BRB No. 02-0551 BLA

DENNIS R. VARNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHEYENNE EAGLE MINING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Modification of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Dennis R. Varney, Phyllis, Kentucky, *pro se*.

David S. Panzer (Greenberg Traurig LLP), Washington, D.C., for employer.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Modification (01-BLA-0538) of

Administrative Law Judge Rudolf L. Jansen rendered 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).[1] The administrative law judge found fourteen years of coal mine employment established and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 4. Considering all of the evidence of record,

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his claim for benefits on March 18, 1997. This claim was denied by Administrative Law Judge Robert L. Hillyard on December 28, 1998 because, while claimant established the existence of simple pneumoconiosis and that his pneumoconiosis arose out of coal mine employment, he failed to establish that he was totally disabled from a pulmonary or respiratory impairment and, therefore, that he was totally disabled due to pneumoconiosis. The Board held that the administrative law judge properly found that claimant failed to

the administrative law judge found that the evidence of record established the existence of pneumoconiosis and total disability, but failed to establish total disability due to pneumoconiosis.[3] Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. In addition, employer contends that the administrative law judge properly found that the existence of complicated pneumoconiosis was not established, but contends that the administrative law judge failed to evaluate properly the x-ray evidence regarding the existence of simple pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds, urging that the administrative law judge's Decision and Order denying benefits be vacated and the case remanded for consideration of the relevant medical opinions pursuant to disability causation as the administrative law judge failed to address all the relevant medical opinions.

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establish a totally disabling respiratory impairment, and affirmed the denial of benefits on December 16, 1999. Director's Exhibits 1, 62, 63. Claimant requested modification on December 5, 2000. The district director granted modification on January 12, 2001 finding that claimant had established total disability. Employer contested the finding of modification and requested a formal hearing. A formal hearing was held before Administrative Law Judge Rudolf L. Jansen on October 16, 2001. Judge Jansen issued the Decision and Order Denying Modification on April 24, 2002. That denial is the subject of the present appeal. Director's Exhibit 81.

[3] While the administrative law judge found that claimant established a change in condition by establishing a totally disabling respiratory impairment based on new evidence, he found that claimant was not entitled to modification of the prior denial because consideration of all the evidence of record did not establish disability causation.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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*).

At the outset, we affirm the administrative law judge's finding that Dr. Sargent's finding on x-ray of size A large opacities, Director's Exhibit 78, is not sufficient to establish the existence of complicated pneumoconiosis in light of all the other relevant evidence of record. Claimant is not, therefore, entitled to the irrebuttable presumption of disabling pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Regarding employer's argument that the administrative law judge did not consider all relevant commentary on the x-rays regarding whether the x-rays showed the existence of simple pneumoconiosis or other abnormalities, we need not reach this contention as the administrative law judge found the existence of simple pneumoconiosis established by medical opinion evidence, in addition to x-ray evidence. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant contends generally that the medical opinion evidence establishes disability causation. The Director contends that the administrative law judge erred by failing to consider all the relevant medical opinions of record when he determined that the evidence was insufficient to establish disability causation. Specifically, the Director contends that the administrative law judge failed to address the opinions of Drs. Mettu, Wright, Myers, Westerfield, Broudy, Fino, Fritzhand, and Branscomb and contends that this error was material because (1) Drs. Myers, Westerfield, and Fritzhand connected claimant's pneumoconiosis to his pulmonary impairment and (2) several physicians (including Drs. Wright, Broudy, Fino, and Repsher) failed to diagnose the existence of pneumoconiosis which necessarily undermines the credibility of their opinions regarding the impact of claimant's pneumoconiosis on his disabling pulmonary impairment.

In addressing disability causation, the administrative law judge discussed the opinions of Drs. Fino, Repsher, Rosenberg, and Sundaram. Weighing the opinions together, the administrative law judge placed the greatest weight on Dr. Fino's opinion because "his credentials qualify him to consider the characteristics of coal workers' pneumoconiosis, and to rule out the disease effects on [claimant]." Decision and Order at 16. Thus, in light of Dr. Fino's opinion and the absence of "a credentialed physician[']s well documented and reasoned opinion to the contrary," the administrative law judge concluded that the medical opinions did not establish that claimant's pneumoconiosis significantly contributed to his disability. Decision and Order at 16. The administrative law judge accorded little weight to the opinions of Drs. Rosenberg, and Repsher as he found their opinions equivocal on causation. Likewise, the administrative law judge accorded little weight to Dr. Sundaram's opinion as he failed to consider claimant's smoking history.

As the Director contends, however, the administrative law judge did not consider the opinions of Drs. Westerfield, Myers, Mettu, Fritzhand, Wright, Broudy and Branscomb. Of these physicians, Drs. Fritzhand, Myers and Westerfield found that claimant's disability was due pneumoconiosis. Director's Exhibits 22, 21, 18, 17. Moreover, as the Director contends, the failure of several physicians, including Drs. Wright, Broudy, Fino and Repsher, to diagnose the existence of pneumoconiosis may affect the credibility of their opinions on causation. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1041-42, 17 BLR 2-16, 2- (6th Cir. 1993); *see Scott v. Mason Coal Co.*, 289 F.3d 263, BLR (4th Cir. 2002). Of course, the administrative law judge may consider the credentials of the physicians, any equivocation or lack thereof in rendering their opinions, and whether they had a complete picture of the miner's health, including smoking history, in assessing the credibility of their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 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); *see Risher v. Director, OWCP*, 940 F.2d 327, 330-31, 15 BLR 2-186, 2-191 (8th Cir. 1991); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984). Thus, as the administrative law judge failed to address all evidence relevant to the issue of disability causation, we vacate the administrative law judge's finding that the evidence was insufficient to establish disability causation and remand the case for reconsideration of all the relevant medical opinions of record. *See Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 955-56, 22 BLR 2-46, 2-68 (6th Cir. 1999), *cert. denied*, 531 U.S. 818 (2000).

Accordingly, the administrative law judge's Decision and Order - Denying Modification is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge