indicates that both physicians provided opinions regarding why coal workers' pneumoconiosis did not play a role in claimant's respiratory impairment. *See* Employer's Exhibits 4, 10. The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). The administrative law judge's failure to consider relevant evidence regarding disability causation requires remand. We therefore vacate the administrative law judge's findings at this subsection and remand the case to the administrative law judge to consider the opinions by Drs. Repsher and Fino at Section 718.204(b) (2000).

Employer also argues that the administrative law judge failed to resolve the conflicting evidence regarding the length of claimant's smoking history. The administrative law judge attempted to reconcile the evidence, finding that claimant smoked for forty years, but ultimately, did not resolve the issue of how much claimant smoked per day. Without resolving this issue, the administrative law judge concluded it could be

reasonably inferred that Dr. Rasmussen was aware of the differing smoking histories as he reviewed other medical opinions with varying smoking histories. The administrative law judge's failure to make a determination in this regard impacts the credibility and the weight to be accorded the medical opinions at Section 718.204(b) (2000). We agree with employer that Dr. Rasmussen's opinion fails to analyze the causation issue in light of the varying smoking histories. Thus, we cannot affirm the administrative law judge's finding that it is reasonable to infer that Dr. Rasmussen was aware of the differing smoking histories in the record.

Employer also challenges the administrative law judge's weighing of the physicians' credentials. Upon review of the administrative law judge's findings in this regard, we cannot affirm the administrative law judge's weighing of the medical opinions of Drs. Castle, Dahhan and Dr. Rasmussen. While the administrative law judge may accord "special consideration" to Dr. Rasmussen, a Board-certified internist, based on his research and extensive experience, in this case the administrative law judge has failed to explain why these factors override the qualifications of Drs. Dahhan and Castle, both Board-certified pulmonary specialists. Thus, we also vacate the administrative law judge's finding in this regard. On remand, the administrative law judge is required to consider all of the relevant evidence of record, to make a finding regarding claimant's smoking history, to consider the rationale behind the medical opinions, and to provide specific explanations of his weighing of that evidence in accord with the holdings of the United States Court of Appeals for the Fourth Circuit in *Hicks*, *supra* and *Akers*, *supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge