BRB No. 01-0443 BLA

JOE DENZIL VAUGHN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.
Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Jeffrey S. Goldberg (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification - Denial of Benefits (00-BLA-0256) of Administrative Law Judge Robert L. Hillyard 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).

The procedural history of this case is as follows. Claimant's 1997 application for benefits was denied by the claims examiner on January 27, 1998. Director's Exhibit 7. Claimant's new application for benefits filed on July 6, 1998, which was treated as a request for modification, Director's Exhibit 9, was denied by the district director on September 24, 1998, Director's Exhibit 8. After further consideration, the district director issued a Proposed Decision and Order - Awarding Benefits on October 28, 1999. Director's Exhibit 47. The case was transferred to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 53.

The administrative law judge credited claimant with thirty-four years and six months of coal mine employment and found that claimant has a smoking history of over eighty pack years. The administrative law judge found modification established based on a mistake in a determination of fact in the district director's January 27, 1998 denial. The administrative law judge found the biopsy evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000), and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge found the pulmonary function study evidence sufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000), but found that total disability was not demonstrated pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3) (2000). The administrative law judge considered the medical opinion evidence with the objective test results and found it insufficient to support a finding that claimant is totally disabled due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant asserts that the amendments to the regulations regarding the definition of pneumoconiosis necessitate that the case be remanded. Claimant also asserts that the Board should remand the case to the administrative law judge for specific consideration of disability causation. In addition, claimant asserts that the administrative law judge erred in his weighing of the medical opinion evidence, and contends that the case should be remanded for the Department of Labor to provide claimant with a complete credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. However, employer requests, if the Board remands the case, that the administrative law judge be instructed to determine whether modification is in the interest of justice. The Director, Office of Workers' Compensation Programs (the Director), responds solely to claimant's assertion that remand is required in light of the amended definition of pneumoconiosis. The Director maintains that remand is not required because the amended definition of coal workers' pneumoconiosis is

consistent with the law of the United States Court of Appeals for the Eight Circuit.[1]

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As a preliminary matter, we instruct the administrative law judge, on remand, to determine the state of claimant's most recent coal mine employment. Although appeal of Board decisions lies in any circuit in which the miner worked in coal mine employment and was exposed to coal dust, the Board applies the law of the United States Court of Appeals for the Circuit in which the miner most recently engaged in coal mine employment. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989). The administrative law judge did not make a finding on this issue.[2]

Claimant argues that remand is required because of the changes to the definition of pneumoconiosis in the amended regulations, which now recognize pneumoconiosis as a

---

[1] We affirm the administrative law judge's finding that claimant has established a mistake in a determination of fact in the earlier denial of benefits, and his finding that claimant has established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000); *see* 20 C.F.R. §718.202(a)(2), arising out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000); *see* 20 C.F.R. §718.203(b), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] It appears that claimant worked in Illinois and Missouri, *see* Director's Exhibits 2, 3, 34, which are within the jurisdiction of the United States Courts of Appeals for the Seventh and Eight Circuits, respectively.

latent and progressive disease, *see* 20 C.F.R. §718.201(c). We reject this assertion. The United States Courts of Appeals for both the Seventh and Eighth Circuits have previously indicated that pneumoconiosis is a progressive disease, and therefore the amendments to Section 718.201(c) do not impact the adjudication of this case. *See Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997).

We now turn to the assertions regarding the administrative law judge's finding that claimant is not totally disabled due to pneumoconiosis. Claimant asserts that the administrative law judge erred by finding the opinion of Dr. Simpao not entitled to determinative weight. Claimant maintains that the administrative law judge erred in finding Dr. Naeye's opinion documented and well reasoned. Claimant challenges the administrative law judge's decision to accord substantial weight to Dr. Fino's opinion. Claimant also asserts that it was error for the administrative law judge to find that Dr. Younes' opinion is entitled to little weight. Claimant also points to inconsistencies in the administrative law judge's evaluation of the evidence, which, he asserts, must be corrected on remand. In its response brief, employer challenges the administrative law judge's finding that the opinions of Drs. Kleinerman and Selby are entitled to less weight.

We reject claimant's argument that Dr. Simpao's opinion is entitled to determinative weight and we affirm the administrative law judge's findings regarding Dr. Simpao's opinion. The administrative law judge reasonably found that Dr. Simpao's opinion is "inconsistent, equivocal, unreasoned, undocumented and unsupported." Decision and Order at 20; *see* Director's Exhibit 42; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Further, we affirm the administrative law judge's finding that Dr. Simpao's opinion is of questionable probative value as the physician did not explain his diagnosis in view of claimant's smoking history. *See Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716 (1984). Claimant asserts that Dr. Naeye's deposition testimony is inconsistent with his report, since Dr. Naeye diagnosed moderately severe coal workers' pneumoconiosis in his report and referred to mild coal workers' pneumoconiosis in his deposition. The administrative law judge found Dr. Naeye's opinion to be entitled to great weight in finding that claimant is not totally disabled due to pneumoconiosis. Decision and Order at 18-20. Since the administrative law judge has not addressed this apparent inconsistency in Dr. Naeye's opinions, *see* Director's Exhibit 46; Employer's Exhibit 1, the administrative law judge must consider this on remand, and determine whether this apparent inconsistency in Dr. Naeye's opinions undermines the physician's determination that pneumoconiosis would not prevent claimant from doing coal mine employment. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. United States*

Steel Corp., 7 BLR 1-12 (1984). Claimant also asserts that, without explanation, Dr. Naeye ruled out coal dust exposure as a factor in claimant's airway disease. Since the administrative law judge has found the evidence sufficient to establish the existence of pneumoconiosis, which Dr. Naeye diagnosed, and since claimant's assertion does not address Dr. Naeye's opinion regarding disability causation, this argument is without merit.

Claimant asserts that it was error for the administrative law judge to rely on Dr. Naeye's opinion, since Dr. Naeye relied on a smoking history of over 85 pack years, in contrast to the administrative law judge's finding that claimant had an eighty pack year history of smoking. We disagree. The administrative law judge found that claimant has a smoking history of "over eighty-pack years," 2001 Decision and Order at 3, and we hold that the difference between "over eighty pack years" and "over eighty-five pack years" is, under these circumstances, inconsequential. Claimant also points out that Dr. Naeye never examined claimant. On remand, the administrative law judge's consideration of the probative value of the opinions of non-examining physicians, such as Dr. Naeye, should be based on the law of the circuit of claimant's last coal mine employment. *See Consolidation Coal Co. v. OWCP*, [*Sisson*], 54 F.3d 434, 19 BLR 2-155 (7th Cir. 1995); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *Peabody Coal Co. v. Helms*, 901 F.2d 571, 13 BLR 2-449 (7th Cir. 1990)(Seventh Circuit holds that an administrative law judge cannot afford more weight to an examining physician's opinion solely because he treated claimant); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985)(Board holds that an administrative law judge may, but is not required to, accord greater weight to the opinion of a claimant's attending physician). We therefore vacate the administrative law judge's reliance upon Dr. Naeye's opinion. On remand the administrative law judge must reconsider this opinion.

Similarly, the probative value of the opinion of Dr. Fino, who did not examine claimant, should be determined by the law of the circuit where claimant last worked. *See Sisson, supra*; *Beasley, supra*; *Helms, supra*; *Wetzel, supra*. In addition, as claimant asserts, while Dr. Fino indicated the smoking histories noted in the different opinions he reviewed, he never made a statement indicating which smoking history he relied upon in rendering his conclusions. *See* Director's Exhibit 48. Although claimant's smoking history is not relevant to the inquiry into the degree of claimant's disability, it is relevant to the determination of the cause of any impairment claimant has, pursuant to 20 C.F.R. §718.204(c), *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Accordingly, on remand, the administrative law judge is instructed to consider this factor in his weighing of the medical opinion evidence. Claimant also asserts that Dr. Fino did not express an opinion on the cause of claimant's pulmonary impairment. Claimant is incorrect. Dr. Fino specifically stated that claimant's coal mine dust inhalation did not cause or contribute to his disability. Director's Exhibit 48.

Employer challenges the administrative law judge's finding that the opinions of Drs. Selby and Kleinerman are entitled to less weight in this case. *See* Employer's Exhibits 2, 3. We vacate the administrative law judge's findings regarding these opinions as the administrative law judge has not adequately explained his reasons for according them less weight. While the Board has held that an administrative law judge may credit the opinion of a physician with a more complete picture of claimant's health, *see Stark, supra*, and may accord diminished weight to the opinion of a non-examining physician who is not apprised of qualifying objective test results, *see Clark, supra*, the Board has also indicated that an administrative law judge may not speculate as to whether a physician's conclusion would have been affected by the knowledge of additional data, *see Parulis v. Director, OWCP*, 15 BLR 1-28 (1991). On remand, the administrative law judge must consider each report in its entirety, rather than independently evaluate the objective data considered by the physician. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Moreover, the administrative law judge is advised that a physician may properly determine that a claimant has no respiratory impairment or is not totally disabled, even though the clinical studies yield qualifying results. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Accordingly, the administrative law judge must reconsider the opinions of Drs. Selby and Kleinerman.

Claimant also alleges that the administrative law judge was inconsistent in his consideration and evaluation of the medical evidence. Specifically, claimant notes that the administrative law judge was inconsistent in his evaluation of the import of the differing smoking histories noted by the physicians, whether the physician personally examined claimant, and what evidence the consulting physicians reviewed. On remand, the administrative law judge is instructed to determine the smoking history each physician relied upon, and consider this factor in his evaluation of the medical opinion evidence regarding the cause of any disability claimant has. *See Stark, supra*; *Maypray, supra*. In addition, the administrative law judge must be consistent in his analysis of the medical opinions, so as to avoid selective analysis of the evidence. Further, the administrative law judge is advised to fully explain his crediting and weighing of the evidence in compliance with 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).

Employer requests that, if the case is remanded, the administrative law judge be instructed to consider whether modification is in the interest of justice. Inasmuch as the administrative law judge did not make a specific determination in this regard, he must render such a finding on remand. *See generally McCord v. Ciphas*, 523 F.2d 1377 (D.C. Cir. 1976); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999).

We also note claimant's suggestion that once the administrative law judge found Dr. Simpao's opinion not credible, the case should have been remanded to the district director for a complete, credible pulmonary evaluation. *See Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 1-51 (1990)(*en banc*). While the case is before the administrative law judge on remand, the parties may present their positions on the issue of whether remand to the district director is appropriate.

Finally, the administrative law judge is instructed, on remand, to determine whether claimant is totally disabled from a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). In making this determination, the administrative law judge must evaluate the pulmonary function study evidence, the blood gas study evidence and the medical opinion evidence, and weigh this evidence together, like and unlike, to determine whether claimant has carried his burden of establishing total disability by a preponderance of the evidence. *See* 20 C.F.R. §718.204(b); *Fields, supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). If the administrative law judge finds that claimant is totally disabled from a respiratory or pulmonary impairment, the administrative law judge must then determine whether claimant has established that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge