BRB No. 98-1260 BLA

LOUIS J. TENTERAMANO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATED RAIL CORPORATION	)	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 on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Louis J. Tenteramano, Wilmington, Delaware, *pro se*.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (92-BLA-1386) of Administrative Law Judge Ralph A. Romano denying benefits on a duplicate 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 has been before the Board on two prior occasions. On the last appeal by claimant, the Board affirmed the administrative law judge's finding of total

disability at 20 C.F.R. §718.204(c). However, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.204(b), and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge to consider and resolve the conflicting evidence regarding claimant's smoking history, and the conflicts between Dr. Dittman's reports, prior to relying on Dr. Dittman's opinion. The Board also instructed the administrative law judge to render a determination with respect to whether claimant was a miner and the length of his coal mine employment. In addition, the Board instructed the administrative law judge to resolve the responsible operator issue if claimant is found to be entitled to benefits. *Tenteramano v. Consolidated Rail Co.*, BRB No. 97-0646 BLA (Jan. 22, 1998)(unpub.).

On the most recent remand, the administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b).[1] Accordingly, the administrative law judge again denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits on remand. Employer has not participated in this appeal. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order on Remand.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order on Remand if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

[1]The administrative law judge also found that claimant failed to establish that he was a miner under the Act.

In finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), the administrative law judge considered the relevant opinions of Drs. Dittman,[2] Kraynak and Kruk. Whereas Drs. Kraynak and Kruk opined that claimant suffers from a totally disabling respiratory impairment due to pneumoconiosis, Director's Exhibits 36-38, 49, 82, 89; Claimant's Exhibit 9, Dr. Dittman opined that claimant does not suffer from a totally disabling respiratory impairment due to pneumoconiosis,[3] Employer's Exhibit 8. The administrative law judge stated that "Dr. Dittman's opinion regarding the etiology of Claimant's pulmonary impairment...[is] more probative than the opinions of Drs. Kraynak and Kruk."[4] Decision and Order on Remand at 2. The administrative law judge found "Dr. Dittman's partial reliance upon Claimant's smoking one pack of cigarettes per day for thirty-five (35) years, to be more creditable than the other contrary smoking histories of record." *Id*. at 1. Specifically, the administrative law judge found "Claimant's statements regarding his smoking history to the physicians of record and his testimony, to be less credible and reliable, as all of these statements were made in preparation of the instant claim, as opposed to the history relied on by Dr. Dittman, which was recorded in preparation for a non-pulmonary hospitalization." *Id*.

[2]In a report dated April 21, 1993, Dr. Dittman stated that claimant "[d]oes not smoke and never has." Employer's Exhibit 8. In a subsequent deposition, however, Dr. Dittman stated that he relied on a Geisinger Medical Center report dated July 17, 1983, which noted that claimant had a thirty-five pack year smoking history. *Id*. The administrative law judge, within a proper exercise of his discretion, determined that Dr. Dittman's deposition testimony, which indicated that he relied in part on a thirty-five year smoking history in forming his opinions, is "sufficient to resolve any apparent conflict with his April 21, 1993 report regarding Claimant's smoking history." Decision and Order on Remand at 1.

[3]Dr. Dittman opined that claimant is not physically impaired or disabled on the basis of pneumoconiosis. Employer's Exhibit 8.

[4]The administrative law judge properly found that the opinion of Dr. Dittman is not hostile to the Act since Dr. Dittman's opinion does not foreclose any possibility that simple pneumoconiosis can be disabling. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). The administrative law judge observed that although "Dr. Dittman stated that it would be 'unusual' for a claimant to be rendered totally disabled due to simple pneumoconiosis, and...that simple pneumoconiosis is 'not usually considered to be physically impairing..., Dr. Dittman also clearly stated that such a finding of total disability was possible and his testimony reflects that he did not preclude the possibility in Claimant's case." Decision and Order on Remand at 2.

at 1-2. Contrary to the administrative law judge's finding, the Board has held that "[m]edical reports prepared for purposes of litigation are neither unusual nor considered inherently defective evidence." *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240, 1-242 (1984). Moreover, the Board has held that "there is no logic in an inference that evidence prepared for trial is more likely to be less reliable than other reports, or to be unfairly slanted in favor of the party presenting it." *Id*.

In addition, an examination of the record reveals that the administrative law judge failed to consider Dr. Wagner's opinion that claimant's respiratory impairment is caused by coal dust exposure. Director's Exhibit 54. While an administrative law judge is not required to accept medical evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Thus, we vacate the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), and remand the case for further consideration of all of the relevant evidence of record. *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). On remand, the administrative law judge must also consider the medical evidence of record in accordance with the Board's holding with respect to medical opinions prepared for the purpose of litigation. *See* 20 C.F.R. §725.414(a); *Chancey, supra*.

Further, inasmuch as we are remanding the case for further consideration of the evidence at 20 C.F.R. §718.204(b), we will also address the administrative law judge's finding that claimant failed to establish that he was a miner under the Act. The administrative law judge stated that "Claimant's equivocal and vague testimony regarding his presence at a coal mine site and coal dust exposure after 1969 is insufficient to meet his burden of proof under the situs prong of the analysis that he spent a 'significant portion' of his time at a coal mine site."[5] Decision and Order on Remand at 3. The administrative law judge also stated that "[a]s Claimant has failed to establish the situs prong, he has failed to establish that he was a miner after 1969 under the Act." *Id*. As the Director asserts, although an employer cannot be a responsible operator where there is no post-1969 exposure to coal dust, a claimant is not precluded from establishing that he was a miner under the Act on this basis. *See Zimmerman v. J. Robert Bazley, Inc.*, 10 BLR 1-75 (1987); *Elkins v. Director, OWCP*, 5 BLR 1-520 (1983). The administrative law judge observed that claimant testified that he spent time in the mines between 1962 and 1978.[6] Decision and

[5]The administrative law judge stated that "it is impossible to determine from Claimant's testimony and the evidence of record, what, if any, exposure Claimant had at a coal mine site after 1969." Decision and Order on Remand at 3.

[6]The administrative law judge stated that "Claimant testified that he was

Order on Remand at 3. However, the record indicates that in addition to the possible coal mine work by claimant from 1962 to 1978, there was possible coal mine work by claimant from 1932 to 1962. Director's Exhibits 2, 4-10, 33. Therefore, we vacate the administrative law judge's finding that claimant failed to establish that he was a miner under the Act, and remand the case for further consideration of the evidence with respect to this issue. On remand, the administrative law judge must also render a length of coal mine employment finding, if he finds such coal mine employment.

Finally, since claimant failed to establish that he was exposed to coal dust after 1969, the administrative law judge must transfer liability for the payment of benefits to the Black Lung Disability Trust Fund if claimant is found to be entitled to benefits. *See Zimmerman, supra*; *Elkins, supra*. As previously noted, the administrative law judge stated that "Claimant's equivocal and vague testimony regarding his presence at a coal mine site and coal dust exposure after 1969 is insufficient to meet his burden of proof under the situs prong of the analysis that he spent a 'significant portion' of his time at a coal mine site." Decision and Order on Remand at 3. In *Stroh v. Director, OWCP*, 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987), the United States Court of Appeals for the Third Circuit held that in order to satisfy the situs test, a claimant must have worked in or around a coal mine or custom coal preparation facility and have been exposed to coal dust as a result of his transportation work. Moreover, a miner must spend a significant portion of his time at a coal mine site to meet the situs test. *See Clifford v. Director, OWCP*, 7 BLR 1-817 (1985); *Musick v. Norfolk and Western Railway Co.*, 6 BLR 1-862 (1984). In the instant case, the administrative law judge observed that "Claimant stated that between 1962 and 1978 he spent 90% of his time on the Reading division." Decision and Order on Remand at 3. The administrative law judge also observed that "most of [claimant's] time on the Reading division was spent at the Luken Steel operation...[where] Claimant hauled scrap iron, slag and steel ingots." *Id*. Additionally, the administrative law judge observed that "Claimant was also unable to quantify the amount of time he spent in the Shamokin division on 'hold downs'[7]

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unable to quantify the amount of time he spent in the mines between 1962 and 1978 while working for the Reading division of the Reading Railroad." Decision and Order on Remand at 3.

[7]The administrative law judge observed that "Claimant testified that a 'hold down' would occur when a person on the Shamokin Division was unavailable to work due to sickness or vacation time and others were allowed to claim a hold down on that vacancy for the time that it was vacant." Decision and Order on Remand at 3 n.5.

after 1969 whenever he was out of work from the Reading division."[8] *Id*. Thus, the administrative law judge, within a proper exercise of his discretion, determined that claimant's most recent employment from 1962 to 1978 did not satisfy the situs test. *See Stroh, supra*; *Clifford, supra*; *Musick, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is vacated and the case is remanded for further 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

[8]The administrative law judge stated that "Claimant was unclear as to how often a hold down required the hauling of raw coal, as opposed to empty cars, to a mine site, and the duration and proximity of exposure to the breaker while at the mine site." Decision and Order on Remand at 3.