BRB No. 01-0280 BLA

WILLIAM J. VANNATTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KNOX CREEK 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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

George A. Mills III, Huntington, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (00-BLA-0024) of Administrative Law Judge Richard A. Morgan on a duplicate claim[1] filed pursuant to the

[1] Claimant, William J. Vannatter, the miner, filed his first claim for benefits with the Social Security Administration on June 13, 1973. Pursuant to claimant's election, this claim was considered and was finally denied by the Department of Labor on December 29, 1980, because the evidence did not establish the existence of pneumoconiosis or total disability. Director's Exhibit 34. The miner took no further action on this claim. He filed a duplicate claim with the Department of Labor on December 11, 1986, which was finally denied on

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).[2] Adjudicating this claim pursuant to 20 C.F.R. Part 718

March 25, 1987 because he again failed to establish pneumoconiosis or total disability. Director's Exhibit 35. Claimant filed a third application for benefits on July 21, 1998, which is the subject of the appeal before us. Director's Exhibit 1.

[2] 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.

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 January 5, 2001, claimant filed a Motion to Suspend the Appeal Procedure and Remand the Decision to the Administrative Law Judge to Correct Typographical Errors and Determine the Applicability of the New Rules and Regulations of the Department of Labor Adopted Subsequent to the Decision Date of October 30, 2000 and the Employer's Notice of Appeal filed November 27, 2000 arguing that the administrative law judge's references to District Director Alan Ruble as a medical consultant, and later, as a physician, were clearly typographical errors requiring correction and that the case should be remanded for the administrative law judge to accord proper weight to the opinion of claimant's treating physician, as provided by the revised regulation at 20 C.F.R. §718.104(d). In response, employer argued that claimant waived his opportunity to have the administrative law judge correct his mischaracterization of Mr. Ruble by failing to file a timely motion for reconsideration. Employer further argues that the new regulations should not be applied to the case for the reasons stated in its (attached) brief before the court challenging the constitutionality and legality of the regulations. 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). By order dated September 27, 2001, the Board denied claimant's Motion to Suspend the Appeal Procedure and Remand to Correct Typographical Errors and Determine the Applicability of the New Rules and Regulations because any typographical errors made by the administrative law judge in the Decision and Order could be addressed by the Board in its decision and because the regulation at 20 C.F.R. §718.104(d), which formed the basis for claimant's motion, was inapplicable to this claim

(2000), the administrative law judge credited claimant with "at least" twenty years of qualifying coal mine employment and found that claimant established a material change in conditions because the biopsy evidence established the existence of simple pneumoconiosis, one of the elements of entitlement claimant had failed to establish in his earlier claim. Decision and Order at 19. Accordingly, addressing all of the evidence of record, the administrative law judge found that it established not only the existence of simple coal workers' pneumoconiosis, but also complicated pneumoconiosis, hence, claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 30 U.S.C. §921(c)(3), which renders unnecessary determinations as to whether the evidence established total disability and causation, Decision and Order 25-26.[3]

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pursuant to 20 C.F.R. §718.101(b), because the evidence was developed prior to January 19, 2001. Furthermore, the court's decision renders moot those argument made by employer regarding the impact of the challenged regulations.

[3] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ..., if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> > (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original], implementing 30 U.S.C. §921(c)(3); *see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B. Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, BLR (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31

Accordingly, the administrative law judge awarded benefits commencing July 1, 1998, the first day of the month in which claimant filed his most recent claim for benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. In response, claimant urges affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to participate in this appeal.[4]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that the administrative law judge irrationally discredited Dr. Naeye's opinion, that complicated pneumoconiosis was not present, because Dr. Naeye's reports and deposition testimony were inconsistent on the issue of whether claimant had simple coal workers' pneumoconiosis. Employer's Brief at 6. More specifically, employer contends that Dr. Naeye's change of opinion regarding the existence of simple coal workers' pneumoconiosis, "never, in any way, impacted his opinion as to the absence of complicated coal workers' pneumoconiosis," Employer's Brief at 8. Employer asserts that Dr. Naeye explained that he found no complicated pneumoconiosis, regardless of the presence of absence of simple pneumoconiosis and that any inconsistencies in Dr. Naeye's opinion on the question of simple pneumoconiosis were irrelevant to his opinion on the absence of complicated pneumoconiosis. Employer's Brief at 8.

(1991)(*en banc*).

[4] We affirm the administrative law judge's findings pursuant to Sections 718.202(a) (2000), 718.203(b) (2000), and 725.309(d) (2000) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 19, 20, 25.

The administrative law judge found that Dr. Naeye provided two medical opinions as well as deposition testimony, but that the opinions contained contrary conclusions. Specifically, the administrative law judge found that while Dr. Naeye diagnosed mild, simple coal workers' pneumoconiosis, in his December 21, 1999 report, based on x-ray and tissue findings, he opined that "there [was] no basis for postulating the presence of any form of coal workers' pneumoconiosis or silicosis in the lungs of this man," in a February 17, 2000 report. Decision and Order at 23; Employer's Exhibits 2, 5. During a deposition taken the same day as the second report, however, Dr. Naeye testified that "[t]here [was] no question that there is coal workers' pneumoconiosis present," a very mild, simple coal workers' pneumoconiosis. Employer's Exhibit 8. Because of these inconsistencies, the administrative law judge accorded less weight to Dr. Naeye's opinion.

Contrary to employer's argument, we cannot say that the administrative law judge erred in finding that Dr. Naeye's inconsistent opinions regarding the presence and/or absence of simple pneumoconiosis rendered his opinion regarding the existence of complicated pneumoconiosis less credible. Decision and Order at 23-24; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984); *see also Brazzalle v. Director, OWCP*, 803 F.2d 934, 9 BLR 2-133 (8th Cir. 1986). Accordingly, we reject employer's argument that the administrative law judge erred in not crediting Dr. Naeye's opinion regarding the absence of complicated coal workers' pneumoconiosis.

Employer next asserts that the administrative law judge erred in rejecting the reasoned and documented opinions of Drs. Morgan and Fino, highly qualified experts, because they did not diagnose the presence of simple pneumoconiosis, as identified by Dr. Naeye. Employer argues that the administrative law judge erred in rejecting their opinions because the presence or absence of simple pneumoconiosis was not the basis for their opinions that claimant did not have complicated pneumoconiosis.[5]

[5] Both Drs. Morgan and Fino reviewed the evidence of record and concluded that there was insufficient objective evidence to justify a diagnosis of simple coal workers' pneumoconiosis or silicosis. Employer's Exhibit 9.

The administrative law judge accorded less weight to the opinions of Drs. Morgan and Fino because neither physician diagnosed the existence of simple coal workers' pneumoconiosis, which the administrative law judge found that employer had conceded.[6] Decision and Order at 19, 24. Furthermore, the administrative law judge also rationally accorded less weight to the opinion of Dr. Morgan because he, like Dr. Naeye, stated that simple coal workers's pneumoconiosis "does not occur after exposure has ceased" and the lesions in claimant's lungs were not detected until thirteen years after claimant ceased coal mine employment. This was rational. *See* 20 C.F.R. §718.201(c)(pneumoconiosis is recognized as latent and progressive disease that may become detectable only after cessation of coal mine employment); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *accord Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993).

It is well established that where there is conflicting evidence on a single issue, the administrative law judge's function is to render a determination of the relative credibility of the evidence relevant to that issue, *Fagg, supra*; *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985), and the administrative law judge need not accept the opinion or theory of any given medical witness but may properly weigh the medical evidence and draw his/her own conclusions, *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985). Accordingly, because the administrative law judge's discrediting of the opinions of Drs. Naeye, Morgan and Fino concerning the absence of complicated pneumoconiosis was rational, employer's arguments regarding those physicians' opinions are rejected.

Employer also asserts that the administrative law judge erred in failing to consider the opinion of Dr. Dahhan who concluded that, while simple pneumoconiosis was present,

[6] In discounting the opinions of Drs. Morgan and Fino, the administrative law judge found that had employer "acknowledged" the existence of simple pneumoconiosis in this case. Decision and Order at 24. A review of the formal hearing transcript and list of contested issues reveals that employer contested the issue of the existence of simple pneumoconiosis, contrary to the administrative law judge's finding that employer conceded its existence. Director's Exhibit 36; Hearing Transcript at 7; Decision and Order at 24. Nevertheless, as the administrative law judge stated that employer did not contest the finding of simple pneumoconiosis by biopsy in counsel's closing argument before the administrative law judge, *see* Decision and Order at 19, and employer has neither challenged this determination nor raised it as an allegation of error on appeal and the administrative law judge has found that the evidence of record affirmatively establishes the existence of simple coal workers' pneumoconiosis, we affirm that finding. *See Coen, supra*; *Skrack, supra*; *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

complicated pneumoconiosis was not present. Employer's Brief at 11-12. However, while the administrative law judge did not discuss Dr. Dahhan's opinion in his discussion of the opinions of Drs. Naeye, Morgan and Fino, Decision and Order at 24, he did summarize Dr. Dahhan's findings earlier in his decision, Decision and Order at 13, acknowledging that Dr. Dahhan diagnosed the presence of simple pneumoconiosis, but not complicated pneumoconiosis.[7] We reject, therefore, employer's argument that the case must be remanded because the administrative law judge failed to consider Dr. Dahhan's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] In a report dated July 20, 1999, Dr. Dahhan opined that there is insufficient objective to diagnose coal worker's pneumoconiosis or any significant pulmonary impairment or disability. Director's Exhibit 31; Employer's Exhibit 10. During his deposition, however, Dr. Dahhan testified that the pathological evidence was sufficient to establish the presence of simple coal worker's pneumoconiosis, but not complicated pneumoconiosis. Employer's Exhibit 10 at 17-18.

Finally, employer contends that the case must be remanded for reconsideration of the evidence because the administrative law judge erred in "blatantly mischaracterizing," Mr. Alan Ruble, a Department of Labor claims examiner, as Dr. Ruble, a Department of Labor medical consultant, even though employer concedes that "it is unclear whether or how the [j]udge's misunderstanding of Mr. Ruble's role and qualifications impacted his decision[.]" Employer's Brief at 5. Although the administrative law judge refers to Mr. Ruble as Dr. Ruble on page 23 of his decision, earlier on pages 12-13 the administrative law judge correctly characterized Mr. Ruble as a claims examiner. We do not, therefore, agree with employer that the administrative law judge's subsequent mischaracterization of Mr. Ruble as Dr. Ruble is anything but harmless error. *See Larioni*, *supra*. *See* Decision and Order at 12, 13, 23; Director's Exhibit 25.[8]

[8] A review of the record reveals that Mr. Ruble, a Department of Labor claims examiner in Charleston, West Virginia, was unable to render a factual determination as to the existence of complicated pneumoconiosis after reviewing the pathological evidence, and consequently, sought a consulting medical opinion from Dr. Gaziano in a memorandum dated June 22, 1999. Director's Exhibit 25. In his summary of the medical opinion evidence, the administrative law judge noted that the record contained a memorandum "from Alan Ruble to Medical Consultant," dated June 22, 1999, stating "this is a peculiar case" and requesting clarification of the pathology reports contained in the record and inquiring about whether complicated pneumoconiosis existed in claimant's lesions. The administrative law judge then quoted the June 1999 memorandum *verbatim* and noted the handwritten responses provided by Dr. Gaziano on June 23, 1999 written directly underneath the typed questions. Decision and Order at 12-13. Later, in his analysis of the medical opinion evidence, however, the administrative law judge erroneously referred to Mr. Ruble as "The Department

of Labor Medical Consultant, Dr. Alan Ruble," who questioned whether the nodule removed from claimant's lung was an anthraco/silicotic nodule and/or whether claimant had been successfully treated for complicated pneumoconiosis. Decision and Order at 23.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge