BRB No. 06-0799 BLA

FRANKLIN D. STEVENSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 06/15/2007
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Franklin D. Stevenson, Grundy, Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Synder (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (04-BLA-5322) of Administrative Law Judge Daniel F. Solomon denying benefits 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 a second time. In his original Decision and Order, the administrative law judge found that the newly submitted evidence established that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and thus found that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order (January 13, 2005) at 2-3, 17-18; Director's Exhibit 1. Considering all of the

record evidence submitted with claimant's prior claim and his subsequent claim, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis, and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c)(1). Decision and Order (January 13, 2005) at 19-23. Accordingly, the administrative law judge denied benefits.

Claimant, without the assistance of counsel, filed an appeal. The Board affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3).[1] *Stevenson v. Island Creek Coal Co.*, BRB No. 05-0430 BLA, slip op. at 3-5 (Feb. 16, 2006) (unpub.). However, the Board vacated the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4).[2] The Board specifically noted that, while the administrative law judge relied on the opinions of Drs. Dahhan and Castle to support his finding that pneumoconiosis was not established, "a review of the record reflect[ed] that Drs. Castle and Dahhan reviewed and referenced x-rays that the administrative law judge found were not admissible pursuant to Section 725.414.]"[3] *Stevenson*, BRB No. 05-0430 BLA, slip op. at 5-6. Because Section 725.414 does not specify what action an administrative law judge should take when medical reports

[1] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant worked 33.20 years of coal mine employment, his finding of total disability pursuant to 20 C.F.R. Section 718.204(b)(2), and his determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Stevenson v. Island Creek Coal Co.*, BRB No. 05-0430 BLA, slip op. at 2, n.3 (Feb. 16, 2006) (unpub.).

[2] The Board affirmed the administrative law judge's determination that the opinions of Drs. Patel, Bulle, and Sutherland were not sufficiently documented or reasoned to support a finding of pneumoconiosis. *Stevenson*, BRB No. 05-0430 BLA, slip op. at 5. The Board also previously held that the administrative law judge committed only harmless error in failing to discuss Dr. Forehand's October 6, 1993 opinion, in the administrative law judge's analysis of the evidence at 20 C.F.R. §718.202(a)(4), as Dr. Forehand did not diagnose pneumoconiosis. *Id*.

[3] The x-ray evidence admitted in accordance with 20 C.F.R. §725.414 consists of the following: one reading by Dr. Sutherland of an x-ray dated March 19, 1990, two readings of an x-ray dated March 6, 1993 by Drs. Sargent and Shahan, two readings of a November 21, 2002 x-ray by Drs. West and Wheeler, three readings of a June 2, 2003 x-ray by Drs. Cappiello, Aycoth and Wiot, one reading by Dr. Scott of an April 29, 2003 x-ray, and one reading by Dr. Castle of a March 3, 2004 x-ray. Director's Exhibits 1, 15, 27, 30, 54; Employer's Exhibit 1, 3, 4.

reference inadmissible evidence,[4] the Board vacated the administrative law judge's finding under Section 718.202(a)(4), and remanded the case for disposition of the issue. *Stevenson*, BRB No. 05-0430 BLA slip op. at 6, citing *Harris v. Old Ben Coal Co*., 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). Furthermore, the Board vacated the administrative law judge's finding, pursuant to Section 718.204(c), that the opinions of Drs. Castle and Dahhan also established that claimant's total disability was not due to pneumoconiosis. *Stevenso*n, BRB No. 05-0430 BLA, slip op. at 6. The Board directed the administrative law judge on remand to consider the cause of claimant's total disability after he had reassessed the medical opinion evidence regarding the existence of pneumoconiosis, in light of *Harris*. *Id*.

On remand, the administrative law judge determined that the opinions of Dr. Dahhan and Dr. Castle, diagnosing that claimant did not have pneumoconiosis, were credible and entitled to greater weight than the contrary opinion of Dr. Mettu, that claimant suffered from the disease. Therefore, the administrative law judge found that claimant failed to establish the existence of the pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge further found that claimant failed to establish that he was totally disabled by pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to

[4] Section 725.414 provides that "[a]ny chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i).

pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, and the evidence of record, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence On remand, in accordance with the Board's directive, the administrative law judge evaluated the probative value of the medical opinions of Drs. Dahhan and Castle in light of their review of negative x-ray readings submitted by employer in excess of the evidentiary limitations at Section 725.414. *Stevenson*, BRB No. 05-0430 BLA, slip op. at 6; *Harris*, 23 BLR at 1-108; Decision and Order on Remand at 3. The administrative law judge first considered the nature of the inadmissible x-ray readings that were reviewed by employer's experts. He noted that Dr. Dahhan examined claimant on April 29, 2003 and read the x-ray taken in conjunction with his examination as negative for pneumoconiosis. Decision and Order on Remand at 3; Director's Exhibit 28. Although the record reflects that Dr. Dahhan is a B reader, employer chose not to designate Dr. Dahhan's negative reading as affirmative case evidence; instead, employer submitted a negative reading of the April 29, 2003 x-ray by Dr. Scott, a Board-certified radiologists and B readers as one of its affirmative x-ray readings pursuant to 20 C.F.R. §725.414(a)(3)(i). Employer's Exhibit 4. The April 29, 2003 x-ray was also read by Dr. Wheeler, a Board-certified radiologist and B reader as negative for pneumoconiosis. Director's Exhibit 28.

The administrative law judge initially determined that he was not required to exclude the entirety of Dr. Dahhan's examination report simply because employer had elected to substitute Dr. Scott's reading for Dr. Dahhan's reading of the April 29, 2003 x-ray.[5] Decision and Order on Remand at 3. The administrative law judge further determined that Dr. Dahhan's opinion, that claimant did not have pneumoconiosis, was credible despite his review of Dr. Wheeler's negative reading of the April 29, 2003 x-ray, as opposed to Dr. Scott's negative reading of the same film. *Id*. The administrative law judge found that the substitution of readings was not prejudicial to claimant since both Dr. Wheeler and Dr. Scott were equally qualified physicians and they were in agreement

[5] We agree that the administrative law judge was not required to exclude Dr. Dahhan's examination report based on employer's substitution of Dr. Scott's reading for Dr. Dahhan's reading. The administrative law judge previously determined that Dr. Dahhan did not rely solely on a negative x-ray to support his opinion that claimant did not have pneumoconiosis; rather, the physician based his diagnosis that claimant did not have pneumoconiosis on the entirety of his physical examination, including a normal physical findings, his review of the pulmonary function and arterial blood gas studies, and also a comparative review of Dr. Mettu's examination findings. Decision and Order (January 13, 2005) at 10-11, 15.

that the April 29, 2003 was negative for pneumoconiosis. *Id*. The administrative law judge noted that he might have reached a different conclusion if Dr. Scott's reading had been positive, which reading would have undermined Dr. Dahhan's opinion as to the absence of the disease. Decision and Order on Remand at 3, n.10. However, because it was evident to the administrative law judge that Dr. Dahhan's opinion on the existence of pneumoconiosis would have been the same if he had reviewed Dr. Scott's admissible reading, and not Dr. Wheeler's inadmissible reading, the administrative law judge concluded that Dr. Dahhan's opinion was documented and reasoned, and entitled to probative weight under Section 718.202(a)(4). Decision and Order on Remand at 3-4.

In assessing the credibility of Dr. Castle's diagnosis that claimant did not have pneumoconiosis, the administrative law judge noted that Dr. Castle, like Dr. Dahhan, reviewed Dr. Wheeler's negative reading of the April 29, 2003 x-ray, as opposed to Dr. Scott's negative reading. Decision and Order on Remand at 4. He similarly concluded that since Dr. Castle's opinion, that claimant did not suffer from pneumoconiosis, was equally supported by either of the negative interpretations of that film, Dr. Castle's opinion remained credible evidence for the absence of the disease. *Id*.

Additionally, the administrative law judge found that Dr. Castle's report referenced two negative readings of a June 2, 2003 x-ray by Drs. Scott and Wheeler, and that neither reading had been designated by employer as evidence. Decision and Order on Remand at 4; Director's Exhibit 54. Instead, employer designated only Dr. Wiot's negative reading of a June 2, 2003 x-ray as rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii). Decision and Order on Remand at 4; Employer's Exhibit 2. Notwithstanding, because all three of the readers of the June 2, 2003 x-ray, namely those of Drs. Scott, Wheeler, and Wiot, were in agreement that the June 2, 2003 x-ray was negative for pneumoconiosis, the administrative law judge reasoned that Dr. Castle's opinion, that claimant did not suffer from pneumoconiosis, would not have changed had he been given the opportunity to reviewed only Dr. Wiot's reading, as opposed to the readings by Drs. Scott and Wheeler. Decision and Order on Remand at 4. The administrative law judge further determined that, insofar as the Board affirmed his finding under Section 718.202(a)(1) that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, Dr. Castle's reliance on two additional [negative] x-ray interpretations to buttress his opinion that claimant did not suffer pneumoconiosis, did not warrant exclusion of his opinion, nor require the administrative law judge to assign Dr. Castle's opinion diminished weight relevant to the presence or absence of pneumoconiosis at Section 718.202(a).[6] *Id*. Thus, the administrative law judge found that Dr. Castle's opinion was reasoned and documented.

[6] We note that Dr. Castle's opinion was based, in part, on his own negative reading of the March 3, 2004 x-ray, which reading was admitted into the record by the

Under the facts of this case, we affirm the administrative law judge's discretionary determination, rendered in accordance with *Harris*, that the medical opinions of Drs. Dahhan and Castle were not erroneously tainted by their review of inadmissible, negative x-ray readings for pneumoconiosis.[7] *See* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Because the administrative law judge has broad discretion in assessing the credibility of the medical experts, s*ee Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), we affirm the administrative law judge's finding that the opinions of Drs. Dahhan and Castle are documented and reasoned, and thereby entitled to probative weight in consideration of the evidence at Section 718.202(a)(4).

We now turn our attention to whether the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). On remand, the administrative law judge correctly found that neither Dr. Dahhan, nor Dr. Castle, nor Dr. Mettu diagnosed that claimant suffered from clinical pneumoconiosis. Decision and Order at 4; Director's Exhibit 15; Employer's Exhibits 5. 6. Dr. Mettu, however, opined that claimant suffered from chronic bronchitis arising out of coal mine dust exposure, which diagnosis could support a finding of legal pneumoconiosis as defined at 20 C.F.R. §718.201. Drs. Dahhan and Castle conversely opined that claimant did not suffer from chronic bronchitis or any other respiratory or pulmonary condition attributable to his coal dust exposure. Employer's Exhibits 5, 6.

In weighing the conflicting medical opinion evidence relevant to the existence of legal pneumoconiosis, the administrative law judge permissibly assigned less probative

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administrative law judge. Decision and Order (January 13, 2005) at 20, citing ALJ Exhibit 2; Employer's Exhibit 2.

[7] In *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), the Board held that an administrative law judge should not *automatically* exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. If the administrative law judge finds that the opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Harris*, 23 BLR at 1-108. Rather, he may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; s*ee Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004) (*en banc*).

weight to Dr. Mettu's opinion because he found that Dr. Mettu failed to explain how he reached his diagnosis of chronic bronchitis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order on Remand at 6. In contrast, the administrative law judge found that Drs. Dahhan and Castle more thoroughly explained why the evidence did not support a conclusion that claimant had a respiratory condition arising out of coal mine employment.[8] Decision and Order on Remand at 5; Employer's Exhibits 5, 6. The administrative law judge also permissibly found that the opinions of Drs. Dahhan and Castle were entitled to determinative weight based on their Board-certification in pulmonary medicine. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order on Remand at 5. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of clinical or legal pneumoconiosis under Section 718.202(a)(4).

Since the administrative law judge has considered the entirety of the relevant evidence of record, and has provided credible reasons in support of his analysis of the weight and credibility of the evidence, we affirm the administrative law judge's findings regarding the existence of pneumoconiosis at Section 718.202(a), as they are supported by substantive evidence in the record and are in compliance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Since claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), benefits are precluded.

[8] The administrative law judge was persuaded specifically by Dr. Dahhan's criticisms of Dr. Mettu's opinion, and his better reasoned opinion that claimant did not suffer from chronic bronchitis because there was no evidence of obstructive respiratory impairment, and since Dr. Dahhan explained why claimant's restrictive respiratory impairment was attributable to claimant's history of congestive heart failure, a condition unrelated to coal dust exposure. Decision and Order on Remand at 4; Employer's Exhibit 6. The administrative law judge also noted that Dr. Dahhan dismissed a diagnosis of industrial bronchitis because that condition typically abates within six to eight months after a miner stops working in the mines, and the record established that claimant had not been exposed to coal dust since 1993, but still complained of respiratory symptoms. *Id*.

Accordingly, the Decision and Order on Remand denying 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