BRB No. 03-0183 BLA

LUTHER HURLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COMBS AND HURLEY COAL COMPANY	)	
	)	DATE ISSUED: 11/14/2003
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard Radzely, Acting 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.

PER CURIAM:

Claimant appeals the Decision and Order on Third Remand-Denying Benefits (94-BLA-1053) of Administrative Law Judge Clement J. Kichuk denying benefits 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). This claim is before the

Board for the fourth time.[1] In its most recent decision in this case, the Board rejected employer's contention that the determination of a material change in conditions must be reconsidered, but it agreed with employer that the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(c)(1)(2000) must be vacated and it instructed the administrative law judge to weigh all relevant evidence together to consider whether total respiratory disability is established.[2] The Board also vacated the administrative law judge's finding regarding the cause of claimant's alleged total respiratory disability. *Hurley v. Combs and Hurley Coal Co.*, BRB No. 00-0902 BLA (June 29, 2001) (unpub.). On remand, the administrative law judge found that the pulmonary function studies and medical opinions establish total respiratory disability, but that the evidence fails to establish that claimant's respiratory disability was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his consideration of the opinions in which Drs. Anderson and Broudy stated that claimant's breathing impairment is not related to coal dust exposure and erred by failing to credit Dr. Chaney's determination that a portion of claimant's impairment is attributable to coal dust exposure.[3] The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant that the administrative law judge erred by crediting Dr.

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[1]The procedural history of this case is fully set forth in our third decision, *Hurley v. Combs and Hurley Coal Co.*, BRB No. 00-0902 BLA (June 29, 2001)(unpub.), slip opinion at 2-3.

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

[3]No party challenges the finding that total disability is established or the weight accorded to the medical opinions by Drs. Wright, Williams and O'Neill. These findings are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Also, claimant does not specifically challenge the credibility determinations made regarding the opinions by Drs. Baker, Jackson and Vaezy. These findings are also affirmed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director*, OWCP, 6 BLR 1-107(1983).

Anderson's opinion because the physician did not believe that claimant suffered from legal pneumoconiosis, which is contrary to a finding already affirmed by the Board.[4]

Employer responds, urging the Board to affirm the administrative law judge's credibility determinations. Employer also asserts that the Board should not address the arguments made in the Director's response brief, as they should have been raised in a cross-appeal. Employer further argues that in light of intervening case law, the finding that claimant established a material change in conditions must be reconsidered. In further support of this argument, employer asserts that pursuant to the decision in *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001), *aff'd in part and rev'd in part sub. nom Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002), claimant is now required to establish that his is one of the rare cases in which pneumoconiosis progressed absent further coal dust exposure. Employer also asserts that because of intervening law, opinions by Drs. Baker and Chaney, previously credited in establishing the existence of pneumoconiosis and a material change in conditions, would now be insufficient as a matter of law to establish these elements. The Director responds that contrary to employer's assertion, he has standing to participate in this appeal, and urges the Board to reject employer's contention that *National Mining Association* requires the administrative law judge to revisit the material change determination.

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).

In considering the issue of the cause of claimant's total disability, the administrative law judge accorded little weight to the opinions by Drs. Wright, Williams and O'Neill, as these physicians did not find that the miner suffered from pneumoconiosis. Decision and Order at 11. The administrative law judge found that Dr. Jackson's reasoned opinion did not support a finding that total disability was due, at least in part, to pneumoconiosis, as the physician only acknowledged the possibility that coal dust exposure contributed to claimant's totally disabling respiratory impairment. Decision and Order at 12. Regarding opinions by Drs. Baker, Vaezy and Chaney, that claimant's totally disabling respiratory impairment was due to a combination of cigarette smoking and dust inhalation, the administrative law judge found these opinions to be unreasoned and speculative, as the physicians relied upon an assumption that when

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[4]The Director, Office of Workers' Compensation Programs (the Director), also argues that Dr. Anderson's theory that residual volume tests are probative of etiology is unsupported by any medical or scientific authority.

cigarette smoking and coal dust exposure are both present, a portion of any respiratory impairment is attributable to coal dust exposure. Decision and Order at 14 – 15.

The administrative law judge found that Drs. Anderson and Broudy, both Board-certified internists and pulmonologists, provided well-reasoned opinions as to why pneumoconiosis was not a contributing cause of claimant's respiratory disability. The administrative law judge found that the credentials of both physicians provided reliability for their causation opinions and he further found that Dr. Broudy's diagnosis was based upon his unique knowledge of claimant's condition for an eight year period. Decision and Order at 16 – 17. The administrative law judge concluded, therefore, that the preponderance of the evidence fails to establish that total disability was due to pneumoconiosis.

On appeal, claimant contends that the administrative law judge erred in rejecting Dr. Chaney's opinion, finding that the physician erroneously assumed that when exposure to both coal dust and cigarette smoking exists, respiratory disability is attributable to both causes. Claimant relies upon the holdings of 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 *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996).[5] This contention is without merit. In *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997), the Sixth Circuit clarified the burden of proof on a miner to establish causation, that is, a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to the totally disabling respiratory impairment. The court added that the miner's pneumoconiosis must be more than merely a speculative cause of the miner's disability. In the instant case, after considering Dr. Chaney's opinions, the administrative law judge acted within his discretion in finding that the physician failed to explain the basis for his opinion that coal dust exposure contributed to claimant's disability and in further finding that the physician essentially opined that if there were multiple exposures to lung irritants, as in the instant case, all exposures caused the disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co*, 10 BLR 1- 19 (1987).

To the extent that claimant contends that Dr. Chaney's opinion is entitled to determinative weight based on his status as a treating physician, we reject this argument as there is no requirement that the administrative law judge give controlling weight to the opinion of a treating physician and may properly accord diminished weight to that opinion if it is not well-reasoned on well-documented. *See Eastover Mining Co. v.*

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[5]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Williams, 338 F.3d 501, BLR (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). As indicated above, the administrative law judge rationally found that Dr. Chaney's opinion was insufficient to establish that pneumoconiosis was a contributing cause in claimant's total respiratory disability. *See* slip opinion at 2 n.2, 4.

Claimant raises no other allegation of error with respect to the administrative law judge's consideration of the other medical opinions which could establish that claimant's total respiratory disability was due in part to pneumoconiosis. We affirm, therefore, the administrative law judge's finding that claimant did not prove that pneumoconiosis is a contributing cause of his total disability pursuant to Section 718.204(c).[6] In addition, in view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total respiratory disability, an essential element of entitlement, we must also affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1(1986)(*en banc*).

[6]We need not address claimant's contentions regarding the administrative law judge's crediting of the opinions of Drs. Anderson and Broudy, nor the Director's arguments regarding the flaws in Dr. Anderson's opinion, as we have affirmed the administrative law judge's decision to discredit the evidence which could assist claimant in satisfying his burden of proof under 20 C.F.R. §718.204(c). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988). Moreover, because we have affirmed the denial of benefits on the merits of the claim, we decline to consider employer's arguments that the finding that claimant established a material change in conditions must be reconsidered in light of intervening law. *Id*.

Accordingly, the administrative law judge's Decision and Order on Third Remand-Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge