BRB No. 01-0689 BLA

MILDRED CLOVIS (Widow of EVERETT CLOVIS)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
FMC MINING EQUIPMENT DIVISION	)	
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 on Remand - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan, Voegelin & Tennant, L.C.), Wheeling, West Virginia, for claimant.

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

PER CURIAM:

Claimant,[1] appeals the Decision and Order on Remand (1999-BLA-41) of Administrative Law Judge Daniel L. Leland denying benefits on a survivor's 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] This case has been before the Board

[1] Claimant, Mildred Clovis, is the surviving spouse of the deceased miner, Everett Clovis, who died on July 10, 1997. Director's Exhibit 3.

[2] The Department of Labor has amended the regulations implementing the Federal Coal

previously. In a Decision and Order issued August 30, 1999, the administrative law judge credited the miner with eleven years of coal mine employment and adjudicated the survivor's claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3) (2000). The administrative law judge, however, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge also found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge awarded benefits.

Employer appealed and claimant cross-appealed the award of benefits to the Board and in *Clovis v. FMC Mining Equipment Division*, BRB Nos. 00-0105 BLA and 00-0105 BLA-A (Dec. 22, 2000) (unpub.), the Board affirmed the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000) as unchallenged on appeal. The Board also addressed several errors with respect to the administrative law judge's weighing of the medical opinions and vacated his finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) (2000), as well as his finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000). The Board remanded the case to the administrative law judge for further consideration.[3]

Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found 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 Board affirmed the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, contingent upon successful prosecution of the claim.

On remand, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). Accordingly, survivor's benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000).[4] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

[4] Claimant also "restates arguments previously made in [her] first appeal to the BRB" regarding the clerical error in employer's response letter at the hearing level. Claimant's Brief in Support of Petition for Review at 38. The argument was addressed and rejected in our prior decision. *Clovis v. FMC Mining Equipment Division*, BRB Nos. 00-0105 BLA and 00-0105 BLA-A (Dec. 22, 2000) (unpub.); *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there are no reversible errors contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Claimant contends that the administrative law judge committed several errors in evaluating the medical opinion evidence pursuant to Section 718.202(a)(4) as he failed to give proper weight to the evidence favorable to claimant. We do not find merit in claimant's arguments. In considering the evidence of record, the administrative law judge must determine its credibility and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge initially reiterated his previous finding that the opinions of Drs. Thagarisa, Gaziano and Devabhaktuni were entitled to little weight. Decision and Order on Remand at 7. Claimant asserts the administrative law judge erred in failing to give greater weight to the treating physicians. We disagree. The administrative law judge reasonably accorded these opinions little weight as he had found that Dr. Thagarisa's diagnosis of pneumoconiosis was not supported by any reasoning, that Dr. Gaziano's opinion was contradictory and indefinite and that Dr. Devabhaktuni's opinion was conclusory. 1999 Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). While the opinions of treating physicians may be entitled to greater weight than the opinions of non-treating physicians, the administrative law judge is not required to credit a treating physician's opinion if he finds that the opinion is not well reasoned. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Moreover the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge should not automatically credit the testimony of a treating or an examining physician merely because the physician treated or personally examined the miner; rather, the administrative law judge should also consider the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

In weighing the other medical opinions of record on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). The administrative law judge properly considered the medical opinion evidence of record on remand as instructed by the Board and reasonably accorded greater weight to the medical opinions of Drs. Naeye, Fino and Renn, which stated that the miner did not have

pneumoconiosis or any other occupationally acquired pulmonary condition, than to the contrary opinions of Drs. Rasmussen, Al-Asadi, Garson and Cohen. *Kuchwara, supra*; Decision and Order on Remand at 7-8. The administrative law judge, in a rational exercise of discretion as the fact-finder, permissibly concluded that the opinions of the physicians supportive of claimant's burden are contradicted by the objective medical evidence and are not well-documented and well-reasoned since the physicians do not explain or offer sufficient support for their diagnoses of pneumoconiosis. Moreover, the administrative law judge reasonably found that the opinions of Drs. Naeye, Fino and Renn were entitled to the greatest weight as these opinions were well-reasoned, fully documented and supported by the objective medical tests and clinical data which the physicians carefully evaluated. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; Decision and Order on Remand at 7-8.

Among the various, valid reasons for according less weight to the opinions favorable to claimant, the administrative law judge found that the diagnoses of pneumoconiosis by Drs. Rasmussen, Al-Asadi, Garson and Cohen were flawed, in part, as they were based upon positive chest x-ray evidence, while the administrative law judge found that the overwhelming weight of the x-ray readings failed to establish the existence of pneumoconiosis. *See Clark, supra*; *Fuller v. Gibraltar Corp.*, 6 BLR 1-1291 (1984); Decision and Order on Remand at 7-8.

Furthermore, contrary to claimant's contention, the administrative law judge permissibly determined that since Dr. Rasmussen's opinion regarding a possible link between the miner's interstitial fibrosis and coal mine dust exposure was equivocal, the opinion was entitled to diminished weight. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Clark, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order on Remand at 7. In addition, the administrative law judge reasonably found that Dr. Rasmussen's opinion was entitled to diminished weight based on the physician's mistaken determination regarding the absence of congestive heart failure, whereas the administrative law judge found that the evidence clearly showed that the miner had congestive heart failure. *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); Decision and Order on Remand at 7.

Moreover, the administrative law judge reasonably, within his discretion as fact-finder, accorded little weight to Dr. Al-Asadi's diagnosis of pneumoconiosis since Dr. Al-Asadi also failed to account for the miner's congestive heart failure, as well as his aspiration pneumonitis, and relied on the presence of anthracotic patches on the bronchoscopy, which Dr. Naeye found to be of no significance, in concluding that the pulmonary fibrosis was not

idiopathic. Decision and Order on Remand at 7. While claimant asserts that the presence of anthracotic patches on the bronchoscopy conclusively establishes the existence of pneumoconiosis, the administrative law judge correctly relied on Dr. Naeye's determination that the black pigment found on one of the slides did not indicate pneumoconiosis. *See Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001)(*en banc*) (Smith and Dolder, JJ, dissenting in part and concurring in part); Decision and Order on Remand at 5; Employer's Exhibit 1.

Further, the administrative law judge reasonably accorded diminished weight to Dr. Garson's diagnosis of pneumoconiosis since the administrative law judge concluded that Dr. Garson was unaware of the miner's aspiration pneumonitis and the severity of the miner's hiatal hernia. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order on Remand at 7. Moreover, contrary to claimant's assertion, the administrative law judge correctly noted that Dr. Garson's qualifications were inferior to the physicians who were Board-certified in pulmonary diseases and rationally accorded his opinion less weight on this basis.[5] *Clark*, *supra*; Decision and Order on Remand at 7.

We also reject claimant's contention that the administrative law judge erred in finding that Dr. Cohen's opinion was defective since he found that Dr. Cohen, initially, relied only on the medical reports favorable to claimant, and subsequently, that it "was not clear that he gave [the reports of Drs. Fino, Renn and Naeye] the same scrutiny that he provided the other reports he reviewed." Decision and Order on Remand at 8. The administrative law judge considered the underlying documentation of Dr. Cohen's opinion based on the credible medical evidence of record and reasonably accorded his opinion little weight since he found that Dr. Cohen's conclusions were based on limited knowledge of claimant's medical history and evidence not supported by the preponderance of the evidence. *Stark*, *supra*.

Contrary to claimant's assertion, the administrative law judge did not summarily credit the opinions rendered by employer's experts, but fully discussed and weighed the conflicting medical opinions of record. Decision and Order on Remand at 7-8; *see Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995). In this regard, the administrative law judge correctly noted that:

> Drs. Naeye, Fino and Renn opined that the [miner] did not have clinical or legal pneumoconiosis. Dr. Naeye is a board certified pathologist who has extensive expertise regarding occupational lung diseases. Dr. Fino and Dr. Renn are board certified pulmonary specialists. They performed a

[5] The administrative law judge noted that Dr. Garson is Board-certified in preventative medicine. Decision and Order on Remand at 4, 7; Claimant's Exhibit 9.

> comprehensive review of all the evidence of record rather than selected portions. Although there is some difference of opinion among these three physicians, notably that Dr. Renn did not find that the [miner] had interstitial pulmonary fibrosis, they were in agreement that his pulmonary problems did not result from coal dust exposure. They related the [miner's] diffusion impairment to his congestive heart failure and the aspiration caused by his hiatal hernia. Dr. Naeye attributed the scarring in the miner's lungs to congestive heart failure, aspiration and bullae. Dr. Fino felt that the fibrosis was idiopatic or due to aspiration, and Dr. Renn blamed it on aspiration from the hernia. Unlike the other physicians, Drs. Naeye, Fino, and Renn, were aware of the size of the [miner's] hiatal hernia and the degree of aspiration it was causing. Their opinions are soundly reasoned and should be credited.

Decision and Order at 8. The administrative law judge did not err in determining that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) since he found that these opinions were well-explained and thus provided probative evidence that claimant does not have coalworkers' pneumoconiosis. The administrative law judge properly considered the relative qualifications of the physicians and rationally accorded greater weight to the opinions of the physicians with superior credentials. *Hicks*, *supra*; *Akers*, *supra*; *Clark*, *supra*; *Dillon*, *supra*. While claimant asserts that the opinions of Drs. Naeye and Renn are hostile to the Act, claimant's assertion is misplaced as both physicians stated that pneumoconiosis can cause disability. *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); Employer's Exhibits 1, 3. Claimant's assertion that it was irrational for the administrative law judge to credit the opinions of Drs. Renn and Fino because these physicians were retained by employer for the sole purpose of defeating the claim, and were thus unfairly biased against claimant, is without merit. Claimant does not specify why he believes that Dr. Renn and Fino were biased against him in the instant case, other than to state that both physicians were retained by employer for the purpose of litigation. There is no showing of evidence supportive of a finding of bias on the part of Drs. Renn and Fino. *Urgolites v. Bethenery Mines, Inc.*, 17 BLR 1-20 (1992). We thus affirm the administrative law judge's finding that the weight of the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant's additional contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding

that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Inasmuch as claimant has failed to establish a requisite element of entitlement, we affirm the denial of benefits. *Trent, supra*; *Perry*, *supra*.

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge