BRB No. 00-0915 BLA

GLENN O. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

John S. Sowards, Jr. (Wilson, Sowards, Polites & McQueen), Lexington, Kentucky, for claimant.

Richard M. Joiner (Mitchell, Joiner & Hardesty, P.S.C.), Madisonville, Kentucky, for employer.

Sarah M. Hurley (Judith E. Kramer, Acting 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

HALL, Chief Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order - Denying Benefits (99-BLA-1140) of

[1] Claimant is Glenn O. Morgan, the miner, who filed his application for benefits on

Administrative Law Judge Donald W. Mosser 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).[2] Adjudicating the claim pursuant to 20 C.F.R. Part 718 (2000), the administrative law judge credited claimant with eighteen years of qualifying coal mine employment and found that claimant established the existence of pneumoconiosis arising out coal mine employment and total respiratory disability. However, the administrative law judge found that claimant failed to establish that his total disability was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.[3]

April 28, 1998. Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In addition, the administrative law judge issued an Order dated May 19, 2000, addressing both claimant's and employer's arguments with respect to the admission of certain x-ray interpretations into the record. None of the parties have challenged the administrative law judge's Order or the findings contained therein. Accordingly, the Order is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v.*

On appeal, claimant argues that the administrative law judge erroneously failed to find total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating her intention not to participate in this appeal.[4]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which all the parties have responded. Claimant filed his brief on April 3, 2001, arguing that the revised regulations set forth at 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease) and 20 C.F.R. §718.204(c)(1)(defining total disability due to pneumoconiosis) may impact the disposition of this case, and as such, the case should be held in abeyance. To the contrary, employer asserts, in its brief dated April 4, 2001, that the revised regulations governing this case will not affect the disposition of this claim. Similarly, the Director's brief, dated April 9, 2001, asserts that the outcome of this case will not be affected by application of the revised regulations pursuant to 20 C.F.R. §718.204(c)(1).

Having considered the briefs submitted by the parties, and reviewed the record, we hold that the disposition of this case is not impacted by the challenged regulations. A review

---

Island Creek Coal Co., 6 BLR 1-710 (1983).

[4] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a)(2000), 718.203(b)(2000), and 718.204(c)(2000) inasmuch as these determinations are unchallenged on appeal. *Skrack, supra*; *see also* 20 C.F.R. §718.202(a), 718.203(b), 718.204(b)(2)(i)-(iv). Decision and Order at 15; *see Coen, supra*.

of the record reveals no evidence implicating Section 718.201(c). Furthermore, the provision set forth in Section 718.204(c)(1) is not inconsistent with the standard articulated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, for determining whether claimant has demonstrated total disability due to pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *accord Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). In addition, we conclude that none of the other challenged regulations affects the outcome of this case based on our review, therefore, we will proceed to adjudicate the merits of 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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred by failing to consider the medical opinions of Dr. Younes, a Board-certified physician in pulmonary medicine, who reviewed the medical evidence of record and specifically addressed the issue of cigarette smoking and coal dust exposure as causative factors in claimant's totally disabling impairment.[5] Director's Exhibit 49. Employer agrees with claimant that the administrative law judge failed to address the report of Dr. Younes in his Decision and Order, but contends that this error is harmless inasmuch as Dr. Younes's one-page report is not a reasoned medical opinion.

A review of the Decision and Order reveals that the administrative law judge did not discuss or even mention the medical opinion of Dr. Younes in his summary of the medical reports nor did he address it in his analysis of the evidence of record. Decision and Order at 8-12, 17-18. Dr. Younes, however, has rendered a medical opinion, which, if credited, would be sufficient to establish total disability due to pneumoconiosis. 20 C.F.R. §718.204(c); Director's Exhibit 49. Although employer contends that the opinion is on its face unreasoned because it does not reflect what factors the doctor relied on in reaching his conclusion, inasmuch as it is the administrative law judge's duty to evaluate the evidence in the first

[5] In a report dated April 5, 1999, Dr. Younes's review of the medical evidence of record revealed a diagnosis of occupational lung disease caused by coal mine employment, resulting in a totally disabling pulmonary impairment. Regarding the etiology of claimant's total respiratory disability, Dr. Younes opined that even though cigarette smoking "is the major reason," coal dust exposure from a history of working in the mines for sixteen years is a "significant contributing factor." Director's Exhibit 49.

instance and the administrative law judge's decision does not reflect whether he considered Dr. Younes's opinion, we agree with claimant that the case must be remanded for the administrative law judge to consider Dr. Younes's opinion, *Director, OWCP v. Rowe*, 710 F.3d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Moreover, inasmuch as the Administrative Procedure Act (APA) requires the administrative law judge to consider all relevant evidence when making findings of fact and conclusions of law, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), we vacate the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis and remand the case for the administrative law judge to consider the opinion of Dr. Younes along with the other relevant medical evidence.

Claimant additionally argues that the administrative law judge mischaracterized the opinion of Dr. Simpao by finding that Dr. Simpao did not attribute an etiology to claimant's total respiratory disability. To the contrary, claimant contends that Dr. Simpao, who performed a complete pulmonary evaluation consisting of claimant's work and medical history, physical examination, pulmonary function and blood gas studies, and chest x-ray, specifically found that claimant's multiple years of coal dust exposure was a medically significant factor in claimant's pulmonary impairment. Claimant further argues that Dr. Simpao diagnosed the existence of coal worker's pneumoconiosis and attributed his severe respiratory impairment to pneumoconiosis. Director's Exhibit 12. Employer responds, again agreeing with claimant that while the administrative law judge mistakenly found that Dr. Simpao did not render an opinion on the cause of claimant's pulmonary impairment, the error is harmless because the administrative law judge properly accorded greater weight to the opinions of Drs. Broudy and Powell based on their superior credentials and logical analyses.

The administrative law judge concluded that, "Dr. Simpao found a severe pulmonary impairment but did not attribute a cause to the disability." Decision and Order at 17. Contrary to the administrative law judge's determination, however, as claimant contends, in his report dated May 19, 1998, Dr. Simpao opined that the cause of claimant's severe impairment was pneumoconiosis.[6] Director's Exhibit 12. Inasmuch as the administrative

[6] Dr. Simpao conducted a pulmonary evaluation of claimant on May 14, 1998 and recorded his findings from the physical examination and diagnostic tests in a report dated May 19, 1998. Director's Exhibit 12. Dr. Simpao diagnosed coal worker's pneumoconiosis resulting in a severe impairment. Additionally, Dr. Simpao's report includes a form also dated May 19, 1998 providing his answers to four questions; he concluded that claimant has an occupational lung disease which was caused by coal mine employment resulting in a severe impairment related to pneumoconiosis. Director's Exhibit 12.

law judge mischaracterized the opinion of Dr. Simpao, the administrative law judge must reconsider Dr. Simpao's opinion in its entirety in determining whether claimant established total disability due to pneumoconiosis, in conjunction with all of the other relevant medical opinions of record. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Further, contrary to employer's argument, because it is the administrative law judge's duty to evaluate the evidence in the first instance, we cannot say that his conclusions would be the same had he properly characterized Dr. Simpao's opinion. *See Rowe*, *supra*.

Claimant additionally contends that Dr. Broudy's opinion on causation is suspect because Dr. Broudy was the only physician who failed to diagnose the existence of pneumoconiosis. Claimant contends, therefore, that the administrative law judge erred in according greater weight to Dr. Broudy's opinion on causation. Rather, claimant contends that the administrative law judge should have accorded less weight to Dr. Broudy's opinion on causation.

In evaluating the medical opinion evidence on the issue of pneumoconiosis, the administrative law judge noted that Dr. Broudy was the only physician of record who did not diagnose the existence of pneumoconiosis, Dr. Broudy associated the miner's chronic obstructive airways disease to emphysema due to smoking and asthmatic bronchitis. Although the administrative law judge found Dr. Broudy's opinion entitled to great weight, noting that Dr. Broudy was Board-certified in both internal and pulmonary medicine and that his opinion was well-documented and supported by the overwhelming weight of the x-ray evidence, he nonetheless found the existence of pneumoconiosis established in light of the uniformity of medical opinion evidence diagnosing the existence of pneumoconiosis which he found to be persuasive and probative.

A review of Dr. Broudy's most recent opinion dated May 28, 1998 and his deposition testimony taken on January 5, 1999 reveals that Dr. Broudy diagnosed obstructive airways disease due to cigarette-smoking induced pulmonary emphysema and chronic asthmatic bronchitis, but he did not diagnose the existence of pneumoconiosis, a finding contrary to the administrative law judge's finding that the weight of the medical opinion evidence established the existence of pneumoconiosis. Nevertheless, the administrative law judge relied on the opinion of Dr. Broudy, *inter alia*, to find that claimant failed to demonstrate total disability due to pneumoconiosis. Decision and Order at 17.

Claimant correctly argues that in considering the issue of causation, the Sixth Circuit has counseled administrative law judges "to treat as less significant..." the opinions of physicians who do not diagnose pneumoconiosis, when the administrative law judge has found pneumoconiosis established. Brief for Claimant at 6, *citing Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 104 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v.*

Consolidated Coal Co., 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *Compare Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998)(a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability). *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193, 19 BLR 2-304, 2-315-316 (4th Cir. 1995), *citing Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821, 19 BLR 2-86, 2-92, 2-93 (4th Cir. 1995)(*Hobbs II*). Because the administrative law judge failed to discuss the significance of Dr. Broudy's failure to diagnose pneumoconiosis, when making his causation determination, we must vacate the administrative law judge's finding regarding Dr. Broudy's opinion and remand the case for him to reconsider it along with other opinions of record. *See Skukan, supra*; *Tussey, supra*; *Bobick, supra*; *Trujillo, supra*.

Claimant next contends that the administrative law judge impermissibly substituted his own judgment for that of the medical experts when he determined that claimant's smoking history since 1995 was significant in spite of evidence indicating that it was not significant. Specifically, claimant avers that he consistently gave a smoking history of no more than four cigarettes per day since approximately 1993 or 1994 and that Dr. Houser testified that the relatively low level of exposure to cigarettes would not be sufficient, by itself, to result in a decrease in claimant's pulmonary function between examinations in 1995 and 1998.[7]

In considering the evidence relevant to causation, the administrative law judge noted that the opinions of Drs. Houser, Broudy, Powell and Myers merit greater weight because of their superior credentials, *i.e.*, Drs. Houser, Broudy and Powell are Board-certified in the fields of internal and pulmonary medicine, and Dr. Myers is a Board-certified internist. The administrative law judge also found that all four physicians conducted thorough and well-documented examinations. The administrative law judge, however, found the opinions of

[7] In two reports and during his deposition on December 16, 1998, Dr. Houser opined that claimant is permanently and totally disabled and that claimant's pulmonary impairment is significantly related to his coal worker's pneumoconiosis and occupational dust exposure. Director's Exhibit 40. A review of Dr. Houser's deposition testimony reveals that during re-direct examination, Dr. Houser was asked whether claimant's cigarette smoking at a rate of three to four cigarettes per day contributed to the progression of his obstructive lung disease. Dr. Houser responded that cigarette smoking "may well be a contributing factor to further deterioration, but three to four per day is a low level of exposure" and would not, by itself, result in a reduction of pulmonary function. Director's Exhibit 40; Houser's Deposition at 21-22.

Drs. Broudy and Powell[8] more probative on the issue of causation in light of claimant's smoking history and symptomotology. Specifically, the administrative law judge noted that:

> "[a]lthough [claimant] smoked only one-half pack of cigarettes a day for over 20 years and recently cut down to a quarter pack or less, this is still a significant smoking history. When coupled with the fact that [claimant] ceased coal mining in 1995 but continues to smoke, and his condition has deteriorated considerably since 1995, the opinions of Drs. Broudy and Powell [that claimant's totally disabling respiratory impairment is due to cigarette smoking, not coal mine employment] are more logical.

Decision and Order at 17. The administrative law judge did not discuss, however, Dr. Houser's opinion that the significant progression of claimant's pulmonary impairment from moderate to severe was due to the natural progression of his coal workers' pneumoconiosis and prior occupational dust exposure. Nor, did the administrative law judge discuss Dr. Houser's opinion that claimant's relatively low level of exposure to cigarettes would not be sufficient by itself to result in the decreased lung capacity observed in claimant's examinations between 1995 and 1998. Inasmuch as the administrative law judge found that Dr. Houser's credentials were equal to those of Drs. Broudy and Powell and his examination was as thorough and well-documented as those of Drs. Broudy and Powell, and pneumoconiosis is acknowledged to be a progressive disease, *see* 20 C.F.R. §718.201(c); *see also Mullins*, 484 U.S. at 151, 11 BLR at 2-9, we must remand the case for the administrative law judge to reconsider Dr. Houser's opinion along with all of the medical opinion evidence

[8] In a report dated December 12, 1998 and during his deposition on January 27, 1999, Dr. Powell diagnosed occupational pneumoconiosis, but opined that claimant has a significant breathing impairment whose cause is emphysema and not related to his work in the coal mining industry. Director's Exhibit 40. Likewise, Dr. Broudy rendered two reports and was deposed on January 5, 1999 and found that claimant's totally disabling respiratory impairment was due to a combination of bronchial asthma, chronic obstructive pulmonary disease, emphysema, and chronic bronchitis, none of which was related to coal mine employment. Director's Exhibits 13, 40.

on causation.

Finally, claimant contends that the opinions of Drs. Broudy and Powell on causation were more equivocal than the administrative law judge acknowledged because Dr. Powell agreed on cross-examination that prolonged, chronic dust exposure was an exacerbating factor and could have hastened the development of the more severe pulmonary disease found in claimant, but that given claimant's history he could not determine one way or another whether coal mine employment had exacerbated and worsened claimant's pulmonary condition. Likewise, claimant contends that Dr. Broudy's causation opinion is more equivocal than acknowledged by the administrative law judge because Dr. Broudy agreed that the inhalation of coal mine dust can cause chronic bronchitis and that claimant's occupational dust exposure could be considered as a triggering agent of his asthmatic bronchitis. Thus, claimant contends, in light of the more positive causation opinions of Drs. Houser, Myers, Simpao and Younes, the administrative law judge's reliance on the opinions of Drs. Powell and Broudy requires reversal.

It is well established that it is within the discretion of the administrative law judge to determine whether a physician's opinion is equivocal, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987), and the Board is not empowered to engage in a *de novo* review of the evidence, *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987). In the instant case, however, inasmuch as the administrative law judge' has made a number of errors in his evaluation of the medical opinion evidence relevant to causation, we also remand the case for the administrative law judge to reconsider the opinions of Drs. Broudy and Powell in light of claimant's arguments. Accordingly, the administrative law judge's finding that claimant failed to establish causation must be vacated and the case is remanded for consideration of the medical opinion on causation. *See Smith*, *supra*; *Adams*, *supra*.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur in the result.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge