BRB No. 00-0236 BLA

DONALD L. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Perry D. McDaniel (Crandall Pyles Haviland & Turner, LLP), Charleston, West Virginia, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Edward Waldman (Judith L. Kramer, Acting 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-1506) of Administrative Law Judge Thomas M. Burke (the administrative law judge) awarding benefits 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] On original consideration, the administrative law judge found forty-four and three-quarter years of coal mine employment, the existence of occupational pneumoconiosis based on the medical opinion evidence, total disability under 20 C.F.R. §718.204(c)(1) and (c)(4)(2000), and disability causation pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, benefits were awarded. Employer appealed. In *Williams v. Peabody Coal Co.*, BRB No. 97-0796 BLA (Feb. 26, 1998)(unpublished), the Board vacated the administrative law judge's findings under 20 C.F.R. §718.202(a)(4)(2000) and Section 718.204(b)(2000) inasmuch as he relied on Dr. Istfan's report. The Board held that the administrative law judge erroneously admitted *claimant's* post-hearing submission of Dr. Istfan's report when he had held the record open to allow *employer* to submit evidence in response to Dr. Rasmussen's report contained at Claimant's Exhibit 1. The Board affirmed the administrative law judge's determination that claimant established the requisite etiology, 20 C.F.R. §718.203(b)(2000), and total respiratory or pulmonary disability at Section 718.204(c)(1) and (c)(4)(2000), as these findings were unchallenged. The Board thus remanded the case, instructing the administrative law judge to determine whether or not to admit Dr. Istfan's opinion and, if so, to allow employer the opportunity to submit evidence in response.

On remand, the administrative law judge admitted Dr. Istfan's opinion, and also admitted the medical opinions of Drs. Branscomb, Tuteur and Zaldivar submitted by employer in response to Dr. Istfan's report. The administrative law judge accorded less weight to these latter three medical opinions, and affirmed his prior Decision and Order awarding benefits. Employer's appeal of the administrative law judge's decision on remand is the subject of the instant appeal.

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Employer alleges error in the administrative law judge's determination that claimant has pneumoconiosis and is totally disabled by it. Employer also contends that the administrative law judge failed to conduct an analysis of the relevant evidence in determining the date from which benefits commence. Claimant responds in support of the decision below. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response: He disagrees with employer's argument that claimant's pre-existing total disability due to systematic vasculitis precludes his entitlement to benefits under the Act. The Director attaches part of the brief he submitted to the United States Court of Appeals for the Fourth Circuit in *Peabody Coal Co. v. Director, OWCP*, [*Morgan*], No. 99-1573 (4th Cir. Oct. 30, 2000).[2] Employer has filed a reply brief.

Pursuant to a lawsuit challenging the revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which employer and the Director have responded. Both employer and the Director filed briefs indicating that the amended regulations would not affect the outcome of the case. Employer adds that if the Board does not agree with employer's position to deny the appeal or to remand the case, then the case should be held pending the court's decision in the lawsuit. Claimant has not filed a brief in response to the Board's order.[3] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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,

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[2] In *Peabody Coal Co. v. Director, OWCP*, [*Morgan*], No. 99-1573 (4th Cir. Oct. 30, 2000), the Director urged the Fourth Circuit not to adopt the standard enunciated by the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). The court ultimately remanded the case on procedural grounds by order of the clerk.

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge shifted the burden of proof to employer to establish that claimant does not have pneumoconiosis, by directly quoting and relying upon his finding in his prior decision that Dr. Rasmussen's diagnosis of pneumoconiosis "was not overcome by the capricious conclusions [of Drs. Branscomb, Zaldivar and Tuteur] that claimant's 44 years of coal dust exposure could in no way contribute to claimant's pulmonary impairment." *See* Decision and Order Awarding Benefits at 7; *see also* Decision and Order On Remand 3. Employer argues that administrative law judge thereby erroneously gave claimant "a presumption of pneumoconiosis" based on his history of exposure to coal mine dust, which requires a remand of the case for the administrative law judge to determine whether claimant has met his burden by affirmative and reliable proof.

Employer's argument lacks merit. The administrative law judge properly considered the credibility of the conflicting medical opinions of record in determining their sufficiency to meet claimant's burden to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Thus, we reject employer's argument that the administrative law judge accorded claimant any presumption of the existence of pneumoconiosis or shifted the burden of proof. Further, notwithstanding the administrative law judge's characterization of the conclusions of Drs. Branscomb, Tuteur and Zaldivar (that claimant's 44-year exposure to coal dust did not contribute to his pulmonary condition or impairment) as "capricious," the record shows that the administrative law judge provided several reasons for according less weight to these opinions. *See* Decision and Order at 3-5. Moreover, the administrative law judge provided several reasons for according greater weight to Dr. Rasmussen's opinion, *Id.* at 1, and did not accept it at face value as employer asserts.

Employer next contends that the administrative law judge erred when he failed to compare and weigh the medical experts' relative qualifications. Employer cites to, *inter alia*, the decisions of the United States Court of Appeals for the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992) in support of its argument that this error requires a remand of the case.

Employer's contention has merit. In the instant case, the administrative law judge did not, on remand, or in his prior Decision and Order, note, discuss, or in any way consider the respective qualifications of the medical experts of record. The Fourth Circuit held in *Hicks*

that:

> Although the ALJ noted the relative qualifications of the two physicians, he attributed no importance to the comparative credentials of the physicians, noting their respective qualifications were "not dispositive of the issue." [citation omitted]. We have previously stated that experts' respective qualifications are important indicators of the reliability of their opinions. *[Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440, 441 nn. 1,2 ; 21 BLR 2-269, 2-273, 2-276 nn. 1, 2 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65, 66 (4th Cir. 1992)].

Hicks, *supra*, 138 F.3d at 536, 21 BLR at 2-341. The Fourth Circuit characterized the administrative law judge's error in *Hicks* as an error of law and reversed the Board's affirmance of the administrative law judge's findings under 20 C.F.R. §718.204(2000). *Id.* Pursuant to *Hicks* and *Akers*, we vacate the administrative law judge's findings at Sections 718.202(a)(4)(2000) and Section 718.204(b)(2000) and remand the case. On remand, the administrative law judge must reassess the credibility of the medical opinion evidence in determining whether claimant has met his burden to establish the existence of pneumoconiosis, 20 C.F.R. §718.202, and the cause of his totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c).[4]

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

Employer next contends that the administrative law judge disregarded "the negative evidence" because he believed that those opinions were contrary "to judicial recognition of the progressive nature of the disease," Decision and Order on Remand at 3. Employer's Brief at 13. Employer argues that the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), prohibits the use of judicially created rules and presumptions to resolve issues that have not been actually litigated. Employer also argues that Drs. Branscomb, Tuteur and Zaldivar did not base their findings that claimant does not have pneumoconiosis on a presumption that pneumoconiosis does not progress absent further exposure, and Dr. Tuteur did not disagree with the proposition that pneumoconiosis may progress after cessation of exposure. Employer makes several assertions in favor of a finding that the reports of Drs. Branscomb, Tuteur and Zaldivar are credible and argues, *inter alia*, that the opinions of Drs. Tuteur and Branscomb "are consistent with the findings of the Surgeon General who reported that in the absence of further coal dust exposure, simple coal workers' pneumoconiosis is not progressive. *See* U.S. Department of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Smoking: Cander and Chronic Lung Disease in the Workplace*, 289-318 (1985)." Employer's Brief at 14.[5]

As an initial matter, the administrative law judge principally relied on his prior findings in determining the sufficiency and reliability of the medical opinion evidence to meet claimant's burden to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. This reliance constitutes error. When the Board, in its Decision and Order, vacated the administrative law judge's findings at Section 718.202(a)(4)(2000) and Section 718.204(b)(2000), the effect of the Board's action was to return the parties to the *status quo ante* the administrative law judge's decision on these issues. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). Moreover, inasmuch as the basis for the Board's remand order was for the administrative law judge to rule on a procedural matter concerning the constitution of the record, the administrative law judge was required to look at all the evidence *de novo*, once he ruled on that procedural matter and admitted Dr. Istfan's report and employer's evidence in response to Dr. Istfan's report. 20 C.F.R. §725.477(b); *see* APA, *supra*.

Further, the administrative law judge did not accord more or less weight to any medical evidence based on the theory that pneumoconiosis is a progressive disease. The administrative law judge merely quoted, in his Decision and Order on Remand, a section of his prior Decision and Order in which he summarily stated that "to the extent that the medical

[5]This report is not part of the record. The Board's review of the case is limited to the record as developed before the administrative law judge. *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985)

reports rest on the assumption that changes in pneumoconiosis conditions do not occur after the miner has left the mines, they are not well-reasoned and [are] contrary to judicial recognition of the progressive nature of pneumoconiosis." Decision and Order on Remand at 1-5. Therefore, as employer correctly asserts, the theory of the progressivity of pneumoconiosis is not at issue in this case. *See* Employer's Brief at 14; Employer's Response to Order Concerning the Applicability of Revised Regulations at 3.

Employer next contends that the administrative law judge's additional reasons for discrediting the opinions of Drs. Branscomb, Tuteur and Zaldivar are not rational and do not comply with applicable law. Employer asserts:

> Judge Burke was convinced that these doctors' opinions were not reliable because they changed their opinions regarding whether Williams' vasculitis affected his lungs. ALJ II at 3. Whether vasculitis affected Williams' lungs has been a sticking point throughout this litigation, and it is a red herring. Drs. Branscomb, Tuteur and Zaldivar did not base their finding of no pneumoconiosis on whether Williams has pulmonary vasculitis and they explicitly stated so in their most recent reports.

Employer's Brief at 15.

Under the revised regulation at 20 C.F.R. §718.204(c)(1), claimant must establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. In the instant case, the administrative law judge applied no specific standard to his disability causation inquiry and the error requires a remand of the case. On remand, the administrative law judge must determine the legal sufficiency of the evidence he finds to be credible, in determining whether claimant has met his burden to establish disability causation under the revised regulation at 20 C.F.R. §718.204(c).

Employer next contends that the administrative law judge erred in rejecting the opinions of Drs. Branscomb, Tuteur and Zaldivar because they relied on the negative x-ray evidence to find that claimant does not have pneumoconiosis. Employer's assertion has merit. The fact that these physicians found no x-ray evidence of pneumoconiosis was not the sole basis upon which they concluded that claimant did not have pneumoconiosis, *see* Employer's Exhibits A-C, and did not render their opinions unreasoned. Specifically, the physicians diagnosed smoking-related conditions and ultimately attributed claimant's totally disabling respiratory or pulmonary impairment thereto. *Id.* Moreover, the administrative law judge previously found that the weight of the x-ray evidence of record is negative. Decision and Order - Awarding Benefits at3-4. On remand, the administrative law judge is instructed to make findings consistent with the Fourth Circuit's decision in *Island Creek Coal*

Co. v. Compton, 211 F.3d 203 (4th Cir. 2000).[6]

Lastly, employer correctly asserts that the administrative law judge failed to engage in any analysis of the evidence in determining the date from which benefits commence. Decision and Order on Remand at 5. If the administrative law judge awards benefits on remand, he must redetermine this issue under the revised regulation at 20 C.F.R. §725.503. We note that these revisions do not alter the principle that benefits must commence with the month in which the claim was filed where the evidence fails to establish when claimant became totally disabled due to pneumoconiosis. 65 Fed. Reg. 80011, 80086.

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

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[6]Employer correctly argues that, contrary to the administrative law judge's finding, Dr. Branscomb did explain the changes on the x-ray film and why they were not indicative of the existence of pneumoconiosis. Employer's Exhibit A. Employer further correctly argues that Dr. Branscomb did not opine that pneumoconiosis does not cause an obstructive defect, but rather, indicated that pneumoconiosis in very advanced stages is obstructive in nature. *Id.* Thus, the administrative law judge's suggestion to the contrary was erroneous and his finding that this opinion is contrary to the regulations constitutes error.

Further, the administrative law judge's finding that Dr. Tuteur failed to account for the worsening of claimant's condition shown on the pulmonary function studies of record is refuted by the record. Employer's Exhibit B. To the extent the administrative law judge apparently disagreed with Dr. Tuteur's opinion, he substituted his opinion for that of a medical expert. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge