BRB No. 98-0423 BLA

| | | |
|---|---|---|
| SHERMAN MATNEY | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | DATE ISSUED: |
| | ) | |
| CONSOLIDATION COAL COMPANY | ) | |
| | ) | |
| 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 - Awarding Benefits of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Rita Roppolo (Henry L. Solano, 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: , and , Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (95-BLA-1472) of Administrative Law Judge Frederick D. Neusner 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on March 30, 1992, which the

district director denied on February 11, 1993, on the ground that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment. Director's Exhibit 25. Claimant took no further action until filing a second claim on March 24, 1994. Director's Exhibit 1. The administrative law judge issued a Decision and Order with respect to this claim on June 20, 1996, in which he treated claimant's March 1994 application for benefits as a request for modification pursuant to 20 C.F.R. §725.310. The administrative law judge accepted the parties' stipulation that claimant is suffering from a totally disabling respiratory impairment under 20 C.F.R. §718.204(c) and further determined that the evidence of record supported a finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Accordingly, benefits were awarded.

Employer filed an appeal with the Board which, in a Decision and Order issued on June 16, 1997, vacated the administrative law judge's finding under Section 725.310. *Matney v. Clinchfield Coal Co.*, BRB No. 96-1349 BLA (June 16, 1997)(unpub.). The Board held that the fact that the district director's denial letter informed claimant that he had sixty days to request a hearing or submit additional evidence did not postpone the effective date of the denial of the claim. *Id*., *slip opinion at 3*. The Board further held, therefore, that the administrative law judge should have treated claimant's March 1994 claim as a duplicate claim pursuant to 20 C.F.R. §725.309. *Id.*. Accordingly, the Board remanded the case to the administrative law judge with instructions to consider whether claimant established a material change in conditions under the standard adopted by the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP*

*[Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). *Id.*.

With respect to the administrative law judge's consideration of the medical evidence of record, the Board vacated the administrative law judge's determination that Dr. Sargent's opinion was hostile to the Act and his determination that Dr. Forehand's opinion is entitled to additional weight based upon Dr. Forehand's superior qualifications. *Id.*, *slip opinion at 3-4*. The Board affirmed, however, the administrative law judge's decision to discredit the opinion in which Dr. Castle determined that claimant does not have pneumoconiosis and is not totally disabled by it. The Board held that the administrative law judge rationally determined that Dr. Castle did not adequately account for claimant's lengthy history of coal mine employment. *Id.*, *slip opinion at 4*.

On remand, the administrative law judge concluded that inasmuch as the newly submitted medical reports of Drs. Patel, Forehand, and Michos supported a finding of pneumoconiosis under Section 718.202(a)(4), claimant established a material change in conditions pursuant to Section 725.309. The administrative law judge further noted that the record established significantly more than ten years of coal mine employment. He concluded, therefore, that claimant was entitled to the presumption, set forth in Section 718.203(b), that his pneumoconiosis arose out of coal mine employment. The administrative law judge also determined that the medical opinions of record were sufficient to establish that claimant is totally disabled due to pneumoconiosis under Section 718.204(b). Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the relevant medical evidence.

The Director, Office of Workers' Compensation Programs (the Director), has responded and urges affirmance of the administrative law judge's decision to credit Dr. Forehand's newly submitted opinion under Section 725.309. The Director further asserts, however, that the administrative law judge erred in determining that Dr. Fino's opinion is hostile to the Act. Claimant has not participated in this appeal.

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).

Employer contends initially that in its prior Decision and Order, the Board erred in affirming the administrative law judge's decision to discredit the opinion in which Dr. Castle determined that claimant is not suffering from pneumoconiosis. Employer maintains that inasmuch as the administrative law judge never made a specific finding as to the length of claimant's coal mine employment, the administrative law judge could not rationally rely upon this factor in assessing the credibility of Dr. Castle's opinion. Employer also argues that the administrative law judge erred in according weight to the opinions of Drs. Forehand and Patel without considering the significance of their reliance upon a history of coal mine employment which conflicts with the district director's finding of twenty-three years of coal mine employment.

These contentions are without merit. When the present case was transferred to the Office of Administrative Law Judges for hearing, the district director indicated on the transmittal form that claimant had alleged at least twenty-seven years of coal mine work

and that a total of twenty-three years of such employment was established. The district director also noted that the Director contested the issue of the length of claimant's coal mine employment, but employer did not. At the hearing, employer did not refer to length of coal mine employment when identifying the issues it intended to litigate before the administrative law judge. Hearing Transcript at 14-15. Thus, employer effectively conceded that claimant worked as a miner for at least twenty-three years, a tenure that can rationally be described as lengthy. *See generally Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985). The administrative law judge's finding that Dr. Castle's opinion was entitled to little weight because he failed to address the significance of claimant's long coal mine employment history is, therefore, rational and supported by substantial evidence. Moreover, contrary to employer's suggestion, the administrative law judge did not assess the credibility of the relevant medical opinions based upon the accuracy of the coal mine employment history each physician recorded nor was he required to do so. *See Addison v. Director, 0WCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Rather, the administrative law judge acted within his discretion in considering whether the physicians of record acknowledged that claimant worked as a miner for many years and discussed the significance of this employment in rendering their opinions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985).

Employer also asserts that the administrative law judge erred in crediting Dr.

Patel's opinion under Section 718.202(a)(4), as Dr. Patel relied upon pulmonary function tests that are not of record. In his medical report, Dr. Patel referred to pulmonary function studies obtained on January 7, 1993 and November 17, 1993 and reported the percentage of the predicted values that claimant achieved, but did not report the actual values produced nor did he submit the tracings or any other materials with his medical report. Director's Exhibit 9. Dr. Patel stated that the results of the pulmonary function tests revealed moderate obstructive airways disease. *Id.*; *see also* Director's Exhibit 18. Dr. Patel concluded that claimant is totally disabled due to fairly advanced lung disease secondary to coal workers' pneumoconiosis and recurrent bronchitis. *Id*. The administrative law judge relied upon the newly submitted opinions of Drs. Patel and Forehand to find that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(b). Decision and Order at 4-6. Inasmuch as employer has conceded that claimant is totally disabled and Dr. Patel's diagnosis of an obstructive impairment is corroborated by the other physicians of record, including employer's experts, the administrative law judge was not required to discredit Dr. Patel's opinion on the ground that he did not fully report the results of the pulmonary function studies that claimant performed. *See Clark*, *supra*.

Employer asserts with respect to Dr. Forehand's newly submitted opinion that the administrative law judge erred in determining that it supported a finding of a material change in conditions pursuant to Section 725.309, as Dr. Forehand's conclusions were identical to those he reported in an opinion considered in conjunction with claimant's

initial claim.[1] The Director has responded and urges the Board to reject employer's contention. We hold that employer's argument is without merit. In *Rutter*, the United States Court of Appeals for the Fourth Circuit held that pursuant to Section 725.309, the administrative law judge must consider whether the newly submitted evidence establishes at least one of the elements of entitlement previously adjudicated against claimant. *See Rutter*, *supra*. The court indicated explicitly that this approach does not require the administrative law judge to examine the evidence behind the prior denial to determine whether it differs qualitatively from the new evidence. *See* 86 F.3d at 1363, n.11, 20 BLR at 2-237, n.11. The administrative law judge recognized this aspect of the Fourth Circuit's decision in *Rutter* and, therefore, acted rationally in declining to compare Dr. Forehand's two medical reports. Decision and Order at 4, n.3; *see Rutter*, *supra*.

[1]Dr. Forehand examined claimant at the request of the Department of Labor (DOL) on May 4, 1992 and prepared a Form CM-988. Director's Exhibit 25. He obtained a chest x-ray, pulmonary function study, blood gas study, and electrocardiogram. Dr. Forehand diagnosed coal workers' pneumoconiosis caused by coal dust exposure and concluded that claimant was totally disabled due to a moderate airflow obstruction. *Id.* Dr. Forehand performed a second DOL examination on April 5, 1994 and prepared another Form CM-988. Director's Exhibit 8. Based on a chest x-ray, pulmonary function study, blood gas study, and electrocardiogram obtained that day, Dr. Forehand stated that claimant is totally disabled due to coal workers' pneumoconiosis arising out of dust exposure in coal mine employment. *Id*.

Employer next contends that the administrative law judge erred in finding that Dr. Fino's medical opinion is contrary to the Act. Dr. Fino reviewed the medical evidence of record and concluded that claimant is totally disabled due to a respiratory impairment caused by asthma, which is not related to coal dust exposure. Employer's Exhibits 37, 39. The doctor further indicated that there is insufficient evidence of simple pneumoconiosis, stating that according to the medical literature and his experience, a miner who does not exhibit either x-ray evidence of pneumoconiosis or an impairment at the time of his retirement from mining will not develop the disease later. Employer's Exhibit 37, Employer's Exhibit 39 at 17. The administrative law judge determined that inasmuch as the Act recognizes coal workers' pneumoconiosis to be a latent disease that may not appear on x-ray until several years after coal dust exposure has ceased, Dr. Fino's opinion is hostile to the Act and cannot be credited. Decision and Order at 3, citing *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Wetherill v. Green Construction Co.,* 5 BLR 1-248 (1982).

We hereby affirm the administrative law judge's finding with respect to Dr. Fino's opinion. The administrative law judge accurately determined that Dr. Fino based his conclusions in part on his belief that neither a respiratory impairment related to coal dust inhalation or x-ray evidence of pneumoconiosis will appear after exposure to coal dust ceases. *Id*. In light of the progressive and irreversible nature of pneumoconiosis, the administrative law judge reasonably concluded that the opinion of Dr. Fino relied on a premise fundamentally at odds with the statutory and regulatory scheme, and thus was inconsistent with the Act. *Id*. It has long been recognized that pneumoconiosis is a

progressive and irreversible disease. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge, as trier-of-fact, is not bound to accept the opinion or theory of any medical expert, but must evaluate the evidence, weigh it, and draw his own conclusions. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Although employer maintains that the opinion of Dr. Fino is not hostile to the Act, the administrative law judge permissibly concluded that his opinion was undermined by the erroneous assumption that pneumoconiosis does not progress once coal dust exposure ceases. Decision and Order at 3; *see generally Warth v. Southern Ohio Coal Co.,* 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Thorn v. Itmann Coal Co.,* 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993)*; see also Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998).

With respect to Dr. Sargent's opinion, employer argues that the administrative law judge erred in finding it hostile to the Act when considering it under Section 718.204(b). Dr. Sargent examined claimant on November 3, 1992, and obtained a chest x-ray, a pulmonary function study, a blood gas study, and an electrocardiogram. Director's Exhibit 25. Dr. Sargent stated that:

> It is my impression that Mr. Matney is not suffering from coal workers' pneumoconiosis. This determination is made on the basis of the character of the ventilatory impairment that is present, and also on the basis of the fact that he has a negative x-ray. Coal workers' pneumoconiosis when it causes a ventilatory impairment, causes a mixed obstructive and restrictive pattern, and also causes a ventilatory impairment in the presence of a positive x-ray. Mr. Matney has a partially reversible obstructive impairment without evidence of restriction. This type of impairment is inconsistent with abnormalities due

> to coal workers' pneumoconiosis. Also, the fact that there is partial reversibility argues against impairment due to pneumoconiosis, since pneumoconiosis is considered to be an irreversible impairment.

Director's Exhibit 25. Dr. Sargent further concluded that claimant's obstructive impairment is totally disabling and is due to asthma, caused by hereditary factors. *Id.*

In his prior Decision and Order, the administrative law judge determined that Dr. Sargent's opinion was not entitled to any weight on the ground that he based his conclusions upon an assumption that pneumoconiosis cannot cause an obstructive impairment. The Board vacated the administrative law judge's finding on appeal, holding that inasmuch as Dr. Sargent did not specifically opine that pneumoconiosis never causes an obstructive respiratory impairment, it is not contrary to the Act. *Matney v. Clinchfield Coal Co.*, BRB No. 96-1349 BLA (June 16, 1997)(unpub.), *slip opinion at 4*, *citing Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). On remand, the administrative law judge determined that Dr. Sargent's opinion contravened the holding of the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), inasmuch as Dr. Sargent did not say that pneumoconiosis is *likely* to cause a restrictive impairment, but rather stated categorically that pneumoconiosis causes a mixed restrictive and obstructive ventilatory pattern and indicated that in the absence of such a pattern and a positive chest x-ray, a miner does not suffer from pneumoconiosis. Decision and Order at 5; Director's Exhibit 25.

The administrative law judge did not accurately characterize either the relevant law or Dr. Sargent's opinion. In *Stiltner*, the United States Court of Appeals for the Fourth Circuit summarized its holding in *Warth* as follows:

> We ...cautioned ALJs not to rely on medical opinions that rule out coal mine employment as a causal factor based on the erroneous assumption that pneumoconiosis causes a purely restrictive form of impairment, thereby eliminating the possibility that coal dust exposure can also cause [chronic obstructive pulmonary disease ] (COPD).

86 F.3d at 341, 20 BLR at 2-253. The court held that an administrative law judge may credit a medical report in which the physician opines that a miner likely would exhibit a restrictive impairment in addition to COPD, if coal dust exposure were a factor, rather than assuming that coal mine employment can never cause COPD. *Id.* The court then indicated that the administrative law judge acted properly in relying upon an opinion in which Dr. Sargent stated that coal workers' pneumoconiosis causes a mixed obstructive and restrictive ventilatory impairment, which was not the type of impairment afflicting the miner. 86 F.3d at 341, n.5, 20 BLR. at 2-254, n. 5. The court also noted that Dr. Sargent, in addition to a number of the other physicians of record, did not rely solely on the absence of a restrictive impairment, but also on a review of the miner's medical history, including his pulmonary function studies, blood gas studies, and chest x-rays. 86 F.3d at 342, 20 BLR at 2-254-2-255.

Dr. Sargent's opinion in the present case does not conflict with the relevant portions of the Fourth Circuit's holdings in *Warth* and *Stiltner*. As noted above, Dr. Sargent stated that coal workers' pneumoconiosis "causes a mixed obstructive and restrictive pattern, and also causes a ventilatory impairment in the presence of a positive x-ray." Director's Exhibit 25. Thus, his opinion does not reflect an assumption that pneumoconiosis causes a purely restrictive form of impairment. Moreover, Dr. Sargent referred to the reversibility of claimant's impairment, as demonstrated on his pulmonary

function study, in addition to the absence of a restrictive ventilatory pattern. *Id.*; *see Stiltner*, *supra*. In addition, contrary to the administrative law judge's apparent determination, Dr. Sargent did not indicate that a positive chest x-ray was a necessary prerequisite to a diagnosis of pneumoconiosis, he merely indicated that coal workers' pneumoconiosis produces an impairment when it is of a sufficient degree to appear on a chest x-ray. *Id.* The administrative law judge's finding with respect to Dr. Sargent's opinion is vacated, therefore, and the case is remanded to the administrative law judge for reconsideration of this opinion under Section 718.204(b). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). In addition, because the administrative law judge's rejection of Dr. Sargent's opinion cannot be affirmed, we must vacate the administrative law judge's determination that employer did not rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment under Section 718.203(b), as the administrative law judge did not consider Dr. Sargent's medical report in rendering this finding. Decision and Order at 4; *see Tackett*, *supra*. If credited, Dr. Sargent's opinion is relevant to the issue of whether claimant's pneumoconiosis arose out of coal mine employment.

In sum, we affirm the administrative law judge's weighing of the opinions of Drs. Patel, Forehand, and Fino pursuant to Sections 718.202(a)(4), 718.203(b), 718.204(b), and 725.309. We vacate, however, the administrative law judge's finding with respect to Dr. Sargent's opinion and remand the case to the administrative law judge for reconsideration of this opinion on the merits under Sections 718.203(b) and 718.204(b).

Accordingly, the administrative law judge's is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings

consistent with this opinion.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge