BRB No. 04-0853 BLA

CYNTHIA LORETTA CLARK (Widow of WILLIAM WESLEY CLARK)	)	
Claimant-Respondent	)	
v.	)	
TRUE LINES, INCORPORATED	)	DATE ISSUED: 07/22/2005
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS	)	
Carrier-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 Benefits in the Miner's Claim and in the Survivor's Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

McGRANERY, Administrative Appeals Judge:

Carrier appeals the Decision and Order – Awarding Benefits in the Miner's Claim and in the Survivor's Claim (2003-BLA-0233 and 2003-BLA-6251) of Administrative Law Judge Edward Terhune Miller rendered on claims 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). On the miner's claim, the administrative law judge found that the evidence established that the miner suffered from the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and that he was totally

disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c). On the survivor's claim, the administrative law judge found that the existence of pneumoconiosis was established, based on the finding in the miner's claim, and found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits on both the miner's claim and the survivor's claim.

On appeal, carrier contends that the administrative law judge erred in finding the medical opinion evidence of record established the existence of pneumoconiosis and a totally disabling respiratory impairment due to pneumoconiosis, and that the miner's death was due to pneumoconiosis. Carrier also contends that the administrative law judge incorrectly excluded Dr. Renn's report from the record as exceeding the evidentiary limitations on evidence pursuant to 20 C.F.R. §725.414(a)(3)(i). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not file a response brief.

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).

At the outset, carrier asserts that the administrative law judge erred when he failed to consider the relevant medical opinion of Dr. Renn, a board-certified pulmonologist. Carrier contends that if the administrative law judge determined that certain portions of Dr. Renn's report exceeded the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(i), he should have excluded those portions of the report instead of excluding the entire report from the record. Carrier asserts that the documented and well-reasoned opinion of Dr. Renn should have been considered as it is relevant to the issue of entitlement in both the miner's and the survivor's claims and that, along with the opinions of Drs. Vasudevan and Zaldivar, Dr. Renn's opinions should been given more weight than the opinion of Dr. Rasmussen. The administrative law judge, based on the filing dates of the miner's and the survivor's claims, admitted Dr. Renn's report into the record on the miner's claim, but disallowed it in the survivor's claim because it was based on inadmissible evidence under Section 725.414(a)(3)(i). *See* 20 C.F.R. §725.2. This was proper. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-53 (2004) (*en banc*).

Carrier next asserts that the administrative law judge erred in finding that the preponderance of the medical opinion evidence established the existence of pneumoconiosis when only one physician, Dr. Rasmussen, opined that claimant had pneumoconiosis, and Drs. Renn, Zaldivar, and Vasudevan, better-qualified physicians, found that claimant did not have

pneumoconiosis.

In finding that the existence of pneumoconiosis was established, the administrative law judge noted that carrier conceded that a preponderance of the x-ray evidence was positive for the existence of pneumoconiosis. Turning to the medical opinion evidence, the administrative law judge concluded that Dr. Vasudevan did not convincingly explain why he concluded that claimant did not have any cardiopulmonary disease and that Dr. Zaldivar's finding that the miner did not have x-ray evidence of pneumoconiosis was contrary to the substantial totality of the positive x-ray evidence. While noting that Drs. Vasudevan and Zaldivar, who were Board-certified in internal medicine and the subspeciality of pulmonary disease, had better credentials than Dr. Rasmussen, who was Board-certified in internal medicine, the administrative law judge nevertheless found that Dr. Rasmussen's experience in the field of pulmonary diseases provided a comparable expertise which made his opinion credible. The administrative law judge's analysis of the opinions of Drs. Vasudevan, Zaldivar, and Rasmussen was reasonable. Likewise, the administrative law judge properly discredited Dr. Renn's opinion of no pneumoconiosis because the doctor was unaware that the weight of the x-ray evidence established the existence of pneumoconiosis (as conceded by employer) and the doctor relied on a flawed pulmonary function study. Decision and Order at 16. Thus, even though the administrative law judge failed to specifically address Dr. Renn's opinion in his discussion of the miner's claim, this was harmless error since a reading of his decision in its totality reflects that he considered Dr. Renn's opinion and gave valid reasons for discounting it. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-22 (4th Cir. 1989); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Accordingly, the administrative law judge properly concluded that the preponderance of medical reports and x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(4) and his finding that claimant established the existence of pneumoconiosis is affirmed.

Carrier next asserts that the administrative law judge erred in crediting the opinion of Dr. Rasmussen to find total disability established, especially when the pulmonary function study and resting blood gas study performed as part of Dr. Rasmussen's examination produced non-qualifying values and the exercise portion of the blood gas study barely satisfied the standards for establishing total disability. Specifically, carrier asserts that the administrative law judge erred in accepting Dr. Rasmussen's explanation that as long as the blood gas study results were close to qualifying, claimant should be considered totally disabled. Carrier contends that acceptance of such an explanation renders the standards for determining total disability meaningless. Thus, carrier argues that Dr. Rasmussen's opinion was not reasoned and the administrative law judge erred in crediting his opinion over the

opinions of Drs. Vasudevan and Zaldivar who found that claimant was not totally disabled and whose opinions were supported by the objective evidence. Additionally, carrier contends that it was error for the administrative law judge to fail to consider the opinion of Dr. Renn on the issue of total disability.

In finding total respiratory disability established, the administrative law judge found that none of the pulmonary function studies of record was qualifying and that all of the blood gas studies with the exception of the exercise portion of the January 5, 2001 study were non-qualifying. Carrier argues that Dr. Rasmussen's opinion finding that the miner was totally disabled cannot be credited because it was not well-reasoned since it was based largely on non-qualifying tests. The law is clear, however, that a mild respiratory impairment evidenced by non-qualifying objective tests may be sufficient to render a miner totally disabled, depending on the exertional requirements of his usual coal mine employment. *Wilson v. Benefits Review Board*, 748 F.2d 198, 7 BLR 2-38 (4th Cir. 1984). In this case, the administrative law judge noted that Dr. Rasmussen, who opined that the miner's testing indicated a minimal to moderate loss of lung function, stated that the miner was totally disabled from a respiratory impairment because the miner performed heavy manual labor as part of his last coal mine employment. Decision and Order at 6, 14.

Turning to the other medical opinions, the administrative law judge found Dr. Vasudevan's opinion, that the miner was not totally disabled, to be unpersuasive because he found that Dr. Vasudevan provided "sparse reasoning with a consequent loss of credibility" in his opinion. Decision and Order at 14. This was permissible. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Lane v. Union Carbide*, 105 F.3d 166 (4th Cir. 1997). The administrative law judge acted reasonably in crediting Dr. Rasmussen's statement that the results of a blood gas study which were very close to qualifying, and were found by Dr. Vasudevan to show hypoxemia, demonstrated a mild impairment which would have prevented the miner from performing his usual coal mine employment because it involved heavy manual labor. *See Hicks*, 138 F. 3d 524, 21 BLR 2-323; *see Clark*, 12 BLR 1-155; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos.88-3531, 88-3578 (6th Cir. May 11, 1989) (unpub.). The administrative law judge also found Dr. Zaldivar's opinion, of no total disability, to be unpersuasive as it was supported by test results which were inconsistent with the other, comparable medical evidence. This was permissible. Decision and Order at 14; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89, n.4; *Clark*, 12 BLR 1-155; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-346 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984). Likewise, the administrative law judge found that Dr. Renn's opinion of no impairment to be discredited because Dr. Renn relied, in part, on Dr. Zaldivar's flawed study, Decision and Order at 16; *Trumbo*, 17 BLR at 1-89, n.4; *Fuller*, 6 BLR 1-1294, and carrier has not challenged the administrative law judge's

characterization of Dr. Renn's opinion. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Accordingly, we affirm the administrative law judge's finding that total disability was established. As carrier has not specifically challenged the administrative law judge's findings regarding the other elements of entitlement on the miner's claim, they are affirmed.

Likewise, the administrative law judge's finding that the miner's death was due to pneumoconiosis is affirmed as carrier has not challenged that finding with any specificity other than to contend that the opinion of Dr. Renn should have been credited. The administrative law judge, however, properly found that Dr. Renn's opinion was inadmissible in the survivor's claim pursuant to Section 725.414(a)(3)(i) in this case. Decision and Order at 2 n.3; 20 C.F.R. §725.2; *Dempsey*, 23 BLR 1-53; *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits in the Miner's Claim and in the Survivor's Claim is affirmed.

SO ORDERED.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

_____
BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

In respectfully disagree from my colleagues' decision to affirm the administrative law judge's decision awarding benefits on the miner's claim in this case. As employer points out, the administrative law judge, after specifically stating that Dr. Renn's opinion was "admissible and found relevant to some degree to the Miner's claim[,]" Decision and Order at 8, n.12, failed to discuss Dr. Renn's opinion in his analysis of the opinions on the existence of pneumoconiosis and total disability. Such failure requires that the administrative law judge's award of benefits on the miner's claim be vacated and the case remanded for the

administrative law judge to fully consider Dr. Renn's findings on pneumoconiosis and total disability along with the other relevant evidence. *See Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *McGinnis v. Freeman United Coal Co*, 10 BLR 1-4 (1987); *Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1984).

In all other respects I concur with my colleagues' decision.

_____

ROY P. SMITH
Administrative Appeals Judge