BRB No. 98-1261 BLA

CHARLES RICHARD SANDRETH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WINDSOR COAL COMPANY	)	
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld & Schiller), Pittsburgh, Pennsylvania, for claimant.

David L. Yaussy (Robinson & McElwee), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order On Remand-Denying Benefits (95-BLA-61) of Administrative Law Judge Michael P. Lesniak denying 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). This case is before the Board for the third time. In the initial Decision and Order, the administrative law judge accepted the stipulation of the parties that claimant worked for forty-five years in coal mine employment and found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d). Next, the administrative law judge determined that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. Part 718. Accordingly, the administrative law judge awarded benefits. Employer appealed, and the Board affirmed the administrative law judge's findings made pursuant to 20 C.F.R. §718.204(c)(1), (c)(2), and (c)(4), but vacated his award because the administrative law judge improperly combined the analyses of the evidence under Sections 718.202(a)(4) and 718.204(b). Thus, the Board vacated the administrative law judge's findings and remanded the case for a determination as to whether claimant first established the presence of pneumoconiosis pursuant to Section 718.202(a)(4), and if so, whether claimant then established that pneumoconiosis was a contributing factor to claimant's total disability pursuant to Section 718.204(b). *Sandreth v. Windsor Coal Co.*, BRB No. 95-1843 BLA (March 29, 1996)(unpub.). On remand, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995),[2] the administrative law judge rejected the opinions of Drs. Altmeyer and Fino that claimant does not suffer from pneumoconiosis on the basis that these physicians premised their opinions "upon the assumption that coal dust exposure does not produce an obstructive impairment." Decision and Order on Remand at 2. Thus, the administrative law judge found that claimant established pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. Employer appealed, contesting the administrative law judge's finding of the presence of

[1]Claimant filed his first application for benefits on February 11, 1974. It was finally denied on January 8, 1981. Director's Exhibit 26. Claimant filed the instant claim on September 16, 1993. Director's Exhibit 1.

[2]In *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, noting that chronic obstructive lung disease is encompassed within the definition of pneumoconiosis under the Act, rejected a physician's opinion that the miner did not suffer from pneumoconiosis inasmuch as this opinion was based on the assumption that since pneumoconiosis causes a purely restrictive form of impairment, obstructive disorders cannot be caused by coal mine employment.

pneumoconiosis under Section 718.202(a)(4). On appeal, the Board again vacated the administrative law judge's findings and remanded the case for a reassessment of the opinions of Drs. Altmeyer and Fino pursuant to *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), which clarified the Fourth Circuit's holding in *Warth*.[3] *Sandreth v. Windsor Coal Co.*, BRB No. 97-0749 BLA (Jan. 29, 1998)(unpub.).

On remand, the administrative law judge found that claimant failed to establish the presence of pneumoconiosis by a preponderance of the evidence. He found that the opinions of Drs. Altmeyer and Fino could not be discredited under the holdings in *Warth* and *Stiltner*, in view of the fact that neither physician stated that coal dust exposure can never cause an obstructive defect. Decision and Order at 3. The administrative law judge rejected Dr. Del Vecchio's opinion that claimant suffers from pneumoconiosis on the basis that the doctor did not explain the role that cigarette smoking had on claimant's respiratory impairment. Finally, the administrative law judge credited the opinions of Drs. Altmeyer and Fino that claimant's disability was attributable to cigarette smoking. Accordingly, benefits were denied. Claimant filed the instant appeal. Employer responds, urging affirmance of the Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this appeal.

The Board's scope of review is defined by statute. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a). 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 on the Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[3]In *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the United States Court of Appeals for the Fourth Circuit noted that an administrative law judge is not precluded from relying on a physician's opinion that notes the absence of a restrictive impairment in his finding of no pneumoconiosis, so long as the diagnosis is not based on the erroneous assumption that coal mine employment can never cause an obstructive impairment.

To be entitled to benefits 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

On appeal, claimant first asserts that the administrative law judge erred in failing to consider Dr. Del Vecchio's report on the issue of the presence of pneumoconiosis. Further, claimant maintains that Dr. Del Vecchio's opinion should be given deference in view of the fact that his opinion was obtained by the Department of Labor. We reject these contentions. Contrary to claimant's assertion, the administrative law judge did consider Dr. Del Vecchio's report regarding the presence of pneumoconiosis, and permissibly found that the doctor did not adequately explain the role claimant's extensive smoking history played in his resulting impairment. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge did not err in declining to accord additional weight to Dr. Del Vecchio's report because the doctor was retained by the Department of Labor. The Board has held that unless an opinion of a physician obtained by a particular party is properly held to be biased, the administrative law judge may not credit an opinion of a Department of Labor physician based on his perceived neutrality. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Stanford v. Director, OWCP*, 7 BLR 1-906 (1985); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984).

Next, claimant asserts that Drs. Altmeyer and Fino did not give appropriate credit to his forty-seven years of coal dust exposure in assessing his pulmonary/respiratory condition, and that therefore, the administrative law judge should not have credited their opinions that he does not suffer from coal workers' pneumoconiosis. We disagree. Dr. Fino, who examined claimant, noted claimant's forty-seven years of coal mine employment but noted that claimant's airway impairment "is not consistent with a coal dust related condition but is consistent with conditions such as cigarette smoking, pulmonary emphysema, non-occupational chronic bronchitis, and asthma." Director's Exhibit 10, p. 7. Dr. Altmeyer, who rendered a consulting opinion, also recognized claimant's forty-seven years of coal mine employment. Employer's Exhibit 1, p. 5. The doctor specifically stated that claimant's impairment was in no way related to coal workers' pneumoconiosis.[4] *Id*. at 9. Dr. Altmeyer

[4]In view of this specific finding by the administrative law judge, we reject claimant's assertion that Dr. Altmeyer's diagnoses of chronic obstructive pulmonary disease, chronic bronchitis, and pulmonary emphysema, all establish the presence of pneumoconiosis. While the diagnoses made by Dr. Altmeyer could establish the presence of

did not base his diagnosis on a distinction between whether claimant had a restrictive or obstructive impairment but rather on claimant's chest x-rays and biopsy results. The administrative law judge credited the two physicians' reports because he found them documented and reasoned. Given that the doctors based their opinions, not only on claimant's forty-seven years of coal mine employment, but also on claimant's smoking history and biopsy results, substantial evidence supports the administrative law judge's determination. Further, we affirm the administrative law judge's finding that the opinions of Drs. Altmeyer and Fino could not be discredited under the holdings in *Warth* and *Stiltner*, in view of the fact that neither physician stated that coal dust exposure can never cause an obstructive defect. Therefore, we affirm the administrative law judge's finding that the preponderance of evidence fails to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4). Inasmuch as claimant has failed to establish the presence of pneumoconiosis, an essential element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra; Perry, supra.*

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

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pneumoconiosis, if linked to coal mine employment, claimant bears the burden of establishing that these respiratory diseases arise out of, or relate to, his coal mine employment. *See* 20 C.F.R. §727.202*; Biggs v. Consolidation Coal Co.*, 8 BLR 1-317, 1-322 (1985); *Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984). Dr. Altmeyer specifically excluded the presence of pneumoconiosis, and therefore, no nexus was established between claimant's respiratory impairments and his coal mine employment.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge