BRB No. 04-0821 BLA

RAYMOND M. GARNEY	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 05/20/2005
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits upon Remand by the Benefits Review Board of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

George E. Mahalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Sarah M. Hurley (Howard M. Radzely, 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.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits upon Remand by the Benefits Review Board (2002-BLA-05031) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) on a subsequent 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). The case is before the Board for the third time. The history of this case is set forth in the administrative law judge's Decision and Order and the Board's prior Decision and Order. *Garney v. Director, OWCP*, 2002-BLA-05031 (July 14, 2004); *Garney v. Director, OWCP*, BRB No. 03-0368 BLA (Feb. 6, 2004) (unpub.). In its Decision and Order, pursuant to an appeal by claimant, the Board vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge. The Board held that the administrative law judge erred in rejecting Dr. Levinson's opinion that claimant's disability

was due to pneumoconiosis as unreasoned because the doctor was unaware of a lung cancer diagnosis which had not yet been made. The Board, therefore, remanded the case for reconsideration of whether Dr. Levinson's opinion was sufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(c). *Garney v. Director, OWCP*, BRB No. 03-0368 BLA (Feb. 6, 2004) (unpub.).

On remand, the administrative law judge found that while Drs. Levinson, Cali and Corazza each provided reasoned and well-documented medical opinions on disability causation, the medical opinions from Drs. Cali and Corazza which attributed claimant's total disability to heart disease outweighed the sole opinion of Dr. Levinson, that claimant's total disability was due to pneumoconiosis. Decision and Order on Remand at 6. The administrative law judge concluded, therefore, that the weight of the medical opinion evidence was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), and thereby, denied benefits.

On appeal, claimant challenges the administrative law judge's determination that the evidence fails to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). Specifically, claimant asserts that the administrative law judge improperly considered and weighed the opinions of Drs. Cali and Corazza on remand, since the Board had affirmed findings made by the administrative law judge in his previous Decision and Order with respect to the opinions of Drs. Cali and Corazza and the Board had instructed the administrative law judge to reconsider only the opinion of Dr. Levinson. Moreover, claimant contends that, in any case, the administrative law judge cannot rely on the opinions of Drs. Corazza and Cali to establish that claimant is not totally disabled due to pneumoconiosis, since the administrative law judge had previously given valid reasons for rejecting each opinion: Dr. Corazza failed to identify the cause of claimant's disabling chronic obstructive pulmonary disease; and Dr. Cali failed to diagnose the existence of pneumoconiosis, which had been established. *See* Administrative Law Judge's Decision and Order dated February 12, 2003. Claimant asserts that Dr. Levinson's opinion is sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), and that Dr. Levinson's opinion is uncontradicted.

In response, the Director, Office of Workers' Compensation Programs, (the Director) has filed a Motion to Remand. The Director asserts that the medical opinions of Drs. Cali and Corazza are insufficient to preclude a finding of total disability due to pneumoconiosis pursuant to Section 718.204(c), as both Drs. Cali and Corazza opined that claimant did not have pneumoconiosis, opinions contrary to the administrative law judge's explicit finding that the existence of pneumoconiosis was established. While the Director agrees with claimant that Dr. Levinson's opinion is uncontradicted, he argues that it is also insufficient to

establish total disability due to pneumoconiosis pursuant to Section 718.204(c) because Dr. Levinson's diagnosis of a restrictive lung impairment is questionable and because Dr. Levinson relied on an inaccurate smoking history and failed to explain why he discounted the effects of claimant's extensive smoking history. The Director contends, therefore, that the case must be remanded to the administrative law judge to reweigh and to reassess Dr. Levinson's opinion with respect to disability causation at Section 718.204(c).

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

At the outset, we address the arguments of claimant and the Director regarding the opinions of Drs. Cali and Corazza. Both claimant and the Director contend that the administrative law judge erred in relying on the opinions of Drs. Cali and Corazza to find that claimant's disability was not due to coal mine employment because, as the administrative law judge previously found, neither doctor acknowledged the existence of pneumoconiosis as found by the administrative law judge. We agree. Accordingly, because neither doctor acknowledged the existence of pneumoconiosis, to which the parties had stipulated, the administrative law judge's previous finding that the doctors' opinions were not probative on the issue of causation, precludes the administrative law judge from relying on them as evidence that claimant's disability was not due to pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-85 (3d Cir. 2004); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8-9 (3d Cir. 1986); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *see also Scott v. Mason Coal Co.*, 289 F.2d 263, 19 BLR 2-257 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

We next address the administrative law judge's finding regarding Dr. Levinson's opinion. Claimant contends that since the administrative law judge erred in crediting the opinions of Drs. Cali and Corazza, that claimant's disability was due to heart disease not pneumoconiosis, Dr. Levinson's opinion attributing disability to pneumoconiosis is uncontradicted and, as the administrative law judge found it to be reasoned and well-documented, it is sufficient to establish causation.

The Director contends, however, that even though the administrative law judge erred in crediting the opinions of Drs. Cali and Corazza, he also erred in crediting the opinion of Dr. Levinson and the case must be remanded for the administrative law judge to reconsider Dr. Levinson's opinion, in light of the flaws contained therein, and to determine whether, even with its flaws, it is sufficient to carry claimant's burden of proof. Specifically, the

Director contends that the administrative law judge needs to address and consider that Dr. Levinson failed to explain how a November 2000 pulmonary function study demonstrated a disabling restrictive impairment since no other doctor diagnosed a restrictive lung impairment until May 2002, when Dr. Corazza found a restrictive lung defect resulting from claimant's treatment for lung cancer, including his lung resection and chemotherapy. Further, the Director contends that the administrative law judge must consider whether Dr. Levinson had a complete and accurate picture of claimant's health since the doctor relied on an inaccurate smoking history and the doctor did not explain why he discounted the effects of claimant's extensive smoking history. The Director concedes, however, that should the administrative law judge find, on remand, that Dr. Levinson's opinion is reasoned and documented, he should award benefits. Director's Brief at 5. We reject the Director's contention, which is no more than a request that we reweigh Dr. Levinson's opinion which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

In a report dated February 12, 2001, Dr. Levinson refers to an evaluation of claimant he conducted November 9, 2000 and to his review of claimant's previous medical records. He notes claimant's history of eight and one-half years in underground coal mine employment and a pack a day smoking history of thirty years. Based on his examination, x-ray, electrocardiogram, as well as both current and earlier pulmonary function studies and blood gas studies, Dr. Levinson opined that claimant had simple coal workers' pneumoconiosis which developed as a result of his eight and one-half years of coal mine employment. Dr. Levinson also opined that while the pulmonary impairment was mild, as reflected by his pulmonary function studies results showing a mild lung restriction and blood gas study results showing mild hypoxemia, the impairment would be sufficient to prevent him from performing his usual coal mine employment. While Dr. Levinson acknowledged claimant's cardiac history, he concluded that claimant's current symptoms and complaints were caused by his coal workers' pneumoconiosis. Director's Exhibit 10.

Contrary to the Director's contention, Dr. Levinson was not the only physician to find a restrictive lung defect prior to claimant's treatment for cancer in 2002, Dr. Aqulina found that claimant's mild restrictive pulmonary impairment was shown by a pulmonary function study in January 1999, as well as earlier pulmonary function studies. Director's Exhibit 40. Further, although the administrative law judge found that claimant testified to an over forty pack year smoking history, he acknowledged that Dr. Levinson reported a thirty pack year smoking history, (also noting that Dr. Cali reported a 42 pack year smoking history and Dr. Corazza reported a 50 pack year smoking history). The administrative law judge was, therefore, aware of the discrepancy in the evidence regarding the length of claimant's smoking history. The Director has not demonstrated that this discrepancy necessarily undermines the doctor's diagnosis. In light of the fact that the administrative law judge

nonetheless concluded that Dr. Levinson was highly qualified, performed an examination, conducted testing, and reviewed extensive medical data regarding claimant's condition, we cannot say that the administrative law judge erred in finding Dr. Levinson's opinion to be reasoned and well-documented. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Kertesz*, 788 F.2d 158, 162-163, 9 BLR 2-1, 2-8-9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge, therefore, properly concluded that Dr. Levinson's opinion was reasoned and well-documented and the administrative law judge acted properly in crediting it. In light of the Director's concession that if the administrative law judge finds the opinion of Dr. Levinson to be reasoned and documented benefits should be awarded, and since the administrative law judge has properly made that finding, we must reverse the administrative law judge's finding that claimant has failed to establish disability causation.

Accordingly, the administrative law judge's Decision and Order Denying Benefits upon Remand by the Benefits Review Board is reversed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully disagree with my colleagues' decision to reverse the administrative law judge's denial of benefits. While I agree that the administrative law judge erred in crediting the opinions of Drs. Cali and Corazza on disability causation inasmuch as the Board previously affirmed the administrative law judge's finding that these opinions were not credible on the issue because they did not acknowledge the existence of pneumoconiosis which was found by the administrative law judge, *see Gillen v. Peabody Coal Co.*, 16 BLR

1-22 (1991), I would vacate the denial of benefits and remand the case for the administrative law judge to reconsider Dr. Levinson's opinion.

As the Director, Office of Workers' Compensation Programs, (the Director) contends, the administrative law judge should reconsider Dr. Levinson's opinion in light of the fact that Dr. Levinson found that claimant had a thirty pack year smoking history, while claimant testified to an over forty pack year smoking history. Such a discrepancy could affect the credibility of Dr. Levinson's opinion as to the cause of claimant's disability, especially in light of claimant's eight and one-half year history of coal mine employment. *See Mancia v. Director, OWCP*, 130 F.3d 579, 588-590, 21 BLR 2-215, 2-234 (3d Cir. 1997); *Kertesz v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991)(administrative law judge may discredit medical opinion based on inaccurate smoking history); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Likewise, I would remand the case for the administrative law judge to reconsider Dr. Levinson's opinion regarding claimant's pulmonary function studies to consider whether Dr. Levinson explained how the findings of restrictive lung impairment, as shown by the pulmonary function studies, supported his finding on causation. *Collins v. J & L Steel*, 21 BLR 1-181, 189 (1999)("A reasoned medical opinion is one in which the physician explains how the underlying documentation supports the physician's conclusions.").

Accordingly, I would vacate the denial of benefits and remand this case for the administrative law judge to reconsider whether Dr. Levinson's opinion is reasoned and well-documented.

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ROY P. SMITH
Administrative Appeals Judge