BRB No. 98-1248 BLA

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| ARTHUR RONDAL HELTON | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| GREAT WESTERN RESOURCES, 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 on Remand of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Mark D. Goss (Goss & Goss Attorneys), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen Chartered), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (96-BLA-1192) of Administrative Law Judge Richard E. Huddleston on a claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended,

[1] Claimant is Arthur Helton, the miner, who filed his application for benefits on December 13, 1988. Director's Exhibit 1. Although the administrative law judge erroneously stated that claimant filed his application on "December 31, 1988," we deem this error harmless inasmuch as it is not dispositive. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order on Remand at 2.

30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. In the initial Decision and Order, Administrative Law Judge Charles W. Campbell adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited claimant with seventeen and one-quarter years of qualifying coal mine employment. Next, Administrative Law Judge Campbell found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded. Director's Exhibit 37. Employer timely appealed the award. The Board affirmed Administrative Law Judge Campbell's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3) inasmuch as these findings were unchallenged on appeal but, vacated his weighing of the medical evidence under 20 C.F.R. §§718.202(a)(1), 718.204(b), and 718.204(c)(4), and consequently, remanded the case for reconsideration of the evidence. *Helton v. Great Western Resources, Inc.*, BRB. No. 92-1114 BLA (Jun. 21, 1995)(unpub.); Director's Exhibit 37.

On remand, the case was assigned to Administrative Law Judge Richard E. Huddleston (administrative law judge), who, based upon the parties' agreement, remanded the case to the district director for further development of the evidence of record. Following the receipt of further evidence, the district director returned the case to the administrative law judge for adjudication. Although the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(1), (a)(4), and 718.203(b), and total disability pursuant to Section 718.204(c), he found that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, he denied benefits.

On appeal, claimant argues that the administrative law judge erred by failing to find total disability due to pneumoconiosis under Section 718.204(b). Employer responds, urging affirmance of the denial. In addition, employer argues that the administrative law judge erroneously found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a). The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating that he will not participate in this appeal.[2]

[2] We affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2), (a)(3), 718.203(b) and 718.204(c)(1)-(4) inasmuch as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 12-15.

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).

Relevant to Section 718.204(b), claimant argues that the administrative law judge impermissibly relied upon the opinion of Dr. Dahhan because Dr. Dahhan failed to diagnose pneumoconiosis whereas the administrative law judge found that the medical evidence established the presence of pneumoconiosis. Claimant's argument has merit. We discussed this issue and the case precedent articulated by the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, in our previous decision, *Helton, slip op.* at 7, *citing Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (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), where we construed the language of the Sixth Circuit court in *Tussey*[3] and *Skukan*[4] to require an administrative law judge to find that a physician's medical opinion has "no probative value" where the underlying premise of the medical opinion, *i.e.*, that there is insufficient evidence to establish coal workers' pneumoconiosis, runs contrary to the established fact that the miner did suffer from pneumoconiosis.[5] *Helton, slip op.* at 7 n.9; *see also Bobick v. Saginaw*

[3] As we noted in our prior decision, in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the Sixth Circuit court held that once pneumoconiosis has been established, a physician's observations regarding the existence of a totally disabling respiratory or pulmonary impairment are deprived of "any probative value," if that physician diagnosed that claimant did not have coal workers' pneumoconiosis. *Helton, slip. op.* at 7 n.9.

[4] After acknowledging that the United States Supreme Court had subsequently vacated the decision on other grounds in *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), we noted that the Sixth Circuit had held that an administrative law judge should treat as less significant, any physician's conclusion about disability causation, where that physician found no evidence of pneumoconiosis after the existence of pneumoconiosis was established. *Skukan, supra, 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).

[5] Moreover, we instructed Administrative Law Judge Campbell that, "if, on remand, [he] finds that claimant has established the existence of pneumoconiosis pursuant to Section

*Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). In finding that claimant failed to establish total disability due to pneumoconiosis, the administrative law judge irrationally relied upon the opinion of Dr. Dahhan, who found no evidence of coal workers' pneumoconiosis or total disability, inasmuch as the underlying premise of Dr. Dahhan's opinion, that there is insufficient evidence to establish coal workers' pneumoconiosis, runs contrary to the established fact that claimant suffers from pneumoconiosis, as so found by the administrative law judge under Section 718.202(a)(1) and (a)(4). Decision and Order on Remand at 16; Director's Exhibit 37. We, therefore, vacate the administrative law judge's Section 718.204(b) finding and remand the case for the administrative law judge to reconsider the relevant evidence of record and determine whether claimant established that his total disability is due, at least in part, to coal workers' pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

We next turn to employer's challenge of the administrative law judge's findings relevant to Section 718.202(a). In its Brief in Response to Claimant's Petition for Review (Employer's Brief), employer avers that, in the event the Board does not affirm the administrative law judge's Decision and Order denying benefits and the case is remanded, the Board should vacate the administrative law judge's Section 718.202(a) determination because he erred in finding the existence of pneumoconiosis. Employer's Brief at 12. Employer raises specific allegations of error with respect to the administrative law judge's analysis of the x-ray and medical opinion evidence under Section 718.202(a)(1) and (a)(4), arguing that the administrative law judge's analyses are flawed, unexplained, and conclusory. Employer's Brief at 12-16.

The Board has consistently held, however, that "Pursuant to the regulations found at 20 C.F.R. §802.212, arguments in response briefs must be limited to those which respond to issues raised in petitioner's brief and those in support of the decision below. Other arguments will not be considered by the Board." *See* 20 C.F.R. §802.212(b); *Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57-58 (1994); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983); *see also Malcomb v.*

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718.202(a), [he] should reinstate his decision to discredit the medical opinions of Drs. Williams and Broudy, on the grounds that their underlying premise, that there is insufficient evidence to establish coal workers' pneumoconiosis, runs contrary to the established fact that the miner did suffer from pneumoconiosis." *Helton, slip op. at 7.*

*Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Dalle-Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987); Employer's Brief at 7-11. Similarly, the provisions set forth in Section 802.205(b)(2) require "a cross-appeal only in the event the party prevailing below contests adverse findings of fact or conclusions of law in order to change some aspect of the Decision and Order itself. If the party prevailing below supports the result of the decision, however, then it may advance any argument or raise any issue in a response brief which will maintain the *status quo* of the decision." *King*, 6 BLR at 1-91; *see Malcomb*, 15 F.3d at 369-370 , 18 BLR at 2-120. Inasmuch as employer's response brief is neither a cross-appeal nor does it provide an alternative basis upon which to affirm the ultimate disposition of the administrative law judge, we decline to address employer's arguments relevant to 718.202(a). *See King*, 6 BLR at 1-91.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge