BRB No. 04-0671 BLA

DONALD R. WRISTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 05/25/2005
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

William D. Turner (Pyles, Haviland, Turner & Smith, LLP), Lewisburg, West Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5071) of Administrative Law Judge Richard A. Morgan denying 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] This case is before the Board for the second time. Claimant filed

[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

a duplicate claim on February 22, 1993.[2] In a Decision and Order dated July 24, 1995, Administrative Law Judge Stuart A. Levin found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Although Judge Levin found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), he further found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, Judge Levin denied benefits. By Decision and Order dated August 22, 1996, the Board affirmed Judge Levin's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000). *Wriston v. Peabody Coal Co.*, BRB No. 95-2104 BLA (Aug. 22, 1996) (unpublished). However, the Board vacated Judge Levin's findings pursuant to 20 C.F.R. §§718.202(a)(4) (2000), 718.204(c)(4) and (b) (2000), and remanded the case for further consideration. *Id.* The Board also instructed Judge Levin to initially determine whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) before considering the merits of claimant's 1993 claim. *Id.*

By Decision and Order dated February 27, 1998, Judge Levin remanded the case to the district director for further development of the medical evidence.[3] After further

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regulations.

[2]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on May 15, 1980. Director's Exhibit 30. The district director denied benefits on April 10, 1981. *Id.* The district director found that the evidence was insufficient to establish that claimant was totally disabled by pneumoconiosis. *Id.* By letter dated June 11, 1981, claimant notified the district director that he wished to "delay" his black lung claim, noting that he had been reinstated to his job in February of 1981. *Id.*

The miner filed a second claim on August 12, 1986. Director's Exhibit 31. The district director denied benefits on October 27, 1986. *Id.* The district director found the evidence insufficient to establish (1) the existence of pneumoconiosis; (2) that claimant's pneumoconiosis was caused at least in part by his coal mine employment; and (3) that claimant was totally disabled by pneumoconiosis. *Id.*

Claimant filed a third claim on February 22, 1993. Director's Exhibit 1.

[3]Administrative Law Judge Stuart A. Levin found that:

> [I]t is apparent that additional medical evidence will be necessary to address the medical questions raised by this remand. Although Claimant

development of the medical evidence, the district director denied the claim on May 16, 2002. Director's Exhibit 72. The case was subsequently forwarded to the Office of Administrative Law Judges for a formal hearing. A hearing was held on June 12, 2003.

In a Decision and Order dated April 21, 2004, Administrative Law Judge Richard A. Morgan (the administrative law judge) found that the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, he found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). After finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), the administrative law judge found that "[t]aken as a whole, the X-ray and medical opinions, do not establish the presence of pneumoconiosis." 20 C.F.R. §718.202(a)(1), (a)(4). In light of his finding that the evidence was insufficient to establish the existence of pneumoconiosis, the administrative law judge found that the evidence was also insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

> has objected to the Employer's request to supplement the record, it is clear that the present state of the record is deficient. Additional medical evidence will be needed which provides physician explanations addressing the alleged inconsistencies in the medical reports. The medical significance of clinical data or medical observations such as "gas exchange abnormalities" needs to be addressed and medical explanations need to be provided concerning how the clinical data or observations relied upon by a physician supports the physician's respective evaluations. To the extent physicians proffer conflicting evaluations, expert medical evaluations of the conflicts should be provided.

Judge Levin's 1998 Decision and Order at 3.

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[4] In finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge credited the opinions of Drs. Fino, Tuteur and Zaldivar, that claimant does not suffer from pneumoconiosis, over the contrary opinions of Drs. Cohen and Rasmussen.[5] Decision and Order at 26-27.

Claimant initially argues that the administrative law judge erred in not addressing the relevance of certain aspects of the opinions of Drs. Cohen, Zaldivar and Tuteur. Claimant accurately notes that the Board, in its 1996 Decision and Order, stated that Judge Levin had:

> not explained the relevance of his findings that Dr. Cohen "observed gas exchange abnormalities, increased A-a gradient, and high dead airspace. Dr. Zaldivar noted normal diffusion capacity which 'shows lung tissue intact.' And while Dr. Cohen noted both wheezing and a productive cough, Dr. Tuteur observed intermittent symptoms." Decision and Order at 8. Accordingly, as the relevance of these findings and their effect on [Judge Levin's] findings are not explained, they cannot be affirmed. *See Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Consequently, we vacate [Judge Levin's] findings in this regard. The Director alleges that [Judge Levin] is rendering his own interpretations of the medical data, and on remand [Judge Levin] must not substitute his own opinion for that of the medical reports of record. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Wriston, slip op. at 3.

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[4]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]The record also contains Dr. Ranavaya's report. In a report dated January 29, 2002, Dr. Ranavaya diagnosed emphysema-chronic obstructive lung disease. Director's Exhibit 72. Dr. Ranavaya opined that this condition was "most probably" caused by claimant's cigarette smoking. *Id.* Dr. Ranavaya opined that claimant's condition was unrelated to his coal dust exposure. *Id.* The administrative law judge discredited Dr. Ranavaya's opinion because the doctor did not provide an explanation for his finding that claimant's lung disease was not related to his coal dust exposure. Decision and Order at 27.

However, after this case was remanded, Judge Levin found it necessary to remand the case to the district director for further development of the evidence. The new evidence includes additional medical reports from Drs. Cohen and Zaldivar. Moreover, a different administrative law judge (Judge Morgan) considered this case on remand. Claimant, in fact, acknowledges the significance of these facts, noting that:

> In fairness, it is noted that a different administrative law judge was assigned to this case on remand, and that new medical evidence was submitted by both parties after remand.

Claimant's Brief at 9.

Claimant, however, contends that the directives in the Board's Decision and Order remained binding on the new administrative law judge. Claimant's Brief at 9. We disagree. The Board, in its previous Decision and Order, agreed with the Director that Judge Levin had failed to explain the relevance of several of his findings regarding the opinions of Drs. Cohen, Zaldivar and Tuteur. The Board, therefore, vacated Judge Levin's particular findings and instructed him that he was not to substitute his own opinion for that of the medical experts. *See Wriston*, slip op. at 3. On remand, after the development of additional medical evidence, the administrative law judge properly reconsidered whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. In doing so, the administrative law judge did not make any of the findings previously made by Judge Levin regarding the opinions of Drs. Cohen, Zaldivar and Tuteur.

Claimant also contends that the administrative law judge erred in not addressing whether Drs. Zaldivar and Tuteur relied upon erroneous assumptions in rendering their opinions. In its previous Decision and Order, the Board instructed Judge Levin to consider whether Drs. Tuteur and Zaldivar relied upon an invalid assumption in light of *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).

In *Warth*, the United States Court of Appeals for the Fourth Circuit held that an administrative law judge should not rely on a physician's opinion that a miner does not suffer from pneumoconiosis when it is based on an assumption that obstructive disorders cannot be caused by coal mine employment. *Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269. However, the Fourth Circuit subsequently clarified its holding. Specifically, in *Stiltner*, the Fourth Circuit explained that administrative law judges are not precluded from relying on physicians' opinions that are not based upon the erroneous assumption that coal mine employment *can never cause* chronic obstructive pulmonary disease. *See*

Stiltner, *supra*. Unlike the physicians in *Warth*, Dr. Zaldivar[6] did not assume that coal dust exposure can never cause an obstructive lung disease. Consequently, the administrative law judge could properly rely upon Dr. Zaldivar's opinion.

In his consideration of Dr. Tuteur's opinion, the administrative law judge noted that the doctor conceded that coal workers' pneumoconiosis can cause an obstructive impairment. Decision and Order at 26. The administrative law judge further noted that Dr. Tuteur explained that the reversibility of claimant's obstructive impairment supported a conclusion that it was not due to coal mine dust exposure.[7] *Id.* The Board previously noted that Dr. Tuteur's opinion "does not explicitly eliminate the possibility that coal dust exposure can cause chronic obstructive pulmonary disease." *Wriston*, slip op. at 4. Consequently, we hold that the administrative law judge could also properly rely upon Dr. Tuteur's opinion.

Claimant next argues that the administrative law judge erred in not following the Board's instructions to address an apparent inconsistency in Dr. Zaldivar's opinion

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[6]Dr. Zaldivar opined that claimant suffered from asthma, which he noted is a chronic obstructive pulmonary disease. Employer's Exhibit 6 at 25. Although Dr. Zaldivar acknowledged that coal dust exposure can cause chronic obstructive pulmonary disease, he opined that claimant's chronic obstructive pulmonary disease did not result from his coal dust exposure. *Id.* at 27, 39. Dr. Zaldivar explained that claimant's clinical findings were different from coal dust-induced chronic obstructive pulmonary disease. Employer's Exhibit 7 at 79. Dr. Zaldivar explained, *inter alia*, that coal dust-induced chronic obstructive pulmonary disease does not include wheezing. *Id.* Dr. Zaldivar also explained that the fact that claimant's ventilatory studies had remained relatively stable was not consistent with coal workers' pneumoconiosis. *Id.* Dr. Zaldivar also explained that claimant's reversible airways obstruction with improvement after bronchodilators was consistent with asthma. *Id.* at 81-82.

[7]Claimant contends that the administrative law judge erred in failing to discuss the "significance, if any, of [a] change of heart from Dr. Tuteur's apparent prior position that [coal dust exposure] could not [cause an obstructive impairment]." Claimant's Brief at 10. Claimant's reference to Dr. Tuteur's "prior position" is confusing in light of the fact that Dr. Tuteur submitted only one report in this case; a report dated December 28, 1994. *See* Director's Exhibit 41. In that report, Dr. Tuteur opined that coal workers' pneumoconiosis could be associated with airways obstruction, but only in the presence of progressive massive fibrosis, at which time the obstruction would not be reversible. *Id.* Because claimant had neither progressive massive fibrosis nor irreversible airways obstruction, Dr. Tuteur opined that claimant's condition could not be attributable to coal workers' pneumoconiosis. *Id.*

regarding whether or not he diagnosed emphysema. When this case was previously before it, the Board held that there was an apparent inconsistency in regard to whether Dr. Zaldivar diagnosed emphysema. *Wriston*, slip op. at 4. However, as previously noted, subsequent to the Board's Decision and Order, Judge Levin remanded the case to the district director for further development of the evidence. In a subsequent report and during several depositions, Dr. Zaldivar clarified his opinion regarding whether claimant suffered from emphysema.[8] Although Dr. Zaldivar conceded that claimant may suffer from some component of emphysema, he indicated that the emphysema would be attributable to claimant's cigarette smoking. *See* Employer's Exhibits 1, 6, 7, 10. Dr. Zaldivar also opined that claimant did not suffer from any lung disease attributable to his coal dust exposure. *Id.* In light of the newly developed evidence, there is no longer any inconsistency in regard to whether Dr. Zaldivar diagnosed emphysema.

Claimant also notes that the administrative law judge, in considering whether the medical opinion evidence was sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment, found that Dr. Zaldivar was "inconsistent in finding total disability." Claimant's Brief at 11 (citing Decision and Order at 29). The issues of the existence of pneumoconiosis and total disability are separate issues. The fact that the administrative law judge questioned Dr. Zaldivar's opinion regarding the extent of claimant's respiratory impairment does not undermine his assessment of Dr. Zaldivar's opinion regarding whether claimant suffers from pneumoconiosis.

We also reject claimant's contention that the administrative law judge's analysis does not comply with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162

[8]In a January 14, 2003 report, Dr. Zaldivar opined that emphysema "may well be present." Employer's Exhibit 1. Dr. Zaldivar, however, further opined that claimant did not suffer from coal workers' pneumoconiosis or "any dust disease of the lungs." *Id.* During a subsequent deposition on May 20, 2003, Dr. Zaldivar explained that a diagnosis of emphysema could not be reliably made because it could be the result of acute bronchospasm. Claimant's Exhibit 6 at 31-32. During his May 27, 2003 deposition, Dr. Zaldivar opined that claimant may suffer from some component of emphysema related to his cigarette smoking. Employer's Exhibit 7 at 59-61, 72. However, Dr. Zaldivar further opined that claimant did not have the "clinical manifestation of emphysema." *Id.* at 90. During his January 26, 2004 deposition, Dr. Zaldivar again opined that claimant did not suffer from a coal dust-induced lung disease. Employer's Exhibit 10 at 5.

(1989). Contrary to claimant's contention, the administrative law judge's analysis of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis complies with the requirements of the APA. *See* Decision and Order at 25-27.

Because claimant does not raise any additional errors in regard to the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), this finding is affirmed.

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4),[9] an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability is due to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9]In finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge properly weighed all of the relevant evidence together in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *See* Decision and Order at 27.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge