BRB No. 05-0849 BLA

DENNIS E. COMPTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 07/26/2006
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 and the Order on Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits and the Order on Reconsideration (96-BLA-1445) of Administrative Law Judge Thomas M. Burke 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 has an extended procedural history, which was previously set out in the Board's Decision and Order issued on August 28, 2003. *Compton v. Island Creek Coal Co.*, BRB No. 02-0775 BLA (Aug. 28, 2003)(Dolder, C.J.,

dissenting)(unpub.). In that Decision and Order, the Board rejected employer's contention that Administrative Law Judge Ralph A. Romano erred in relying on Dr. Carrillo's opinion, as well as employer's assertion that Dr. Carrillo's opinion does not satisfy the legal definition of pneumoconiosis. The Board also rejected employer's challenge to Judge Romano's finding that Dr. Cabauatan's opinion supports Dr. Carrillo's diagnosis of legal pneumoconiosis. The Board held that substantial evidence supported Judge Romano's determination that Dr. Fino did not adequately consider the issue of legal pneumoconiosis. The Board further determined that Judge Romano properly discredited Dr. Fino's opinion as flawed, due to the physician's failure to consider the issue of legal pneumoconiosis. Therefore, the Board affirmed Judge Romano's finding that the existence of legal pneumoconiosis was established. The Board rejected employer's assertion that Judge Romano did not weigh the evidence together to determine whether claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and ultimately affirmed Judge Romano's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a). In addition, the Board affirmed Judge Romano's finding that claimant established that pneumoconiosis was a substantially contributing cause of claimant's totally disabling respiratory or pulmonary impairment. Accordingly, the Board affirmed the award of benefits. Judge Dolder dissented on the basis that remand was required as Judge Romano failed to provide a valid reason for discrediting Dr. Fino's opinion, and had improperly shifted the burden of proof to employer, when he discredited Dr. Fino's opinion for failing to rule out the possibility that coal dust exposure aggravated claimant's obstructive respiratory impairment. *Id.*

Employer appealed the Board's decision to the United States Court of Appeals for the Fourth Circuit. In an unpublished opinion, the Fourth Circuit held that Judge Romano's "requirement that Dr. Fino 'rule out' pneumoconiosis essentially shifted the burden to proof to the employer. . . ." *Island Creek Coal Co. v. Compton*, No. 03-2255, slip op. at 5 (4th Cir. May 12, 2004)(unpub.)("*Compton II*"). The court also noted that the "objective evidence appears supportive of Dr. Fino's opinion." *Id.* Further, the court stated that Judge Romano "failed to follow" its prior "encouragement 'to consider more explicitly the impact of the doctors' respective credentials.'" *Id.* The court determined that Judge Romano's discrediting of Dr. Fino's opinion was not supported by substantial evidence and required remand. The court instructed that the case be assigned to a different administrative law judge on remand, in order that it receive a "fresh perspective." *Id.* In an Order issued on July 13, 2004, the Board remanded the case to the Office of Administrative Law Judges and ordered that it be reassigned to a different administrative law judge. *Compton v. Island Creek Coal Co.*, BRB No. 02-0775 BLA (July 13, 2004)(Order)(unpub.).

On remand, the case was assigned to Administrative Law Judge Thomas M. Burke (the administrative law judge). In a Decision and Order on Remand Awarding Benefits on March 23, 2005, the administrative law judge addressed six distinct bases provided by Dr. Fino for his opinion that claimant does not suffer from pneumoconiosis, and concluded that "Dr. Fino's opinion is not persuasive and is insufficient to counter the well-reasoned and well-documented

opinions of Drs. Carrillo and Cabauatan that the miner's totally disabling respiratory impairment stems from his coal dust exposure and tobacco abuse." 2005 Decision and Order at 7. The administrative law judge therefore awarded benefits.

Employer requested reconsideration. On July 8, 2005, the administrative law judge issued his Order on Reconsideration. The administrative law judge rejected employer's assertion that it was error for him to consider the comments to the amended regulations, in rendering his 2005 Decision and Order. The administrative law judge, therefore, granted employer's Motion for Reconsideration, but denied the relief requested.

On appeal now, employer asserts that the administrative law judge erred in selectively analyzing the evidence to credit the opinions of Drs. Carillo and Cabauatan over that of Dr. Fino. Employer maintains that the administrative law judge has not provided the "fresh perspective" requested by the Fourth Circuit. Employer contends that the administrative law judge has not complied with the instructions of the Fourth Circuit to consider the relative qualifications of the physicians, nor has he considered all of the evidence regarding the existence of pneumoconiosis together, as mandated by *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) ("*Compton I*"). Employer also contends that the administrative law judge erred by using the comments to the amended regulations to discredit Dr. Fino's opinion. The Director, Office of Workers' Compensation Programs (the Director), responds, solely addressing employer's argument that the administrative law judge erred in considering the comments published in the Federal Register. The Director urges the Board to reject employer's allegations of error in this regard. Claimant has not submitted a brief on appeal.

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).

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[1] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

As an initial matter, we consider employer's assertion that the administrative law judge erred by using the comments to the amended regulations to discredit Dr. Fino's opinion.[2] *See* 65

[1] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[2] At issue in the case are the medical opinions of Drs. Fino, Carillo and Cabauatan concerning the existence of pneumoconiosis. Dr. Cabauatan examined claimant on July 31,

Fed. Reg. 79938-39 (Dec. 20, 2000). Employer argues that it is irrational to discredit Dr. Fino's opinion because of his comments provided during the rule-making process, asserting that these comments were based on a review of then-available medical literature, these comments do not pertain to claimant, and these comments do not contain Dr. Fino's exact comments but, rather, are the Department of Labor's characterization of his comments. Specifically, employer notes that the comments in the Federal Register were published after the record in this case was closed. It asserts, therefore, that if these comments are to be used, employer must be given the opportunity to clarify Dr. Fino's opinion. Moreover, employer argues that it is inappropriate to retroactively apply the comments to the amended regulations to a case governed by the old regulations. Employer contends that these comments are not binding law, and it argues that if the administrative law judge wanted to take judicial notice of these comments, he needed to follow the procedures for so doing. Employer maintains that Dr. Fino has provided a specific analysis regarding claimant's condition which, employer argues, is more probative than his general comments contained in the Federal Register. Employer also refers to *Compton II* and notes that the Fourth Circuit has found Dr. Fino's explanation, that claimant has no condition related to coal mine dust, adequately explained and supported by substantial objective evidence. Employer''s Brief at 15.

The portions of the amended regulations addressing the definition of pneumoconiosis, contained in 20 C.F.R. §718.201, and how a claimant establishes the existence of pneumoconiosis, contained in 20 C.F.R. §718.202(a), apply to all claims. *See* 20 C.F.R. §718.2. Because the amended version of Section 718.202(a) applies to this claim, the administrative law judge's consideration of the comments considered during the promulgation of the regulations

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1979. He diagnosed "C.O.P.D." and checked the box indicating that this condition is related to dust exposure in claimant's coal mine employment. Director's Exhibit 36. Dr. Carillo examined claimant on June 8, 1995. He diagnosed severe obstructive pulmonary disease based on claimant's history of coal dust and cigarette smoke exposure, "his history" and physical examination, and the results of his pulmonary function study. Dr. Carillo opined that the etiology of claimant's condition is his exposure to coal dust and cigarette smoke. Director's Exhibit 11. Dr. Fino reviewed claimant's medical records and, in a report written on December 9, 1996, he opined that there is insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis. Dr. Fino stated that claimant does not suffer from an occupationally acquired pulmonary condition. Further, Dr. Fino opined that claimant has a moderate respiratory impairment due to smoking and not related to the inhalation of coal mine dust. Employer's Exhibit 9. In January 1997, Dr. Fino wrote a subsequent statement, based on his review of additional medical evidence. Dr. Fino concluded that there were "no changes consistent with a coal mine dust associated occupational lung disease." Employer's Exhibit 10. The record indicates that Dr. Fino is Board-certified in Internal Medicine, Pulmonary Diseases and that he is a B reader. Employer's Exhibit 9. The record does not contain any documents addressing the qualifications of Dr. Cabauatan or Dr. Carillo.

was appropriate. *See e.g., Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 156, n.29, 11 BLR 2-1, 2-12, n.29 (1987), *reh'g denied*, 484 U.S. 1047 (1988). In addition, we reject employer's assertion that the administrative law judge erred by taking judicial notice of the comments in the Federal Register. The Board has held that the opportunity to file a Motion for Reconsideration, as employer did in the instant case, satisfies the requirement that the parties be given a chance to respond to the taking of judicial notice. *See Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). The administrative law judge, in considering Dr. Fino's comments in the Federal Register, has considered the specifics of Dr. Fino's opinion regarding claimant's condition, and he has provided a detailed explanation of his reasons for discrediting Dr. Fino's opinion regarding claimant's condition. *See* 2005 Decision and Order at 2-6.

We also reject employer's assertion that because Dr. Fino's comments, contained in the Federal Register, were published after the record in this case was closed, it must be allowed the opportunity to clarify Dr. Fino's opinion. The administrative law judge rejected similar assertions on reconsideration from his 2005 Decision and Order and determined that employer's right to due process had not been violated. He, therefore, declined to reopen the record for the submission of additional evidence. As the administrative law judge found, and as noted in the Federal Register, the definition of pneumoconiosis in the amended regulations is consistent with case law existing at the time the record in this case closed, in particular *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-66-67 (4th Cir. 1995) and *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 175, 19 BLR 2-265, 2-269 (4th Cir. 1995), both of which were issued by the Fourth Circuit in 1995, prior to the date of Dr. Fino's opinion in this case. *See* 65 Fed. Reg 79943 (Dec. 20, 2000). Therefore, it was reasonable for the administrative law judge to consider the comments contained in the Federal Register and we find no abuse of discretion in the administrative law judge's decision to decline to re-open the record for employer to rehabilitate Dr. Fino's opinion.

Consequently, we reject employer's assertion that it was error for the administrative law judge to consider the comments published in the Federal Register in evaluating Dr. Fino's opinion. Since employer raises no other contentions regarding the administrative law judge's consideration of Dr. Fino's opinion, we affirm the administrative law judge's finding that Dr. Fino's opinion is not persuasive. *See generally Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer also asserts that the administrative law judge selectively analyzed the evidence, in crediting the opinions of Drs. Carillo and Cabauatan, over that of Dr. Fino. We find merit in this argument. After conducting a detailed evaluation of Dr. Fino's opinion, 2005 Decision and Order at 2-7, the administrative law judge concluded that Dr. Fino's opinion "is not persuasive and is insufficient to counter the well-reasoned and well-documented opinions of Drs. Carrillo and Cabauatan," without any other discussion of the opinions of Drs. Carillo and Cabauatan. 2005 Decision and Order at 7. In the Order on Reconsideration, the administrative law judge

noted that Dr. Fino's credentials, as a Board-certified physician in internal medicine and a B reader, cannot overcome the deficiencies in his opinion. The administrative law judge also noted that Dr. Carillo's qualifications are not in the record, but the administrative law judge stated that his opinion is well-reasoned and well-documented.

While the administrative law judge scrutinized Dr. Fino's opinion, 2005 Decision and Order at 2-6, he has not provided any analysis of the opinions of Drs. Carillo and Cabauatan, nor has he explained his finding that the opinions of these physicians are well-reasoned and well-documented and sufficient to carry claimant's burden of establishing the existence of pneumoconiosis. Although Judge Romano's finding, that Dr. Carillo's opinion is reasoned and sufficiently documented, was affirmed by the Fourth Circuit,[3] *see Compton*, 211 F.3d at 212, 22 BLR at 2-176, *this* administrative law judge, who is charged with providing a "fresh perspective," has not specifically discussed the opinions of either Dr. Carillo or Dr. Cabauatan. Consequently, we vacate the administrative law judge's finding at Section 718.202(a)(4) and instruct the administrative law judge, on remand, to fully explain his credibility determinations and his weighing of the evidence.

Moreover, as alleged by employer, the administrative law judge has not complied with the holding in *Compton I*, which requires the administrative law judge to consider all of the relevant evidence together before determining whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a). *Compton*, 211 F.3d 203, 22 BLR 2-162. On remand, the administrative law judge must comply with the mandate of *Compton I*, to consider all of the relevant evidence before determining whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge is also advised to consider the relative qualifications of the physicians in his consideration of the evidence, as urged by the Fourth Circuit court. *See Compton*, 211 F.3d at 213, n.13, 22 BLR at 2-178, n.13; *Compton*, No. 03-2255, slip op. at 5.

Consequently, we reject employer's allegations regarding the administrative law judge's consideration of Dr. Fino's opinion, but we vacate the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4). This case is also remanded for further consideration of the evidence at Section 718.202(a), consistent with the mandate of the United States Court of Appeals for the Fourth Circuit.

[3] In *Compton I*, the Fourth Circuit court concluded that substantial evidence supported Judge Romano's finding that Dr. Carillo's opinion is reasoned and sufficiently documented. *Compton*, 211 F.3d at 212, 22 BLR at 2-176. In that same decision, the court noted that Judge Romano had not discussed Dr. Cabauatan's opinion. *Compton*, 211 F.3d at 207, n.3, 22 BLR at 2-167, n.3.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge