BRB No. 06-0680 BLA

JOHN R. McGREEVY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 06/29/2007
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (03-BLA-5232) of Administrative Law Judge Michael P. Lesniak rendered 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 original Decision and Order, the administrative law

[1] Claimant initially filed a claim for benefits on May 7, 1993. Director's Exhibit 1. The district director denied the claim on November 5, 1993. *Id.* The district director denied the claim because he found that the evidence was insufficient to establish all of

judge credited claimant with thirty years of coal mine employment and determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge therefore found that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Weighing all of the record evidence, including the evidence submitted with the prior claim, the administrative law judge found that clamant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b),(c). Accordingly, the administrative law judge awarded benefits.

Employer appealed to the Board, citing numerous errors in the administrative law judge's analysis of the medical evidence under Sections 718.202(a)(1),(4), 718.204(b)(2)(iv), and 718.204(c).[2] The Board affirmed the administrative law judge's finding that claimant established the existence of pneumoconiosis based on a preponderance of the positive x-ray evidence at Section 718.202(a)(1). *McGreevy v. Consolidation Coal Co*., BRB Nos. 04-0339 BLA and 04-0339 BLA-A, slip op. 4-6 (Mar. 29, 2005) (unpub.). With respect to Section 718.202(a)(4), the Board affirmed the administrative law judge's finding that the medical opinion of Dr. Basheda was too equivocal to support a finding of pneumoconiosis, and his determination that the opinion of Dr. McMonagle was neither well-reasoned nor well-documented. *McGreevy*, slip op. at 7. However, because the administrative law judge found Dr. Basheda's opinion to be equivocal, the Board held that it was error for the administrative law judge, in turn, to rely on Dr. Basheda's opinion to further support Dr. Garson's opinion that claimant suffered from pneumoconiosis. *Id*. The Board also held that the administrative law judge erred by failing to address whether Dr. Garson's diagnosis of coal workers' pneumoconiosis was merely a restatement of an x-ray opinion, and whether Dr. Garson's diagnosis of chronic bronchitis due to coal dust exposure was sufficiently reasoned to support a finding of legal pneumoconiosis. *McGreevy*, slip op. at 7-8. Thus, the Board vacated the administrative law judge's finding at Section 718.202(a)(4) and remanded the

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the requisite elements of entitlement. There is no indication that claimant took any further action in regard to his 1993 claim. Claimant filed the instant subsequent claim on September 28, 2001. Director's Exhibit 3.

[2] Employer argued that the administrative law judge erred in determining the onset date for payment of benefits, and also challenged the validity of 20 C.F.R. §725.503(b). Employer further challenged the award of attorney fees. Claimant filed a cross-appeal, asserting that the administrative law judge erred in reducing the requested attorney fee.

case for the administrative law judge to reweigh the conflicting medical opinions and explain why he considered Dr. Garson's opinion to be more persuasive than the contrary opinions of employer's experts, Drs. Fino and Renn, as to the existence of clinical and legal pneumoconiosis. *McGreevy*, slip op. at 8-9. The Board also vacated the administrative law judge's finding at Section 725.309 that claimant had established a change in an applicable condition of entitlement, insofar as that determination was based on his finding of pneumoconiosis. *McGreevy*, slip op. at 10. Furthermore, in light of the Board's determination to vacate the administrative law judge's finding that claimant had established the existence of pneumoconiosis, the Board also vacated the administrative law judge's disability causation finding, that claimant had established total disability due to pneumoconiosis, pursuant to Section 718.204(c). *Id*. Lastly, the Board vacated the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(b)(2)(iv).[3] On remand, the Board directed the administrative law judge to reweigh the evidence relevant to the existence of legal pneumoconiosis, and to determine whether claimant established a change in an applicable condition of entitlement. The Board instructed the administrative law judge on remand to consider whether the opinions of Drs. Garson and McMonagle were reasoned with regard to the extent of claimant's pulmonary impairment; to consider whether Dr. McMonagle's familial relationship with clamant had any effect on the credibility of his opinion; and to address the specific exertional requirements of claimant's usual coal mine employment in comparison with the physicians' opinions regarding claimant's disability. *McGreevy*, slip op. at 10-13. The administrative law judge was also directed, if necessary, to reweigh the evidence relevant to the issue of disability causation.[4] Thus, the Board vacated the award of benefits and remanded the case for further consideration.

[3] The Board affirmed, as unchallenged on appeal, the administrative law judge's determination that claimant was unable to establish his total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *McGreevy v. Consolidation Coal Co.*, BRB Nos. 04-0339 BLA and 04-0339 BLA-A, slip op. 10 n.10 (Mar. 29, 2005) (unpub.).

[4] The Board declined to address the merits of employer's challenge regarding the onset date of disability since the Board vacated the award of benefits. *McGreevy*, slip op. at 13-14. However, the Board rejected employer's contention that 20 C.F.R. §725.503(b) contravened the Administrative Procedure Act and was therefore invalid for the purpose of determining the date of onset. *McGreevy*, slip op. at 14-15. Additionally, the Board rejected the parties' arguments pertaining to the issue of attorney fees and affirmed the administrative law judge's attorney fee award. *McGreevy*, slip op. at 15-19. The Board noted that the award would only become effective and enforceable upon successful prosecution of the claim and an award of benefits. *McGreevy*, slip op. at 19 n.20.

On May 3, 2006, the administrative law judge issued his Decision and Order on Remand - Awarding Benefits. The administrative law judge credited Dr. Garson's opinion, that claimant suffered from pneumoconiosis, over the contrary opinions of Drs. Renn and Fino, that claimant suffered from pneumoconiosis, and thus found that claimant established the existence of coal workers' pneumoconiosis pursuant to Sections 718.202(a)(4), 718.203(b), and a change in an applicable condition of entitlement pursuant to Section 725.309. With respect to the issue of total disability, the administrative law judge determined that claimant's usual coal mine work required moderate manual labor, and found, based on the assessments provided by Drs. Garson and Fino regarding claimant's physical capabilities, that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). After weighing all of the contrary probative evidence along with the evidence supportive of claimant's total respiratory disability, the administrative law judge found that clamant had satisfied his burden of proof to establish total disability pursuant to Section 718.204(b)(2). Lastly, the administrative law judge credited Dr. Garson's opinion that claimant was totally disabled by his pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, alleging that the administrative law judge failed to follow the Board's instructions on remand, and that he erred in rendering his credibility determinations. Employer specifically asserts that the administrative law judge erred in finding that Dr. Garson's opinion was more persuasive than employer's experts on the issue of whether claimant established the existence of pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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).

After consideration of the administrative law judge's Decision and Order on Remand – Awarding Benefits, the evidence of record, and the issues presented on appeal, we affirm the administrative law judge's award of benefits as it is supported by substantial evidence and rendered in accordance with applicable law. We specifically reject employer's assertion that the administrative law judge erred in finding Dr. Garson's opinion to be reasoned and documented with regard to the existence of clinical and legal pneumoconiosis.

Contrary to employer's assertion, in weighing the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge properly followed the Board's

directive that he address whether Dr. Garson's diagnosis of pneumoconiosis was based on more than a positive x-ray reading, and whether his opinion, that claimant suffered from both clinical and legal pneumoconiosis, was sufficiently reasoned and documented to support claimant's burden of proof. The administrative law judge specifically explained:

> I find the opinion of Dr. Garson, on the issues of legal and clinical pneumoconiosis to be sufficiently reasoned. Prior to rendering an opinion, Dr. Garson took occupational, medical and social histories. He completed pulmonary function testing, reviewed medical records and reports, including the report of Dr. Fino. His deposition testimony, as well as the body of his written report, fully reveals the factors which he considered and the fact that his diagnosis was based on more than just an x-ray reading. Thus, Dr. Garson took into account and discussed objective medical testing, his physical examination of the [c]laimant, and information about the [c]laimant's symptoms and work and medical histories, as well as a review of prior medical records. Upon examining the reasoning employed in his medical opinion in light of the objective material supporting his opinion, also taking into account the contrary test results or diagnoses, I find the opinion of Dr. Garson to be well-reasoned and well-documented. In so doing, I also take into account his qualifications and expertise in this area. While Dr. Garson testified that while there was a possibility that there was a mixed dust disease by x-ray, it was simple pneumoconiosis. I do not equate this to a diagnosis which was merely a restatement of an x-ray opinion. Dr. Garson's testimony makes it clear that he relied upon many factors in reaching his conclusions and did not rely solely upon the [c]laimant's x-ray.

Decision and Order on Remand at 10.

Employer asserts that the administrative law judge erred in concluding that Dr. Garson's opinion was supported by his review of objective testing and medical records, alleging that Dr. Garson was unaware of many of the clinical tests or reports that the other physicians considered. Employer's Brief in Support of Petition for Review at 14. Employer's argument is without merit. The administrative law judge properly found that Dr. Garson had "the opportunity to review medical records, including treatment records and the reports of Drs. Fino, McMonagle, and Celko." Decision and Order at 5. Our review of the record also reveals that Dr. Garson was provided a copy of Dr. Fino's report, and copies of medical records, for review prior to Dr. Garson's deposition, and he was asked to refute their findings during his deposition. Employer's Exhibit 3.

Employer further challenges the administrative law judge's reliance on Dr. Garson's opinion, asserting that Dr. Garson had an inaccurate understanding of the amount and duration of claimant's smoking history. Employer's Brief in Support of Petition for Review at 15. This argument is also without merit. The administrative law judge stated that he credited claimant's testimony with respect to the amount and duration of his smoking habit. Decision and Order on Remand at 10 n.3. Claimant testified that he began smoking at the age of seventeen or eighteen years, and that he smoked until approximately fourteen years prior to the hearing. During his deposition, Dr. Garson stated that he was aware of the conflicting smoking histories provided by claimant, and that in rendering his opinion regarding the etiology of claimant's respiratory condition, he had assumed that claimant had smoked for at least thirty-five years or more, averaging at least one pack or more per day. Employer's Exhibit 3 at 42-43. Because Dr. Garson's testimony reflects his consideration of a smoking history in keeping with claimant's hearing testimony, we reject employer's contention that Dr. Garson underestimated the importance of claimant's smoking habit, such that the administrative law judge was required to assign his opinion little probative weight. *See Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Employer also contends that there is no evidentiary support for the administrative law judge's conclusion that Dr. Garson's opinion "fully takes into account the [claimant's] exposure to asbestos." Decision and Order on Remand at 11. Employer's contention is without merit. The regulatory definition of pneumoconiosis includes any "chronic dust disease of the lung" which is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201. Dr. Garson acknowledged that claimant may have had exposure to asbestos and other hard minerals while working in coal mine employment. Dr. Garson specifically stated, "[A]s you know in preparation plants construction and everything there are mixed types of exposures, everything from asbestosis to hard minerals, to all kinds of things, which undoubtedly as he did not give a history of wearing protection, he undoubtedly had other exposures other than coal dust exposure that he suggested." Employer's Exhibit 3 at 15. In light of claimant's work history, Dr. Garson opined that it was "fair to say" that claimant's respiratory condition represented a mixed dust disease. Employer's Exhibit 3 at 30. Because the administrative law judge has discretion in assessing the credibility of the medical experts, we affirm his finding that Dr. Garson's opinion best explains the etiology of claimant's respiratory condition by accounting for all of his occupational exposure in coal mine employment. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003).

Lastly, we reject employer's argument that the administrative law judge erred in his consideration of whether claimant's idiopathic fibrosis was due to coal dust exposure. Although Dr. Fino opined that claimant suffered from idiopathic fibrosis unrelated to coal dust exposure, the administrative law judge permissibly relied on Dr. Garson's

explanation that a diagnosis of "idiopathic" fibrosis presupposes a lung that has not been exposed to smoking or coal dust exposure, and was only an appropriate diagnosis if the there was no explanation for the source of the fibrosis. Employer's Exhibit 3 at 24. In Dr. Garson's opinion, claimant's pulmonary fibrosis was explained by both his exposure to tobacco smoke and coal dust. *Id*. Because the administrative law judge had discretion to find Dr. Garson's testimony that claimant's idiopathic fibrosis was due in part to coal dust exposure persuasive, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

It is the duty of the administrative law judge to determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met his burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The Board will not reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge, in this instance, rationally considered the quality of the evidence in determining whether the opinions of record were supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because substantial evidence supports the administrative law judge's determination, pursuant to Section 718.202(a), that claimant established the existence of pneumoconiosis, and employer has not challenged, in this appeal, the administrative law judge's findings relevant to the other issues of entitlement, we affirm the award of benefits.[5]

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established a totally disabling respiratory impairment, and the administrative law judge's finding that claimant established disability causation. 20 C.F.R. §§718.204(b)(2), 718.204(c); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983)

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

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