BRB No. 01-0313 BLA

PAUL E. INGRAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ZEIGLER COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.) Madisonville, Kentucky, for claimant.

Lenore S. Ostrowsky (Greenberg Traurig LLP), Washington D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-BLA-1818) of Administrative Law Judge Clement J. Kichuk denying benefits on a duplicate 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

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 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 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

third time.[2] Initially, considering claimant's duplicate claim, Administrative Law Judge J.

Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association 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).

[2] Claimant filed his initial application for benefits on January 7, 1980. *See* Director's Exhibit 30. Benefits were awarded and employer contested. *Id*. Following a hearing on the merits, Administrative Law Judge John C. Bradley credited claimant with 29 years and 11 months of coal mine and found Zeigler Coal Company to be the responsible operator. *Id*. Judge Bradley found the weight of the x-ray evidence of record sufficient to invoke the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). *Id*. However, Judge Bradley also found the evident of record sufficient to establish rebuttal the interim presumption at 20 C.F.R. §727.203(b)(2) and denied benefits. *Id*. On appeal, the Board affirmed the finding of Judge Bradley at Section 727.203(a)(1) as unchallenged on appeal. The Board also affirmed Judge Bradley's finding that rebuttal had been established at Section 727.203(b)(2), and the

Michael O'Neill credited claimant with twenty-nine years of coal mine employment, found employer to be the responsible operator, and found the new evidence submitted in support of the duplicate claim sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). On the merits, Judge O'Neill found the evidence of record established the existence of pneumoconiosis arising out of coal mine employment, demonstrated the presence of a totally disabling respiratory impairment, but did not establish that claimant's totally disabling respiratory impairment was due in part to his pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, benefits were denied.

On appeal, the Board affirmed Judge O'Neill's finding that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000) as unchallenged, and therefore, declined to address employer's arguments at 20 C.F.R. §718.202(a)(1) (2000). The Board, however, vacated Judge O'Neill's determinations that claimant had established a material change in conditions at 20 C.F.R. §725.309 (2000), that claimant had demonstrated the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4) (2000), and that claimant failed to establish causation at 20 C.F.R. §718.204(b)(2000), and remanded the case for further consideration of these issues. The Board also directed Judge O'Neill to consider Dr. Bassali's finding of complicated pneumoconiosis. *Ingram v. Zeigler Coal Co.*, BRB No. 98-1526 BLA (Feb. 3, 2000)(unpub); *aff'd on recon.* (Apr. 25, 2000) (unpub.).

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denial of benefits as supported by substantial evidence. *Ingram v. Zeigler Coal Co.*, BRB No. 85-904 BLA (May 26, 1987)(unpub). *Id*. Claimant took no further action until he filed the duplicate claim on July 25, 1996, which is the subject of the appeal before us.

On remand, Administrative Law Judge Clement J. Kichuk (the administrative law judge)[3] found Dr. Bassali's diagnosis of complicated pneumoconiosis insufficient to meet claimant's burden of proof for establishing the existence of complicated pneumoconiosis at 20 C.F.R. §718.304, 30 U.S.C. §921(c)(3). The administrative law judge, however, found the newly submitted medical opinion evidence sufficient to establish the presence of a totally disabling respiratory impairment, and thus, a material change in conditions. *See* 20 C.F.R. §725.309 (2000). Turning to the merits, however, the administrative law judge found the evidence of record insufficient to establish that claimant's totally disabling respiratory impairment was due at least in part to his pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's decision to credit the opinions of Drs. Selby and Fino, that claimant's pulmonary impairment resulted solely from cigarette smoking, over the opinion of Dr. Sahetya, claimant's treating physician, and Dr. Simpao, a Department of Labor evaluating physician, who both opined that claimant's pulmonary impairment was due to coal workers' pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not 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 applicable law, they are binding upon this Board and may not be disturbed. 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).

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[3] As Administrative Law Judge J. Michael O'Neill was not available, this case was reassigned to Administrative Law Judge Clement J. Kichuk. Neither party objected to this reassignment.

[4] We affirm the administrative law judge's findings regarding the opinions of Drs. Bassali and Branscomb as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge did not follow the Board's remand order and determine the credibility of the medical opinions of Drs. Fino and Selby in accordance with the teaching of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Claimant also asserts that the administrative law judge erroneously assumed that Drs. Fino and Selby would still have found claimant's totally disabling respiratory impairment entirely due to his smoking even if they were of the opinion that claimant had coal workers' pneumoconiosis as neither physician ever expressed this opinion. Claimant also argues that the administrative law judge erroneously applied the causation standard set forth by the United States Court of Appeals for the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), rather than the causation standard set forth by the United States Court of Appeals for the Sixth Circuit in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989) and further explained in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Finally, claimant requests final judgment in his favor as the administrative law judge acknowledged that Drs. Simpao and Sahetya opined that claimant's totally disabling pulmonary impairment is due to his coal mine employment and there is no credible evidence to refute those opinions.

We need not address claimant's arguments concerning the medical opinions of Drs. Fino and Selby and whether the administrative law judge applied the proper causation standards in the instant case, however, because claimant has not challenged the administrative law judge's finding that the causation opinions of Drs. Simpao and Sahetya were unreasoned and unreliable, based upon his determination that they were "not supported by objective medical test data" and in the case of Dr. Simpao's opinion, "laden with equivocation." Decision and Order at 11-12. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).[5] Thus, as the record contains

[5] Subsequent to the issuance of the administrative law judge's Decision and Order, the regulations concerning total disability causation were amended and became applicable to all pending claims. 20 C.F.R. §718.204(c)(2001).

no credible medical opinion evidence supportive of claimant's burden of proof on the issue of causation, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge