BRB No. 02-0255 BLA

EDGAR JUSTICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITMANN 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 on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-0940) of Administrative Law Judge Stuart A. Levin awarding benefits on a claim[1] 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).[2] This case is before the Board for the third time. The

[1] Claimant, Edgar Justice, filed his application for benefits on August 29, 1995. 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All

procedural history of the case is contained in the Board's prior decision. *Justice v. Itmann Coal Co.*, BRB No. 99-0565 BLA (Sep. 29, 2000) (unpub.). In that decision, the Board held that the administrative law judge had committed errors requiring reconsideration of the case: he had failed to provide a basis for his determination that Dr. Rasmussen's opinion was sufficiently reasoned despite recognizing that the opinion was flawed; he had improperly substituted his opinion for that of Dr. Zaldivar regarding the effect of claimant's coal dust exposure on claimant's condition; he had erred in his consideration of the opinions of Drs. Jarboe and Fino; and he had failed to consider the respective qualifications of the physicians in weighing the medical opinion evidence. Consequently, the Board vacated the administrative law judge's findings that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000);[3] the Board vacated the award of benefits, and remanded the case for further consideration.[4]

Acknowledging that Drs. Zaldivar, Jarboe, and Fino were all Board-certified in pulmonary diseases, while the credentials of Dr. Rasmussen were not in the record, the

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The Board noted that the administrative law judge did not render separate findings pursuant to Sections 718.202(a)(4) and 718.204(b), but instead, combined his consideration of these two issues, ultimately finding that the evidence was sufficient to establish both elements. *Justice v. Itmann Coal Co.*, BRB No. 99-0565 BLA, *slip op.* at 2 (Sep. 29, 2000) (unpub.), *citing* [1999] Decision and Order on Remand at 2-10.

[4] In its 1998 Decision and Order, the Board affirmed the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). *Justice v. Itmann Coal Co.*, BRB No. 97-0973 BLA, *slip op.* at 2 n.1 (Mar. 13, 1998) (unpub.).

administrative law judge, nonetheless, found that Dr. Rasmussen's opinion was well reasoned and documented, and entitled to greater weight than the contrary opinions of Drs. Zaldivar, Jarboe, and Fino, whose opinions he found to be less persuasive. He therefore, found that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis; hence, he awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating that he does not intend to participate in this appeal.

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 argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion and finding it reasoned, solely because he conducted an examination of claimant. Employer contends that Dr. Rasmussen's opinion is clearly unreasoned because there is absolutely nothing in the administrative law judge's decision or Dr. Rasmussen's opinion which identifies the reasoning that led Dr. Rasmussen to find the existence of pneumoconiosis, except for claimant's history of coal mine employment and positive x-ray readings.

Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on over thirty-five years of coal mine employment and x-ray evidence of pneumoconiosis. He also, however, diagnosed chronic obstructive pulmonary disease - emphysema due to coal mine dust exposure and cigarette smoking. He further found that claimant was totally disabled due to his cigarette smoking and coal mine dust exposure, noting that the latter was at least a significant contributing factor. Director's Exhibit 7. The administrative law judge found that Dr. Rasmussen's opinion: diagnosing chronic obstructive pulmonary disease - emphysema due to coal mine dust exposure and cigarette smoking, and finding that the combination rendered him totally disabled from resuming his last coal mine employment established the existence of legal pneumoconiosis and causation. Because the opinion was based on: claimant's medical and employment histories; symptomotology; physical examination revealing reduced breath sounds, but no rales, wheezes, or rhonchi; a positive chest x-ray interpretation; and arterial blood gas and pulmonary function studies revealing severe, partially reversible obstructive ventilatory impairment, the administrative law judge concluded that Dr. Rasmussen's opinion was sufficiently documented and reasoned. This

was rational. Decision and Order on Remand at 2-4; *see Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 BLR 1-1127 (1984); *see generally Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *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); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984). Thus, contrary to employer's argument, the administrative law judge correctly found that Dr. Rasmussen's opinion of "legal" pneumoconiosis, as opposed to "clinical" pneumoconiosis, was not based solely on a history of coal mine employment and erroneous positive x-rays. 20 C.F.R. §718.201(a)(1), (2).

Employer next argues that the administrative law judge impermissibly substituted his own opinion for that of Dr. Zaldivar's by assuming that coal dust must lodge in the lungs of a smoker and cause its own obstruction and impairment, when Dr. Zaldivar clearly and unequivocally testified that claimant's obstruction was the result of emphysema due to paralyzed lung silica and that claimant's obstruction was not the result of coal dust particles.

The administrative law judge found that, contrary to employer's argument, he did not "assume... that claimant's coal dust exposure must have had a negative effect on claimant's lungs which were already compromised by claimant's smoking history." Decision and Order on Remand at 5, *citing Justice, slip op.*, at 5. Rather, the administrative law judge found that Dr. Zaldivar's analysis contained "gaps" and he questioned "the basis and rationale Dr. Zaldivar employed in reaching his conclusion in light of [the doctor's] explanations of the paralyzing effect of smoking on lung cilia." Decision and Order on Remand at 6. Specifically, the administrative law judge stated:

> ... Dr. Zaldivar testified that (1) smoking paralyzes lung cilia, and (2) in non-smokers lung cilia are the normal mechanism for removing coal dust. ... Given these two predicates, if the cilia in the lungs of non-smokers act to remove inhaled coal dust as Dr. Zaldivar testified, and if the cilia of a smoker are paralyzed and can not perform the function of removing inhaled substances such as coal dust as Dr. Zaldivar testified, some further medical explanation for the conclusion that synergy does not exist in this situation is warranted. Dr. Zaldivar provided the conclusion that there is no synergy, but he provided no explanation in support of his conclusion, and the employer cites to no explanation.

Decision and Order on Remand at 6 [emphasis omitted]. Consequently, the administrative law judge reasonably found that Dr. Zaldivar's opinion was internally inconsistent and inadequately reasoned because Dr. Zaldivar's own testimony undermined his affirmative conclusions and "raised legitimate questions which he did not address." Decision and Order on Remand at 6; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Puleo v. Florence Mining Co.*, 8 BLR 1-198, 1-199 (1984); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984).

The Board is not empowered to engage in *de novo* review of the record and may not set aside an inference merely because it finds the opposite one more reasonable, *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 303, 9 BLR 2-221, 2-223 (6th Cir. 1987), or because it questions the factual basis of that inference, *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 326, 5 BLR 2-130, 2-136 (7th Cir. 1983). Contrary to employer's assertion, a review of the administrative law judge's weighing of Dr. Zaldivar's report and deposition testimony does not reveal that the administrative law judge substituted his opinion for that of Dr. Zaldivar regarding the effect of claimant's coal dust exposure on his pulmonary impairment. We must defer to the administrative law judge in the finding of facts, and may not exceed our narrow scope of review even in cases, where, as here, the record may permit an alternative conclusion. *See Zbosnik*, *supra*; *see also Groves*, 277 F.3d at 836, 22 BLR at 2-331; *Campbell*, 811 F.3d at 303, 9 BLR at 2-223. Given that Dr. Zaldivar testified that smoking paralyzes lung cilia, which serve as the normal mechanism for removing inhaled coal dust, it was not unreasonable for the administrative law judge to conclude that Dr. Zaldivar failed to proffer an explanation for his opinion that there is no synergy between smoking and coal dust inhalation. Because the administrative law judge determined that this was a critical theory devoid of any medical explanation, and that the lack of an explanation diminished the weight attributable to Dr. Zaldivar's opinion, it was not unreasonable for the administrative law judge to find that Dr. Zaldivar's opinion was insufficiently reasoned. Accordingly, employer has not shown, nor does it appear from the record, that the administrative law judge's determination of the relative credibility of Dr. Zaldivar's opinion is irrational. We, therefore, affirm the administrative law judge's determination that Dr. Zaldivar's opinion was entitled to less weight. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (*en banc*) (Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable); *Calfee*, *supra*.

Employer also contends that the administrative law judge substituted his opinion for that of Dr. Jarboe because the administrative law judge assumed that coal dust exposure combined with smoking has a synergistic effect, when Dr. Jarboe clearly explained that claimant's obstruction was related to cigarette smoking, not to both cigarette smoking and coal dust exposure.

The administrative law judge, however, rationally discounted Dr. Jarboe's opinion, that claimant's severe pulmonary impairment is not caused by inhalation of coal dust. The

administrative law judge noted that, although Dr. Jarboe was aware of both claimant's smoking and coal mine employment histories, his opinion did not consistently reflect this. The administrative law judge reasonably concluded that Dr. Jarboe's opinion, that "[pneumoconiosis] rarely, in the absence of cigarette smoking, would cause this degree of impairment," Employer's Exhibit 10 at 6 unpaginated, did not demonstrate that claimant's severe impairment was not caused in part by pneumoconiosis because claimant was both a miner and a smoker. Dr. Jarboe's opinion established only that pneumoconiosis alone would not be expected to cause a severe impairment. Hence, the administrative law judge determined that Dr. Jarboe's opinion had no bearing on the case at bar. We, therefore, reject employer's argument that the administrative law judge erred in discrediting Dr. Jarboe's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Carpeta, supra*; *see also Balsavage v. Director, OWCP*, 295 F.3d 390, 397, BLR (3d Cir. 2002) (administrative law judge may disregard medical opinion that does not adequately explain basis for its conclusion); *Mathies Coal Co. v. Simonazzi*, 733 F.2d 283, 286 (3d Cir. 1984); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-6-7 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). Accordingly, we affirm the administrative law judge's rejection of Dr. Jarboe's opinion since the administrative law judge's analysis constitutes a permissible evaluation of the evidence.

Finally, employer argues that the administrative law judge impermissibly substituted his opinion for that of a medical expert when he refused to accept Dr. Fino's report that all of claimant's obstruction was due to smoking. Specifically, employer avers that the administrative law judge erred in accepting claimant's qualifying blood gas studies as undisputed proof of pulmonary abnormality while ignoring Dr. Fino's reasoned explanation for claimant's abnormal studies.

The administrative law judge reasonably accorded less weight to Dr. Fino's opinion because it contained internal inconsistencies, gaps in analysis, and a lack of explanation for his conclusions. *See Trumbo, supra*; *Clark, supra*. He rationally found that Dr. Fino's opinion that small airways flow is more reduced than large airways flow, a condition consistent with smoking, emphysema, asthma, and non-occupational bronchitis, did not adequately support his conclusion that claimant did not suffer from an occupationally acquired pulmonary condition. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order on Remand at 9-10. Similarly, the administrative law judge found that Dr. Fino provided no rationale for the qualifying values resulting from claimant's post-bronchodilator pulmonary function studies and he incorrectly characterized the April 10, 1996 blood gas study as "normal" when it yielded qualifying results. This was rational.

Because the administrative law judge, within a permissible exercise of his discretion, considered the inadequacy of the discussion and explanation in Dr. Fino's opinion and thus,

questioned its reliability and probative value, we affirm his discounting of Dr. Fino's opinion. *See Rowe, supra*; *Trumbo, supra*; *White v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Hence, the administrative law judge rationally found that Dr. Fino's opinion, that claimant does not have coal worker's pneumoconiosis, was neither well documented nor well reasoned, and therefore, entitled to little weight. *See King, supra*; *Lucostic, supra*.

Thus, contrary to employer's argument, the administrative law judge properly found that Dr. Rasmussen's opinion was entitled to determinative weight because it was better reasoned than the opinions of Drs. Zaldivar, Jarboe, and Fino, even though the latter physicians were Board-certified in pulmonary diseases and Dr. Rasmussen's credentials did not appear in the record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Accordingly, we affirm the administrative law judge's determination that claimant established the existence of pneumoconiosis[5] and total disability due to pneumoconiosis, requisite elements of entitlement in this Part 718 case. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Because the administrative law judge properly found that claimant affirmatively established all requisite elements of entitlement, the administrative law judge's determination that claimant is entitled to benefits is affirmed. *See Trent, supra*; *Perry, supra*.

[5] The administrative law judge determined that, after a review of all of the relevant evidence, claimant established the existence of pneumoconiosis by a preponderance of the evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); [2001] Decision and Order on Remand at 3 n.2.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge