BRB No. 99-0951 BLA

STANLEY J. STASIUM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits (Upon Second Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman (Abrahamson, Moran & Conaboy, P.C.), Scranton, Pennsylvania, for claimant.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (Upon Second Remand by the Benefits Review Board) (96-BLA-0551) of Administrative Law Judge Robert D. Kaplan 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 third time. The administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited claimant with two and one-half years of

[1] Claimant is Stanley J. Stasium, the miner, who filed his application for benefits on March 15, 1994. Director's Exhibit 1.

qualifying coal mine employment. Next, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and accordingly, denied benefits. Claimant appealed and the Board affirmed as unchallenged the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(3), but vacated his length of coal mine employment determination because he failed to determine whether claimant's employment as a coal truck driver constituted the work of a miner under the Act. Additionally, the Board vacated the administrative law judge's determination pursuant to 20 C.F.R. §718.202(a)(4) and instructed the administrative law judge to reweigh the medical opinion evidence if he credited claimant with additional qualifying coal mine employment on remand. Accordingly, the Board remanded the case for further consideration. *Stasium v. Director, OWCP*, BRB. No. 97-0275 BLA (Sep. 25, 1997)(unpub.)(*Stasium I*).

On remand, the administrative law judge accepted the parties' stipulation of four and one-quarter years of qualifying coal mine employment and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Claimant appealed and the Board affirmed as unchallenged the administrative law judge's length of coal mine employment determination. However, the Board vacated the administrative law judge's determination under 20 C.F.R. §718.202(a)(4) because he improperly disregarded the Board's previous holding regarding Dr. Aquilina's opinion, failed to determine if Dr. Ramakrishna's opinion "constituted affirmative evidence of no pneumoconiosis," and failed to provide a complete analysis of the conflicting medical opinion evidence that comports with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Accordingly, the Board remanded the case to the administrative law judge for further consideration. *Stasium v. Director, OWCP*, BRB. No. 99-0672 BLA (Feb. 23, 1999)(unpub.)(*Stasium II*). On second remand, the administrative law judge again found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and accordingly, denied benefits.

On appeal, claimant argues that the administrative law judge erred by failing to find the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(c) and total disability due to pneumoconiosis pursuant to Section 718.204(b) and (c). The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the denial. The Director acknowledges, however, that the administrative law judge did not fully comply with the Board's remand instructions under Section 718.202(a)(4) and did not fully weigh the medical opinion evidence in accordance with the APA.

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. 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).

With respect to Section 718.202(a)(4), claimant argues that the opinions of Drs. Majernick and Aquilina, physicians who relied upon a length of coal mine employment that is not much different than that relied upon by the administrative law judge, are sufficient to establish the presence of pneumoconiosis.[2] We agree. The administrative law judge concluded that, where a discrepancy exists between the administrative law judge's finding as to the claimant's length of coal mine employment and the assumption by the physicians regarding length of coal mine employment it is within administrative law judge's authority as the trier-of-fact "to weigh the discrepancy and determine whether it is significant." [1999] Decision and Order at 4. Consequently, the administrative law judge held that, contrary to the Board's previous holding in this case, the disparity between the parties' stipulation of four and one-quarter years and Dr. Aquilina's assumption of seven years of coal mine employment is significant, and accordingly, discounted Dr. Aquilina's opinion on this basis.[3] *Id*.

[2] Claimant similarly argues that Dr. Levinson's opinion proves the existence of pneumoconiosis even though claimant concedes, "Dr. Levinson diagnosed no respiratory disease whatsoever and therefore found no impairment arising out of coal mine employment." Claimant's Brief at p.8 [unpaginated]. As claimant's argument has no merit, we reject it. *See* Director's Exhibit 31.

[3] The administrative law judge noted that Dr. Aquilina stated that if claimant had coal mine employment of only 3.2 years, this could affect his opinion regarding the etiology of the disease. [1999] Decision and Order at 5 n.4. However, contrary to the Director's argument, the administrative law judge did not give this as a reason for his discounting of Dr. Aquilina's opinion.

In our first Decision and Order, we held that four and one-quarter years of coal mine employment "is not significantly less tha[n] the five and three-quarter years or the seven years relied on by the physicians who diagnosed pneumoconiosis, ... ," and who was discredited by the administrative law judge as relying on an inaccurate length of coal mine employment. *Stasium I*, *slip op*. at 4. Likewise, in our second Decision and Order, we held that "the administrative law judge erred by disregarding the Board's holding" and again, vacated his discounting of Dr. Aquilina's opinion based on his determination that the length of coal mine employment difference is "significant."[4] *Stasium II*, *slip op*. at 4; *see Sellards v. Director, OWCP*, 17 BLR 1-77 (1983); *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986)(10-11 year difference is significant); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985)(16-19 year disparity is significant); *Long v. Director, OWCP*, 7 BLR 1-254 (1984)(7-½ year discrepancy is significant). Consequently, we vacate the administrative law judge's determination pursuant to Section 718.202(a)(4) and his weighing of the evidence as a whole under Section 718.202(a) in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In view of the administrative law judge's response to both of our previous orders remanding this case, *see Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988), we believe that "review of this claim requires a fresh look at the evidence," *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998). Accordingly, we remand this case to the Office of Administrative Law Judges for assignment to another administrative law judge, who must consider all of the relevant evidence to determine whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a), *see Williams*, *supra*, and if reached, whether claimant has established pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(c) and total disability due to pneumoconiosis pursuant to 718.204.[5]

[4] Indeed, the actual discrepancy between Dr. Aquilina's opinion of seven years and the administrative law judge's finding of four and one-quarter years is two and three-quarter years.

[5] In light of our disposition of this case, we decline to address claimant's arguments regarding the x-ray evidence and pursuant to Sections 718.203(c) and 718.204(b) and (c).

Accordingly, the Decision and Order - Denying Benefits (Upon Second Remand by the Benefits Review Board) of the administrative law judge is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge