BRB No. 08-0441 BLA

E.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY, INCORPORATED	)	DATE ISSUED: 03/24/2009
	)	
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 Denying Benefits of Pamela Lakes Wood, 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.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2004-BLA-5694) of Administrative Law Judge Pamela Lakes Wood (the administrative law

judge) on a claim filed on July 18, 2002 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 is before the Board for the second time. In her original Decision and Order, the administrative law judge credited the miner with "27.94 years of coal mine employment,"[1] 2006 Decision and Order at 3, and adjudicated this claim pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's findings that claimant established the existence of clinical pneumoconiosis at Section 718.202(a)(1) and that claimant established total disability at Section 718.204(b). *E.B. v. Golden Oak Mining Co.*, BRB Nos. 06-0929 BLA/S, slip op. at 2 n.2, 3 (Aug. 28, 2007) (unpublished). However, the Board vacated the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4), and remanded the case for reconsideration of all relevant evidence in accordance with the standard set forth by the United States Court of Appeals for the Sixth Circuit in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), for determining whether a medical opinion is hostile to the Act. *E.B.*, BRB Nos. 06-0929 BLA/S, slip op. at 4. The Board also vacated the administrative law judge's finding that claimant established total disability due to pneumoconiosis at Section 718.204(c), and remanded the case for reconsideration of all relevant evidence in accordance with the standard set forth by the Sixth Circuit in *Adams* for determining whether a medical opinion is hostile to the Act.[2] *E.B.*, BRB Nos. 06-0929 BLA/S, slip op. at 5.

On remand, the administrative law judge found that claimant failed to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). The administrative law judge also found that claimant failed to establish total disability due to pneumoconiosis at Section 718.204(c). Accordingly, the administrative law judge denied benefits.

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[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 3, 5.

[2] The Board also affirmed the Order Awarding Attorney Fees. [*E.B.*] *v. Golden Oak Mining Co.*, BRB Nos. 06-0929 BLA/S (Aug. 28, 2007)(unpublished).

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Claimant specifically argues that the administrative law judge failed to adequately address the medical opinions of Drs. Fino and Westerfield. Claimant also contends that the administrative law judge erred by not invoking the presumption that claimant's pneumoconiosis arose out of coal mine employment at Section 718.203. Further, claimant challenges the administrative law judge's finding that the evidence was insufficient to establish total disability due to pneumoconiosis at Section 718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Benefits (the Director), responds, urging remand of this case for reconsideration of the medical opinion evidence.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, 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. §§718.3, 718.202, 718.203, 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).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Specifically, claimant argues that the administrative law judge erred in crediting the opinions of Drs. Fino and Westerfield, that claimant's respiratory impairment is due to cigarette smoking, over the contrary opinion of Dr. Baker,[3] that claimant's chronic obstructive pulmonary disease (COPD) is due to both coal dust exposure and smoking. Claimant maintains that the administrative law judge erroneously applied a mechanical "nose count" of witnesses, and failed to adequately address the deficiencies in the opinions of Drs. Fino and Westerfield. Claimant's Brief at 6-12. The Director agrees, contending that the administrative law judge's interpretation of the Board's decision that, absent a finding that the opinions of

[3] The Board held that substantial evidence supported the administrative law judge's finding that Dr. Baker's opinion is adequately reasoned. [*E.B.*], BRB Nos. 06-0929 BLA/S, slip op. at 3-4.

Drs. Fino and Westerfield are "hostile to the Act," she was required to credit their opinions, was in error. Director's Brief at 2. The arguments of claimant and the Director have merit.

In evaluating the medical opinions of record on remand pursuant to Section 718.202(a)(4), the administrative law judge clarified the basis for her previous decision to give less weight to the opinions of Drs. Fino[4] and Westerfield[5] than to Dr. Baker's contrary opinion. The administrative law judge stated, "I did not intend to find in my previous decision that the opinions of Drs. Fino and Westerfield were 'hostile to the Act' under the criteria pertinent in the Sixth Circuit or elsewhere." 2008 Decision and Order on Remand at 5. The administrative law judge next noted that the Board stated that in order to establish that a medical opinion is hostile to the Act in the Sixth Circuit, the administrative law judge must determine that the physician's opinion is inconsistent with congressional intent; that it is absolute, in that it forecloses all possibility that simple pneumoconiosis can be disabling; and that the physician's predisposed belief forms the primary basis for his conclusion. *Id*. at 5-6. The administrative law judge then found that the opinions of Drs. Fino and Westerfield were not hostile to the Act under Sixth Circuit precedent, stating:

> Here, although the first and third factors are at least arguably satisfied, it is clear that the second one, the requirement that the opinion be absolute, is not. Thus, although Dr. Westerfield's analysis is based upon his assumption that a given case of pneumoconiosis caused by coal mine dust exposure is not likely to be progressive, he has not stated that progression would never occur. Likewise, while Dr. Fino has assumed that, for a given case of obstructive respiratory disability, it is unlikely to be associated with coal mine dust exposure in the absence of a restrictive defect, he has not stated that such is always the case.

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[4] Dr. Fino examined claimant on November 21, 2002 and diagnosed moderate emphysema and chronic obstructive bronchitis due to smoking, based on a negative x-ray reading, an obstructive abnormality consistent with smoking, and the fact that claimant's total lung capacity was not reduced. Director's Exhibit 8.

[5] Dr. Westerfield, a consulting physician, diagnosed coal workers' pneumoconiosis, based on x-ray, and chronic obstructive pulmonary disease (COPD) due to smoking, based on a smoking history of forty years, a decrease in FEV_1, and the fact that claimant has the lowest category of coal workers' pneumoconiosis. Although Dr. Westerfield could not rule out coal dust exposure as a contributing factor to claimant's COPD, he indicated that he could not quantify it. Employer's Exhibits 1, 3.

Id. at 6.

The administrative law judge also determined that the Board essentially held that unless an administrative law judge finds that an opinion is hostile to the Act, it cannot be discounted merely because the doctor assumes criteria contrary to those stated in the regulations. *Id*. at 6. Further, after concluding that the Board vacated her only basis for discrediting the opinions of Drs. Fino and Westerfield, the administrative law judge found that the opinions of Drs. Baker, Fino, and Westerfield were reasoned and documented. *Id*. Hence, because she determined that the medical opinion evidence was, at best, in equipoise, the administrative law judge found that claimant failed to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Moreover, the administrative law judge found that claimant failed to establish total disability due to pneumoconiosis at Section 718.204(c).

However, contrary to the administrative law judge's finding, the Board did not hold that the only valid basis that was available to the administrative law judge for discounting the opinions of Drs. Fino and Westerfield was to find that their opinions were hostile to the Act. Rather, the Board instructed the administrative law judge to conduct a full and comparative weighing of all relevant evidence in accordance with the standard set forth by the Sixth Circuit in *Adams*. Because the administrative law judge failed to reconsider the medical opinion evidence of record in its entirety, as directed by the Board, *Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988), we vacate the administrative law judge's finding that claimant failed to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), and remand the case for reconsideration of all the relevant evidence thereunder.

Furthermore, because the administrative law judge's legal pneumoconiosis analysis affected her disability causation analysis, we vacate the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis at Section 718.204(c), and remand the case for reconsideration of all the relevant evidence thereunder, if reached.

Moreover, on remand, the administrative law judge must reconsider her determination that the opinions of Drs. Fino and Westerfield outweigh Dr. Baker's contrary opinion at Sections 718.202(a)(4) and 718.204(c). As claimant notes, Dr. Fino's opinion that claimant does not have clinical or legal pneumoconiosis was based on a negative x-ray reading that was contrary to the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(1). Further, Dr. Fino determined that a qualifying arterial blood gas study was normal, Director's Exhibit 8, while Dr. Westerfield reviewed the same study and opined that the miner has "quite abnormal blood gases." Employer's Exhibit 1 at 11-12. Thus, in addressing the medical opinions of record, the administrative law judge should address not only the

physicians' ultimate diagnoses, but whether their opinions are reasoned in light of the explanations for their conclusions, the documentation underlying their medical judgments, the regulations, and the evidence as a whole. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge