

BRB No. 01-0711 BLA

JOHN M. ADAIR)
)
 Claimant-)
 Respondent)
) DATE ISSUED:
 v.)
)
 FLORENCE MINING COMPANY)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
) DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

George H. Thompson (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Rita Roppolo (Eugene Scalia, 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:

Employer appeals the Decision and Order on Remand - Awarding Benefits (98-

BLA-0010) of Administrative Law Judge Daniel L. Leland (the administrative law judge) with respect to 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). This is the second time that this case has been before the Board.¹ In *Adair v. Florence Mining Co.*, BRB No. 00-0217 BLA, the Board affirmed the administrative law judge's finding that

the newly submitted evidence of record was sufficient to establish the presence of a totally disabling pulmonary impairment under 20 C.F.R. §718.204(c) (2000) and, therefore, a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).² The Board further determined, however, that the administrative law judge had erred in rejecting the opinions of Drs. Strother, Garretson, Bush, and Tuteur pursuant to 20 C.F.R. §718.204(b) (2000) on the ground that they are hostile to the Act.³ Accordingly, the award of benefits was vacated and the case remanded to the administrative law judge for reconsideration of these medical opinions. The Board also instructed the administrative

¹Claimant filed an application for benefits on July 14, 1980. Director's Exhibit 38. This claim was finally denied in a Decision and Order issued by Administrative Law Judge Ralph A. Romano on June 28, 1988. *Id.* Claimant took no further action until filing a second application for benefits on March 28, 1997. Director's Exhibit 1.

²The 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 (2001). Unless otherwise noted, all citations are to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). Therefore, any arguments made by the parties in response to the Board's Order requesting briefing are now moot.

³The regulations pertaining to total disability causation, previously set forth in 20 C.F.R. §718.204(b) (2000), are now set forth in 20 C.F.R. §718.204(c) (2001).

law judge to reconsider the evidence of claimant's use of cigarettes and his finding that Dr. Schaaf's opinion is the most credible of record.

On remand, the administrative law judge discredited the opinions of Drs. Strother, Garretson, Bush, and Tuteur and accorded greatest weight to the opinion in which Dr. Schaaf stated that claimant is totally disabled due to pneumoconiosis. Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the medical opinions of regard regarding the issue of the cause of claimant's totally disabling impairment. Claimant and the Director, Office of Workers' Compensation Programs, have responded and urge affirmance of the administrative law judge's Decision and Order on Remand - Awarding Benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

On remand from the Board, the administrative law judge reconsidered the relevant medical reports of record pursuant to 20 C.F.R. §718.204(c) and discredited the opinions of Drs. Strother and Garretson on the ground that they premised their conclusions upon assumptions that are inconsistent with the Act and the regulations.⁴ Decision and Order on Remand at 4; Director's Exhibits 29, 38; Employer's Exhibits 6-8, 10. Specifically, the administrative law judge found that both physicians relied upon their belief that simple pneumoconiosis is not disabling. *Id.* The administrative law judge further noted

⁴Dr. Strother examined claimant and concluded that claimant is suffering from asthmatic bronchitis and is totally disabled by it. Dr. Strother determined that coal dust exposure played no role in causing claimant's impairment. Director's Exhibits 29, 38; Employer's Exhibit 6. Dr. Garretson also examined claimant. He diagnosed chronic bronchitis related to claimant's use of cigarettes and indicated that neither pneumoconiosis nor coal mine employment had played a role in causing claimant's symptoms. Director's Exhibit 38; Employer's Exhibits 8, 10.

that Dr. Strother indicated that his diagnoses were based, in part, upon the principle that pneumoconiosis does not progress in the absence of additional coal dust exposure. *Id.*

Employer contends that the administrative law judge did not properly weigh the opinions of Drs. Strother and Garretson, as neither physician foreclosed the possibility that simple pneumoconiosis can be totally disabling. Employer also asserts that Dr. Strother acknowledged that he has seen cases in which simple pneumoconiosis progressed in the absence of additional exposure to coal dust. In reviewing the decision below, we are not empowered to substitute our judgement for that of the administrative law judge, but rather, we must affirm the administrative law judge's findings if they are supported by substantial evidence. *See Clites v. Jones and Laughlin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981); *see also O'Keeffe, supra.*⁵ We hold that the administrative law judge's determination with respect to the opinions of Drs. Strother and Garretson is based upon substantial evidence in the record and, therefore, it is affirmed. The administrative law judge reviewed each opinion in detail and identified the statements which indicated the physicians' belief that simple pneumoconiosis does not produce a disabling impairment.⁶ Moreover, on remand, the administrative law judge

⁵This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's last year of coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

⁶Dr. Strother testified at his deposition that "low levels of pneumoconiosis usually relate to no impairment or dysfunction of the lungs" and stated that he had not seen a patient with level one pneumoconiosis with a functional impairment caused by pneumoconiosis. Employer's Exhibit 6 at 38-39. Dr. Garretson stated that he could not recall examining a miner with simple pneumoconiosis who was totally disabled by the

rationaly determined that although neither physician stated that simple pneumoconiosis can *never* be totally disabling, the totality of their medical reports and deposition testimony supported a conclusion that Drs. Strother and Garretson based their respective diagnoses “on a premise fundamentally at odds with the statutory and regulatory scheme.” Decision and Order on Remand at 4, quoting *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 109-110, 12 BLR 2-305, 2-310-2-311 (3d Cir. 1989); *see also Hoffman v. B & G Construction Co.*, 8 BLR 1-1-65 (1985); *Wetherill v. Green Construction Co.*, 5 BLR 1-248 (1982). Thus, the administrative law judge acted within his discretion in finding that the opinions of Drs. Strother and Garretson are not credible regarding the issue of the cause of claimant’s totally disabling impairment.

disease, that he does not think that level 1 pneumoconiosis would cause shortness of breath, and that “generally speaking,” he does not believe that a person with level 1 pneumoconiosis would be disabled. Employer’s Exhibit 10 at 13, 38.

Turning to the medical reports of Drs. Bush and Tuteur, the administrative law judge discredited both opinions on the ground that the physicians “failed to provide a credible explanation as to how claimant’s cigarette smoking caused his pulmonary impairment thirty-eight years after claimant quit smoking.”⁷ Decision and Order on Remand at 5-6; Employer’s Exhibits 4, 7, 9, 11. The administrative law judge also noted that Dr. Bush failed to take into account the progressive nature of pneumoconiosis and did not give enough weight to claimant’s thirty-three year history of coal mine employment. *Id.* Employer asserts that, contrary to the administrative law judge’s finding, Drs. Bush and Tuteur considered disease processes other than those caused by smoking and explained why claimant’s symptoms were consistent with a smoking induced impairment rather than legal or clinical pneumoconiosis. Employer also contends that the administrative law judge’s finding must be vacated, as the administrative law judge stated incorrectly that Dr. Bush’s qualifications are not of record.

Employer’s contentions are without merit. The administrative law judge acted within his discretion in determining that neither Dr. Bush nor Dr. Tuteur described how smoking caused claimant’s impairment, despite the length of time that elapsed between the cessation of cigarette use and the appearance of claimant’s symptoms, particularly in light of evidence indicating that claimant’s past smoking had not caused any significant impairment when he was examined in 1987. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Both physicians

⁷Dr. Bush examined claimant and diagnosed simple pneumoconiosis, chronic bronchitis, and an abnormal EKG. Dr. Bush attributed the bronchitis to smoking and indicated that the smoking induced bronchitis has produced a moderate obstructive impairment. The doctor stated that “[claimant] is only now beginning to suffer from that prolonged exposure in the remote past.” Employer’s Exhibits 7, 11. Dr. Tuteur reviewed the medical evidence of record and determined that although claimant “likely has radiographically significant pneumoconiosis,” the cause of his chronic obstructive pulmonary disease is smoking. Employer’s Exhibits 4, 9.

indicated that the appearance of measurable damage from smoking can lag and set forth reasons in support of their conclusion that claimant's condition was due to smoking rather than coal dust exposure, but neither described the mechanism by which the delayed response to smoking occurs. We affirm, therefore, the administrative law judge's finding that the opinions of Drs. Bush and Tuteur are not credible regarding the source of claimant's totally disabling impairment, regardless of the fact that Bush's qualifications are in the record. Employer's Exhibits 7, 11; see *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Lastly, employer asserts that the administrative law judge erred in giving greatest weight to the opinion in which Dr. Schaaf stated that claimant has pneumoconiosis and that pneumoconiosis is a substantially contributing cause of claimant's total disability.⁸ Decision and Order on Remand at 6-7; Claimant's Exhibits 3, 10. This contention is also without merit. The administrative law judge rationally found that Dr. Schaaf's opinion was entitled to greatest weight based upon his qualifications, his adherence to the principles that simple pneumoconiosis is a progressive disease that can cause total disability, and his attention to claimant's physical examination and symptoms, the medical data, and claimant's smoking history. See *Clark, supra*; *Peskie, supra*; *Lucostic, supra*. The administrative law judge also rationally determined that Dr. Schaaf adequately discussed claimant's smoking history and considered the possibility that claimant smoked more than he reported. *Id.* Thus, we affirm the administrative law judge's finding that Dr. Schaaf's opinion supports a finding that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to Section 718.204(c).

⁸Dr. Schaaf examined claimant and reviewed the medical evidence of record. He determined that claimant has pneumoconiosis, chronic bronchitis, and suffers from a totally disabling obstructive impairment caused primarily by his pneumoconiosis. Dr. Schaaf indicated that claimant's smoking history was minimal. When asked to assume that claimant had smoked two and one-half packs per day for over twenty years, Dr. Schaaf stated that he "would be more willing to think about smoking as a cause of the problem," but added that he would not be able to rule out pneumoconiosis's role in claimant's disability. Claimant's Exhibits 3, 10 at 56.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge