BRB No. 07-0847 BLA

D.M.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	DATE ISSUED: 07/30/2008
JUDE ENERGY, INCORPORATED	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (01-BLA-00468) of Administrative Law Judge Daniel L. Leland on a subsequent 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 a

second time.[1] In his Decision and Order issued on November 28, 2005, the administrative law judge credited the miner with twenty-one years of coal mine employment and, in consideration of the newly submitted evidence, found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). The administrative law judge further found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded. Employer appealed, and the Board vacated the administrative law judge's award of benefits because the administrative law judge failed to adequately review the evidence of record in its entirety, particularly the medical evidence from the prior November 1993 claim, when he addressed the merits of entitlement.[2] [*D.M.*]. *v. Jude Energy, Inc.*, BRB No. 06-0379 BLA, slip op. at 3 (Jan. 30, 2007) (unpub.) (Hall, J., dissenting). The Board also held that the administrative law judge "failed to thoroughly review all of the reasons given by Dr. Zaldivar for finding that claimant's respiratory disease was due solely to smoking and to explain the bases on which he found Dr. Zaldivar's opinion was not well reasoned and was unconvincing." *Id*. at 4-5. Thus, the Board remanded the case for further consideration.

On remand, employer filed a motion to reopen the record for further development of Dr. Zaldivar's opinion on the issue of disability causation, which was denied by the administrative law judge. In his Decision and Order on Remand - Awarding Benefits, the

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[1] Claimant filed an initial claim for benefits on November 8, 1993, which was denied by Administrative Law Judge Edward J. Murty, Jr., on November 27, 1995, on the grounds that the evidence was insufficient to establish both the existence of pneumoconiosis and total disability. Director's Exhibit 1. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*D.M.*] *v. Jude Energy, Inc*., BRB No. 96-0566 BLA (Aug. 23, 1996) (unpub.); Director's Exhibit 1. Claimant filed a request for modification on November 14, 1996. Director's Exhibit 1. In a Decision and Order dated January 21, 1999, Administrative Law Judge Lawrence Donnelly denied benefits, finding that while claimant was totally disabled, he failed to establish that he had pneumoconiosis. Director's Exhibit 1. Claimant appealed, and the Board affirmed the denial of benefits. [*D.M.*] *v. Jude Energy, Inc*., BRB No. 99-0457 BLA (Feb. 29, 2000) (unpub.) (Hall J., dissenting). Claimant took no further action until he filed his subsequent claim on October 22, 2002. Director's Exhibit 3.

[2] The Board affirmed, as unchallenged, the administrative law judge's finding that the newly submitted evidence established the existence of pneumoconiosis and a change in an applicable condition of entitlement, and his finding of total disability. [*D.M.*] *v. Jude Energy, Inc.*, BRB No. 06-0379 BLA, slip op. at 2-3 n.2 (Jan. 30, 2007) (unpub.).

administrative law judge weighed the x-ray evidence from the prior claim, along with the newly submitted x-ray evidence, and found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Weighing all of the medical opinions submitted with the prior claim and this claim, the administrative law judge credited the opinions of Drs. Ranavaya, Gaziano and Rasmussen, that claimant suffered from pneumoconiosis, over the contrary opinions of Drs. Fino and Zaldivar, that claimant did not have the disease, and thus, he found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Weighing all of the evidence together, the administrative law judge determined that claimant had pneumoconiosis and further determined that claimant established that he was totally disabled due to pneumoconiosis at Section 718.204(c). Accordingly, the administrative law judge awarded benefits, commencing October 1, 2002, the first day of the month in which claimant's subsequent claim was filed.

On appeal, employer contends that the administrative law judge erred in dismissing its motion to reopen the record. Employer also contends that the administrative law judge erred in weighing the x-ray evidence at Section 718.202(a)(1), and that he did not comply with the Board's directive to explain the weight accorded Dr. Zaldivar's opinion at Section 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, addressing employer's allegation that the administrative law judge erred in rejecting Dr. Zaldivar's opinion, as to whether claimant is totally disabled by pneumoconiosis. The Director maintains that Dr. Zaldivar's opinion is "fatally flawed," with regard to the issue of disability causation, because the doctor's disability causation analysis does not take into consideration that claimant has radiographic evidence for clinical pneumoconiosis, and therefore, the administrative law judge properly assigned Dr. Zaldivar's opinion less weight at Section 718.204(c). Director's Letter Brief at 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 the applicable law, they are binding upon this Board and may not be disturbed.[3] 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, 363 (1965).

Initially, we address employer's argument that the administrative law judge erred in refusing to reopen the record on remand. We note that employer obtained new counsel subsequent to the formal hearing held on July 21, 2005. Following the Board's decision,

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

employer's new counsel filed a Motion to Reopen the Record for the purpose of taking Dr. Zaldivar's deposition. The administrative law judge denied employer's motion, and specifically noted:

> Having considered the motion, it is noted that the Decision and Order of the Benefits Review Board calls for a reconsideration of the evidence contained in the record at the time of the undersigned's decision and order.

Order Denying Employer's Motion to Reopen the Record and Setting Briefing Schedule (May 2, 2007). Employer argues that the administrative law judge erred in denying its motion without proper consideration, and by not explaining the grounds for his denial of that motion, as required by the Administrative Procedure Act, 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 30 U.S.C. §932(a). We disagree.

In his Order, the administrative law judge correctly noted that the Board's remand directive did not require that he reopen the record for further medical development as to the cause of claimant's total disability. Rather, the Board directed the administrative law judge to further explain the bases for his credibility determinations with respect to the evidence of record. [*D.M*], BRB No. 06-0379 BLA, slip op. at 5. Although employer asserts that due process and fundamental fairness require that it be given the opportunity to depose Dr. Zaldivar and further develop the physician's medical opinion as to the etiology of claimant's respiratory disability, employer has failed to show how it has been prejudiced by the administrative law judge's refusal to reopen the record, since employer was represented by counsel and had the opportunity to fully develop its case prior to the hearing and the administrative law judge's initial decision. Because the decision to reopen the record is a procedural matter within the sound discretion of the administrative law judge, we decline to disturb his ruling. *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). We therefore reject employer's argument and affirm the administrative law judge's Order denying employer's motion to reopen the record.

On the merits, employer contends that the administrative law judge erred in crediting the more recent x-ray evidence as establishing the existence of pneumoconiosis, as that type of analysis amounts to an impermissible presumption that pneumoconiosis is "always" progressive.[4] Employer's Brief at 12. Employer's argument is without merit. The administrative law judge correctly recognized that because pneumoconiosis may be latent and progressive, it is reasonable to accord greater weight to the more recent x-ray

[4] The regulations provide that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal dust exposure." *See* 20 C.F.R. §718.201(c).

evidence for pneumoconiosis. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (Decision and Order on Reconsideration *en banc*); Decision and Order on Remand at 4. Of the two most recent x-rays of record, the administrative law judge accurately noted that the January 7, 2003 x-ray was read as positive by Drs. Patel and Binns, while the September 17, 2003 x-ray was read as negative by Dr. Zaldivar. Decision and Order on Remand at 4. Because Drs. Patel and Binns are dually qualified as Board-certified radiologists and B readers, and Dr. Zaldivar is only a B reader, the administrative law judge permissibly assigned greatest weight to the January 7, 2003 x-ray and found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Since the administrative law judge followed the Board's directive to consider all of the x-ray evidence of record, and he properly accorded greatest weight to the September 17, 2003 x-ray as establishing the existence of pneumoconiosis, we affirm his finding at Section 718.202(a)(1) as supported by substantial evidence.

Pursuant to Section 718.202(a)(4), the administrative law judge observed that all of the record physicians based their diagnoses as to the presence or absence of clinical pneumoconiosis, on their review of the x-ray evidence and, therefore, he gave greatest weight at Section 718.202(a)(4) to the opinions of Drs. Ranavaya, Gaziano, and Rasmussen, as their diagnoses of pneumoconiosis were in accord with his finding that claimant established the existence of pneumoconiosis by x-ray. Because we have affirmed the administrative law judge's Section 718.202(a)(1) finding, and the administrative law judge's credibility determinations are within his discretion, *see Clark*, 12 BLR at 1-151, we affirm his finding that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(4). Furthermore, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis, based on a weighing of all of the evidence pursuant to Section 718.202(a)(1)-(4). *Island Creek Coal Co. v Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000); Decision and Order on Remand at 4.

Employer also challenges the administrative law judge's finding at Section 718.204(c) that claimant is totally disabled due, at least in part, to pneumoconiosis. Employer argues that the administrative law judge erred in discounting Dr. Zaldivar's opinion as to the cause of claimant's respiratory impairment solely because he did not diagnose pneumoconiosis.[5] We disagree.

[5] Employer inexplicably states that "while Dr. Zaldivar assessed that there was some pulmonary impairment, he concluded that it was not sufficient to render [claimant] unable to perform his last coal mine employment" and, therefore, employer maintains that Dr. Zaldivar's opinion is "fully relevant to a determination of total disability pursuant to Section 718.204." Employer's Brief at 8. We note, however, that the administrative

In weighing the evidence at Section 718.204(c), the administrative law judge stated that he found no persuasive reason to credit Dr. Zaldivar's opinion as to the etiology of claimant's disabling respiratory impairment since Dr. Zaldivar was not of the opinion that claimant had pneumoconiosis, contrary to the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis. Decision and Order at 5. This was permissible. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-382-3 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

Employer contends that the administrative law judge erred in rejecting Dr. Zaldivar's disability causation opinion, noting that Dr. Zaldivar reported that his opinion would not change, even if claimant had pneumoconiosis. Employer's characterization of Dr. Zaldivar's opinion is somewhat misleading. In his October 3, 2003 report, Dr. Zaldivar stated:

> Even if [claimant] were found to have coal workers' pneumoconiosis by tissue biopsy, my opinion regarding the cause of his pulmonary impairment given all the historical and factual findings over the years, as well as the physiological radiographic findings, would remain the same as I have given here.

Director's Exhibit 10. As noted by the Director, although Dr. Zaldivar indicated that his opinion would not change in the event of positive biopsy evidence for pneumoconiosis, the doctor did not specifically set out what his opinion would be if claimant had positive x-ray evidence for pneumoconiosis, as determined by the administrative law judge. Director's Letter Brief at 1. Moreover, because Dr. Zaldivar opined that claimant has no evidence of any respiratory condition due to coal dust exposure, we reject employer's assertion that the administrative law judge failed to properly weigh Dr. Zaldivar's opinion at Section 718.204(c). *See Scott*, 289 F.3d at 269, 22 BLR at 2-382-3; *Toler*, 43 F.3d at 116; 19 BLR at 2-83.

In contrast to Dr. Zaldivar's opinion, the administrative law judge determined that Dr. Rasmussen's opinion, that claimant's totally disabling respiratory impairment was due, in part, to pneumoconiosis, was entitled to determinative weight since it was consistent with the preponderance of the x-ray evidence. *See Harris v. Director, OWCP*,

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law judge's finding that claimant is totally disabled was affirmed by the Board in the prior appeal. [*D.M.*], BRB No. 06-0379 BLA, slip op. at 2-3 n.2. Furthermore, contrary to employer's contention, Dr. Zaldivar opined that claimant could not return to his usual coal mine employment due to his respiratory impairment from smoking. Director's Exhibit 10.

3 F.3d 103, 106, 18 BLR 2-1, 2-5 (4th Cir. 1993); *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order on Remand at 5. Because the administrative law judge set forth the evidence and his rationale for concluding that claimant is totally disabled due to pneumoconiosis, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989), we affirm his finding at Section 718.204(c) as supported by substantial evidence. We therefore affirm the administrative law judge's award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge