BRB No. 98-0676 BLA

SHIRLEY L. ROWAN (Widow of DELMER B. ROWAN)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED:
BETHENERGY MINES, INCORPORATED	)	
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 Thomas M . Burke, Administrative Law Judge, United States Department of Labor.

Richard K. Wehner (Wehner Law Offices), Kingwood, West Virginia, for claimant.

William S. Mattingly and Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (93-BLA-1435) of Administrative Law Judge Thomas M . Burke on a claim for survivor's benefits 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). The relevant procedural history of this case is as follows: The miner died on September 30, 1992.[1]

[1]The miner filed a claim for benefits on February 10, 1988. Director's Exhibit 27.

The death certificate, prepared by Dr. Piccirillo, identified acute respiratory failure, due to or as a consequence of chronic obstructive pulmonary disease, as the cause of death. Director's Exhibit 9. Claimant, the miner's widow, filed an application for survivor's benefits on October 22, 1992. Director's Exhibit 1. The district director found that claimant was entitled to benefits. At employer's request, the case was transferred to the Office of Administrative Law Judges (OALJ) for a hearing. On August 25, 1994, Administrative Law Judge Robert J. Amery issued a Decision and Order in which he accepted the parties' stipulation that the miner suffered from simple pneumoconiosis and determined that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded. Employer filed an appeal with the Board which, in a Decision and Order issued on February 24, 1995, affirmed Judge Amery's findings and the award of benefits. *Rowan v. Bethenergy Mines, Inc.*, BRB No. 94-3987 BLA (Feb. 24, 1995)(unpub.).

Employer sought review of the award of benefits by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. The court held that Judge Amery did not provide an adequate rationale for his decision to accord greatest weight to the opinion in which Dr. Franyutti, the autopsy prosector, concluded that pneumoconiosis was a contributing factor in the miner's death. *Rowan v. Bethenergy Mines, Inc.*, No. 95-1886 (4th Cir. July 30, 1996)(unpub.). Therefore, the court vacated the Board's Decision and Order and returned the case to the Board for remand to Judge Amery. Upon remand of the case to the OALJ, the case was reassigned to Administrative Law Judge Thomas M. Burke, due to Judge Amery's unavailability.

After giving the parties the opportunity to file briefs setting forth their respective positions on the issue of death due to pneumoconiosis, Judge Burke (the administrative law judge) issued a Decision and Order in which he referenced Judge Amery's summary of the relevant evidence. The administrative law judge engaged in a *de novo* consideration of the medical opinions of record under Section 718.205(c) and determined

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This claim was finally denied in a Decision and Order issued by the Board on January 29, 1991. *Rowan v. Bethenergy Mines, Inc.*, BRB No. 89-2617 BLA (Jan. 29, 1991)(unpub.). The Board affirmed Administrative Law Judge Reno E. Bonfanti's determination that the miner did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.*. No further action was taken with respect to the miner's claim.

that the better reasoned medical opinion evidence supported a finding that the miner's pneumoconiosis substantially contributed to his death pursuant to Section 718.205(c)(2). Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the medical opinions of record, erred in summarily incorporating portions of Judge Amery's Decision and Order, and in citing to a dissenting opinion in an unidentified Fourth Circuit case. Claimant has responded and urges the Board to affirm the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As an initial matter, we reject employer's contention that the administrative law judge erred in adopting Judge Amery's recitation of the medical opinions of record and in referring to an unidentified dissenting opinion. Contrary to employer's assertion, the administrative law judge did not incorporate Judge Amery's "flawed" findings of fact into his own discussion of whether the miner's death was related to pneumoconiosis under Section 718.205(c). The administrative law judge merely summarized Judge Amery's findings and indicated that he was incorporating Judge Amery's recitation of the evidence into his Decision and Order. Decision and Order on Remand at 2-4. The administrative law judge then identified the issues on remand as set forth in the Fourth Circuit's opinion and engaged in an analysis of these issues based upon a *de novo* consideration of the relevant medical opinion evidence. Decision and Order on Remand at 4-7.

The dissenting opinion of Circuit Judge Hall, which the administrative law judge cited, was clearly the opinion Judge Hall wrote in response to employer's appeal of the Board's Decision and Order affirming Judge Amery's award of benefits. Decision and Order on Remand at 6, 7; *Rowan v. Bethenergy Mines, Inc.*, No. 95-1886 (4th Cir. July 30, 1995)(unpub.), *slip opinion at 5*. In addition, contrary to employer's argument, it was not a *per se* abuse of discretion for the administrative law judge to refer to Judge Hall's observation that the medical opinions submitted on employer's behalf were premised on the discredited assumption that an obstructive pulmonary disorder cannot be caused by coal mine employment. *Id.*. Inasmuch as the majority opinion did not address this issue, but rather remanded the case to allow the administrative law judge to render findings with respect to the credibility of the medical opinions of record, the administrative law judge was not prohibited from mentioning Judge Hall's analysis when considering the evidence under Section 718.205(c).

Turning to the administrative law judge's findings on the merits of entitlement, employer argues that the administrative law judge erred in crediting the report in which Dr. Gaziano stated that pneumoconiosis was a contributing factor in the miner's death.

Employer asserts that Dr. Gaziano's opinion is unreliable as a matter of law on the grounds that the doctor expressed his conclusion in the form of brief, handwritten responses to a claims examiner's written questions, did not consider the miner's clinical history, did not perform a physical evaluation of the miner, and did not provide a rationale for his opinion. Director's Exhibit 9. We reject this contention. Although the factors to which employer has referred could, if true, provide a basis for discrediting Dr. Gaziano's opinion, they do not demonstrate that the opinion is inherently unreliable. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Thus, the administrative law judge did not err in giving some weight to Dr. Gaziano's opinion, although characterizing it as "cursory," and determining that it corroborated the opinions of Drs. Rasmussen, Doyle, and Harron. Decision and Order on Remand at 6; *see Clark*, *supra*; *Lucostic*, *supra*; *Peskie*, *supra*.

Employer also asserts that the administrative law judge erred in discrediting the opinions of Drs. Renn, Fino, Kleinerman, Bush, and Hutchins on the ground that these physicians relied upon the assumption that pneumoconiosis cannot cause an obstructive impairment - an assumption that has been discredited by the United States Court of Appeals for the Fourth Circuit. Decision and Order on Remand at 6, 7, citing *Stiltner v. Island Creek Coal Co.*, 86 F.3d 377, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-20 (4th Cir. 1990). In *Warth*, the Fourth Circuit held that an opinion in which a physician relies upon the erroneous assumption that obstructive disease cannot be caused by coal mine employment is entitled to little, if any, weight. In *Stiltner*, however, the court determined that the central holding in *Warth* does not apply when instead of suggesting that chronic obstructive pulmonary disease can never result from dust exposure in coal mine employment, a physician states that a miner's chronic obstructive pulmonary disease would be accompanied by a restrictive impairment if his condition were related to coal dust exposure. The United States Court of Appeals for the Fourth Circuit also indicated that a physician's opinion attributing a purely obstructive impairment to something other than coal dust exposure can be credited if it is based upon a thorough review of all of the medical evidence of record. Finally, the court stated that the reference in *Eagle* concerning the credibility of a medical opinion which excludes coal dust exposure as a potential source of obstructive lung disease was *dicta* and, therefore, does not have precedential value.

In the present case, the administrative law judge has not cited the language in the opinions of Drs. Fino, Renn, Kleinerman, Bush, and Hutchins which he found objectionable. It appears that none of these physicians stated explicitly that coal dust exposure in coal mine employment cannot cause an obstructive impairment and that several of the physicians explained in detail why the miner's medical and clinical histories did not support a finding of dust related lung disease. Employer's Exhibits 1-6, 8. Inasmuch as the administrative law judge did not identify the statements made by Drs. Fino, Renn, Kleinerman, Bush, and Hutchins which allegedly conflict with the Fourth

Circuit's holdings in *Warth* and *Stiltner*, we vacate the administrative law judge's finding in this regard and remand the case to the administrative law judge for reconsideration of these opinions under Section 718.205(c). On remand, the administrative law judge must set forth in detail his conclusions with respect to these opinions. *See Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983).

Employer also maintains that the administrative law judge erred in discrediting the opinions of Drs. Kleinerman, Bush, and Hutchins, in part, on the ground that these physicians believe that minimal pneumoconiosis is never sufficient to be a contributing factor to death. This contention has merit. The administrative law judge stated that he inferred from the physicians' statements, that the miner's simple pneumoconiosis was too mild to have contributed to or hastened his death, that these reviewing pathologists relied upon the assumption that minimal simple coal workers' pneumoconiosis can never contribute to death. Decision and Order on Remand at 5-6; Employer's Exhibits 1-3, 8. In light of the fact that Drs. Bush, Kleinerman, and Hutchins appeared to have relied specifically upon their microscopic examinations of the miner's lung tissue in setting forth their conclusions regarding the degree of pneumoconiosis suffered by the miner and its relationship to his death, we vacate the administrative law judge's finding in this regard and instruct the administrative law judge to reconsider these opinions and the opinion of Dr. Franyutti on remand. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer asserts next that the administrative law judge erred in relying upon the medical opinions of Drs. Rasmussen, Doyle, and Harron to determine that pneumoconiosis was a contributing cause of the miner's death pursuant to Section 718.205(c)(2). Employer maintains with respect to the opinions of Drs. Rasmussen and Doyle that the administrative law judge failed to explain why he accepted their conclusions that pneumoconiosis played a role in the miner's demise. Regarding Dr. Harron's opinion, employer argues that the administrative law judge erred in inferring that Dr. Harron determined that pneumoconiosis hastened the miner's death and in according greater weight to Dr. Harron's opinion. These contentions have some merit. In stating that the opinions of Drs. Rasmussen and Doyle were consistent with the miner's lengthy history of coal mine employment, the findings of pneumoconiosis by the pathologists of record, and the qualifying pulmonary function studies, the administrative law judge did not explain why their conclusions that pneumoconiosis was a contributing cause of the miner's death were bolstered by the factors to which the administrative law judge referred. Decision and Order at 6-7; *see Robertson*, *supra*.

The administrative law judge acted within his discretion, however, in treating Dr. Harron's statement that "certainly pneumoconiosis was [a] contributing cause" of the miner's death as a conclusion that pneumoconiosis hastened the miner's death in accordance with the United States Court of Appeals for the Fourth Circuit's holding in *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113

S.Ct. 969 (1993).[2] Decision and Order on Remand at 7; Claimant's Exhibit 3; *see Clark*, *supra*; *Peskie*, *supra*. Although Dr. Harron may have used equivocal language to identify the extent to which pneumoconiosis contributed to the miner's disability, he did not resort to such terminology when expressing his ultimate conclusion regarding the extent to which the miner's death was related to pneumoconiosis. Director's Exhibit 27; Claimant's Exhibit 3. The administrative law judge also did not abuse his discretion in treating Dr. Harron's opinion as documented despite the fact that Dr. Harron did not describe in detail the evidence that he reviewed in reaching his conclusions, as a doctor is not required to identify explicitly all of the documentation underlying his conclusions. *See Peabody Coal Co. v. Director, OWCP, [Durbin]*, 165 F.3d 1126, BLR (7th Cir. 1999); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987).

Employer is correct, however, in asserting that the administrative law judge erred in determining that Dr. Harron's opinion regarding the cause of the miner's death was entitled to greater weight than the contrary opinions of Drs. Renn and Fino because Dr. Harron submitted a medical report in conjunction with the miner's claim in which he diagnosed pneumoconiosis based upon his examination of the miner, while Drs. Renn and Fino submitted reports in which each concluded that the miner did not have pneumoconiosis.[3] Decision and Order on Remand at 6; Director's Exhibit 27. Drs. Renn and Fino both stated that although the x-ray evidence did not support a diagnosis of pneumoconiosis, the autopsy report and the reports of the reviewing pathologists established that the miner suffered from simple pneumoconiosis. Employer's Exhibits 4, 5 at 18. Thus, their opinions were not premised upon a conclusion at odds with that expressed by Dr. Harron. The administrative law judge must, therefore, reconsider his relative weighing of the opinions of Drs. Harron, Renn, and Fino on remand.[4] *See Tackett*, *supra*.

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[2] As indicated by the administrative law judge, in *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), the United States Court of Appeals for the Fourth Circuit held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Decision and Order on Remand at 7.

[3]Contrary to employer's argument, however, the principle of collateral estoppel did not operate to preclude the administrative law judge from considering the evidence submitted in conjunction with the miner's claim. Director's Exhibit 27; *see Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994); *see also Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[4]Employer's assertion that the administrative law judge should have accorded more weight to the opinions of Drs. Renn and Fino than to Dr. Harron's opinion based upon their superior qualifications is without merit. The administrative law judge is not required to resolve the conflict between medical opinions by reference to the

Employer next contends that the administrative law judge did not properly weigh the opinion of Dr. Franyutti, the autopsy prosector. Employer alleges that the administrative law judge erred in failing to make a credibility determination regarding Dr. Franyutti's statement that pneumoconiosis contributed to the miner's death and in failing to resolve the conflict between Dr. Franyutti's opinion and the opinions of Drs. Kleinerman, Bush, and Hutchins, each of whom reviewed the autopsy report and the tissue slides. These contentions have merit. The administrative law judge stated that the opinions of Drs. Kleinerman, Bush, and Hutchins were perhaps entitled to greater weight based upon their superior qualifications and the fact that they were aware of the miner's medical history and objective test results. Decision and Order on Remand at 5; Employer's Exhibits 1-3, 8. The administrative law judge relied upon his determination that the reviewing pathologists believed that coal dust exposure does not cause obstructive disease and that simple pneumoconiosis cannot contribute to death to resolve the conflict between Dr. Franyutti's opinion and the opinions of Drs. Kleinerman, Bush, and Hutchins. Decision and Order on Remand at 6-7. As indicated above, however, the administrative law judge did not act appropriately in relying upon these factors. Thus, the administrative law judge must reconsider his relative weighing of Dr. Franyutti's opinion on remand.

Moreover, the administrative law judge did not provide the requisite rationale for his apparent determination that Dr. Franyutti's opportunity to actually conduct the gross examination of the miner's lungs gave him an advantage over the reviewing pathologists. *See Milburn Colliery Company v. Hicks*, 138 F.2d 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); *Urgolites v. Director, OWCP*, 17 BLR 1-20 (1992). The administrative law judge merely noted that Dr. Franyutti did not state that a reviewing pathologist would be in exactly the same position as the autopsy prosector with respect to his ability to determine the extent to which pneumoconiosis contributed to the miner's death. Decision and Order on Remand at 6; Employer's Exhibit 7 at 10.

In addition, under the Administrative Procedure Act (APA), 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), if the conclusions of the physicians of record are conflicting, the administrative

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physicians' respective qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Employer's identical contention with respect to the administrative law judge's relative weighing of the opinions of Dr. Franyutti and Drs. Kleinerman, Bush, and Hutchins is also without merit.

law judge must resolve the conflict and set forth an explanation for his finding. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). In order to accomplish this task, the administrative law judge should consider factors that tend to either bolster, or undermine, the credibility of the medical reports of record. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). In the present case, the administrative law judge did not examine the extent to which Dr. Franyutti's opinion, as expressed in his deposition, is reasoned and documented, nor did he discuss Dr. Kleinerman's comments regarding the validity of Dr. Franyutti's conclusions. Employer's Exhibits 7, 8 at 33-38. In light of the foregoing, we vacate the administrative law judge's finding that claimant established that pneumoconiosis was a contributing cause of the miner's death pursuant to Section 718.205(c)(2) and remand the case to the administrative law judge for reconsideration of the medical opinions of record.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge