BRB No. 03-0457 BLA

BOBBY MORRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOCUST GROVE, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 03/22/2004
	)	
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--Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order--Denial of Benefits (2001 -BLA-01191) of Administrative Law Judge Daniel J. Roketenetz 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] Claimant filed his application for benefits on June 27, 2000. Director's Exhibit 1. The district director initially denied benefits, Director's Exhibit 20, but upon consideration of additional evidence, awarded benefits on June 28, 2001. Director's Exhibit 39. Employer requested a hearing, Director's Exhibit 40, which was held on September 17, 2002.

The administrative law judge credited claimant with fourteen years of coal mine employment, and found that the chest x-ray evidence, biopsy evidence, and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §71 8.202(a)(1), (a)(2), (a)(4). The administrative law judge additionally found that although claimant established that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), he did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(l). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the biopsy and medical opinion evidence pursuant to Sections 71 8.202(a)(2), (a)(4), and 718.204(c)(1). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §7l8.3, 718.202, 718.203,

[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] We affirm as unchallenged on appeal the findings of fourteen years of coal mine employment, that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (a)(3), and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(2), claimant contends that the administrative law judge erred in finding the biopsy evidence to be in equipoise as to the existence of pneumoconiosis. Claimant's contention lacks merit. The administrative law judge considered pathology reports based on a biopsy of claimant's right lung.[3] Director's Exhibits 31, 44. In a joint report, Drs. Kline and Harlamert, whose credentials are not of record, reported findings "consistent with simple coal worker's pneumoconiosis," and diagnosed "[f]ibrosis with anthrosilicosis." Director's Exhibit 31. However, Dr. Naeye, who the administrative law judge noted is a "board-certified pathologist," Decision and Order at 9, reviewed the biopsy report and slides and concluded that "[n]one of the lesions that comprise coal worker's pneumoconiosis (CWP) are present in the lung tissues available for analysis." Director's Exhibit 44. The administrative law judge additionally considered Dr. Naeye's testimony that in his view, Drs. Kline and Harlamert mistook ruptured bullae and fused alveoli for fibrosis, and failed to detect crystals of free silica, part of the characteristic lesion of coal workers' pneumoconiosis. Employer's Exhibit 12 at 5-7, 15, 17-18, 20.

The administrative law judge "determine[sj the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof." *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-2 12 (2002)(*en banc*). In the case at bar, the administrative law judge considered fully the conflicting pathology reports and found, within his discretion, that the biopsy evidence was in equipoise. *Id*. Claimant's assertions that Dr. Naeye "was equivocal" and "appeared to recant a portion of his testimony," Claimant's Brief at 7, amount to "a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers." *Abshire*, 22 BLR at 1-211-12. Consequently, we reject claimant's contention that the administrative law judge erred in finding the biopsy evidence to be in equipoise. Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 71 8.202(a)(2). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

[3] The biopsy was obtained during surgery to treat bullous lung disease that causes claimant to suffer recurrent, spontaneous lung collapses when bullous "blebs" rupture. Director's Exhibit 31. The record contains no medical evidence linking the bullous blebs or lung collapses with dust exposure in coal mine employment. *See* 20 C.F.R. §718.201(a)(2).

Pursuant to Section 71 8.202(a)(4), claimant contends that the administrative law judge misinterpreted Dr. Baker's opinion as a mere restatement of an x-ray when he found it "neither well-reasoned nor well-documented." Decision and Order--Denial of Benefits at 19. The administrative law judge found that Dr. Baker's diagnosis of pneumoconiosis was "based upon his own reading of a chest x-ray and the [c]laimant's history of dust exposure." *Id*. The administrative law judge concluded that because "Dr. Baker fail[ed] to state any other reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history," his report was not a reasoned medical judgment. *Id*.

In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, agreed that merely restating an x-ray does not qualify as a reasoned medical judgment, but held that the administrative law judge's characterization of the medical reports as mere restatements of x-rays was inaccurate, because the physicians based their opinions on a range of factors, including physical examinations, employment and smoking histories, and pulmonary function studies. In the case at bar, the record reflects that Dr. Baker conducted a physical examination, considered work and smoking histories, and administered a chest x-ray, pulmonary function study, and blood gas study. Director's Exhibit 13. In addition to diagnosing "Coal Workers' Pneumoconiosis 1/0" based on "abnormal chest x-ray and coal dust exposure," Dr. Baker diagnosed a severe obstructive impairment based on pulmonary function testing and attributed the impairment to both cigarette smoking and coal dust exposure. Director's Exhibit 13 at 3-5. The latter diagnosis, if credited, could support a finding of the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2)(b); *Cornett*, 227 F.3d at 575, 22 BLR at 2-119. Thus, substantial evidence does not support the finding that Dr. Baker merely restated an x-ray. *Cornett*, 227 F.3d at 576, 22 BLR at 2-120. Where substantial evidence does not support the administrative law judge's findings, "the proper course for the Board is to remand the case to the AU pursuant to 33 U.S.C. §921(b)(4) rather than attempting to fill the gaps in the AU's opinion." *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Consequently, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and instruct him to reconsider Dr. Baker's opinion consistently with *Cornett*.

In finding that total disability due to pneumoconiosis was not established pursuant to Section 718.204(c)(1), the administrative law judge relied on his view that Dr. Baker's report was unreasoned to find it outweighed by the contrary opinions of Drs. Broudy, Fino, and Jarboe. Because we have vacated the administrative law judge's finding that Dr. Baker's report did not constitute a reasoned medical judgment, we also vacate the administrative law judge's finding pursuant to Section 718.204(c)(1) and instruct him to revisit the disability causation issue if he finds the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). To clarify the proceedings on remand and avoid the repetition of any error in the analysis of disability causation, we note that the administrative law judge erred in discounting Dr. Baker's opinion for failing to state the

extent each condition contributed to claimant's impairment: a medical opinion need not apportion the relative amounts of lung disease due to smoking versus coal mine dust exposure. *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Southard v. Director, OWCP*, 732 F.2d 66, 72, 6 BLR 2-26, 2-35 (6th Cir. 1984). Additionally, the administrative law judge should explain fully his decision to discount Dr. Baker's opinion regarding the etiology of claimant's disabling obstruction because the opinion was based on an invalid pulmonary function study, citing *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). In *Street*, the Board approved an administrative law judge's decision to give less weight to medical opinions that a claimant was totally disabled -by a respiratory or pulmonary impairment because the pulmonary function studies the physicians relied upon to diagnose total disability were invalid. *Street*, 7 BLR at 1-67. Because the issue in Street was the proper evaluation of medical opinions on total disability, not causation, it has no bearing on the case at bar. Hence, on remand the administrative law judge should explain his conclusion that Dr. Baker's opinion as to the etiology of the severe obstruction is undercut by reliance on an invalid pulmonary function study.[4] *See* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97, 1-101 (2000)(*en banc*).

[4] To the extent the pulmonary function studies may be relevant to the administrative law judge's analysis on remand, we note that he erred in crediting the non-qualifying pulmonary function study of May 6, 2002 on the ground that it was the most recent test of record and pneumoconiosis is a progressive disease. The Sixth circuit court has specified that where more recent medical evidence does not show deterioration, but rather, "shows that the miner has improved, [such] 'reasoning' simply cannot apply," because the evidence "is inconsistent with" the progressive nature of pneumoconiosis. *Woodward v. Director, OWCP*, 991 F.2d 314, 3 19-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993)(citation omitted).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge