BRB No. 98-1289 BLA

JAMES ROBERTSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ACTION MINING COMPANY	)	DATE ISSUED: 11/5/99
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James M. Jacobs, Jr. (Yelovich & Flower), Somerset, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (97-BLA-0858) of Administrative Law Judge Michael P. Lesniak 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). Claimant filed a claim for benefits in May 1996. Director's Exhibit 1. After two denials by the district director, claimant filed a request for modification that was granted by the district director.[1] Director's Exhibits 16, 23, 33. Upon employer's request, the case was then referred to the Office of Administrative Law Judges for a hearing. Director's Exhibits 34, 36, 37. The administrative law judge found that claimant established at least twenty-three years of coal mine employment. Considering the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b). Moreover, the administrative law judge found total disability established under 20 C.F.R. §718.204(c)(1)-(c)(2), and found that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(b). Accordingly, benefits were awarded, commencing May 1, 1996.[2]

Employer appeals, challenging the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(b). Claimant has filed a response brief advocating affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter stating that he will not respond to this appeal unless specifically requested to do so by the Board.[3]

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 the Board and may not be

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[1] As the administrative law judge considered the claim on the merits, the administrative law judge properly adjudicated the instant request for modification. 20 C.F.R. §725.310(a); *Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

[2] We affirm, as uncontested on appeal, the administrative law judge's finding of at least twenty-three years of coal mine employment, of causation of pneumoconiosis at 20 C.F.R. §718.203, of total disability pursuant to 20 C.F.R. §718.204(c)(1)-(c)(2), and the May 1, 1996 date of onset of disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] In a footnote, the Director, Office of Workers' Compensation Programs (the Director), describes as "obviously wrong" employer's contention that *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) and *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994) were overruled by *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir.1995) and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). The Director adds that, in any event, the instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit.

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

In considering the medical opinion evidence under Section 718.202(a)(4), the administrative law judge stated that:

> Drs. Hanzel and Strother determined that the Claimant does not suffer from pneumoconiosis. I find Dr. Strother's opinion is not well-reasoned as he failed to adequately consider Claimant's extensive coal mine employment and its impact on his impairment. Instead, Dr. Strother determined that the Claimant's condition is caused solely by his cigarette smoking history. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Drs. Levine and Schmitt determined that the Claimant suffers from pneumoconiosis based upon x-ray evidence. I find their opinions are well reasoned and well documented as each took into consideration the Claimant's significant smoking history as well as his significant coal mining history in diagnosing the cause of the Miner's condition. Dr. Rover's opinion is entitled to little weight as his finding that the Claimant may suffer from pneumoconiosis is equivocal. *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995). After weighing all of the physician opinion evidence, I find that the Claimant has establish [sic] that he suffers from pneumoconiosis by a preponderance of the well-reasoned physician opinion evidence.

Decision and Order at 8-9.

Initially, we note that the United States Court of Appeals for the Third Circuit, under whose jurisdiction the instant case arises,[4] has held that the methods of proof set forth for establishing the existence of pneumoconiosis under Section 718.202(a) are to be weighed together by the fact-finder in determining whether a claimant has established the existence of pneumoconiosis. 20 C.F.R. §718.202(a); *see Penn Allegheny v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Inasmuch as the administrative law judge's finding of pneumoconiosis under Section 718.202(a)(4) does not comport with *Williams*, we vacate that finding and remand the case for the administrative law judge to reconsider his Section 718.202(a) findings pursuant to *Williams*.

[4] It appears that claimant's most recent coal mine employment occurred within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See* Director's Exhibits 2, 4.

In challenging the administrative law judge's weighing of the medical opinions under Section 718.202(a)(4), employer argues that the administrative law judge erred in crediting the opinions of Drs. Schmitt and Levine because they based their opinions on x-rays which were subsequently found to be negative by the administrative law judge. Contrary to employer's contention, the administrative law judge did not specifically find that the x-rays reviewed by Drs. Schmitt and Levine were negative.[5] Decision and Order at 8. In addition, we reject employer's contention that the administrative law judge was required to discredit the reports of Drs. Schmitt and Levine because they did not have the opportunity to review any original x-ray films or the negative x-ray interpretations which were performed by Board-certified radiologists and B readers. We also reject employer's argument that the administrative law judge erred in crediting the opinions of Drs. Levine and Schmitt because they were non-examining physicians. *See Evosevich v. Director, OWCP*, 789 F.2d 1021, 9 BLR 2-10, 2-20 (3d Cir. 1986). However, the administrative law judge erred in failing to render a credibility determination with regard to Dr. Hanzel's opinion. *See generally Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In addition, we agree with employer's argument that the administrative law judge's rejection of Dr. Strother's opinion was too cursory.[6]

Thus, in summary, in light of the administrative law judge's failure to apply *Williams* and the errors identified herein, we must vacate the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis

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[5] It appears that Drs. Schmitt and Levine each reviewed fifteen x-ray interpretations. Claimant's Exhibits 1, 3. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge stated that:

> There are thirty-two readings of seven (7) different x-ray films contained in the record. Of the thirty two interpretations, twelve were read as positive for pneumoconiosis and twenty were read as negative for pneumoconiosis. Of the thirty-two interpretations, thirty-one were rendered by dually qualified board certified radiologists/B-readers and one was read by a B-reader. I find by a preponderance of the chest x-ray evidence that Claimant has failed to establish that he suffers from pneumoconiosis.

Decision and Order at 8.

[6] Noting that Dr. Strother determined that claimant's condition was caused solely by his smoking history, the administrative law judge found Dr. Strother's opinion not well reasoned because he failed to adequately consider claimant's extensive coal mine employment and its impact on his impairment. Decision and Order at 8-9. As employer correctly notes, Dr. Strother discussed claimant's extensive coal mine employment, *see* Employer's Exhibit 2, Deposition at 33, and offered an explanation for how he could separate out injury to the lung tissues caused by cigarette smoking versus injury that would be caused by an occupational type of injury. *See* Employer's Exhibit 2, Deposition at 22.

under Section 718.202(a)(4). On remand, the administrative law judge must reconsider the relevant evidence under Section 718.202(a) in light of *Williams*. *See Williams*, *supra*.

With regard to Section 718.204(b), employer argues that the administrative law judge erred in rejecting the opinions of Drs. Strother and Hanzel. The administrative law judge rejected these reports since neither physician found the existence of pneumoconiosis, citing the Fourth Circuit's decision in *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Decision and Order at 10. Because the administrative law judge's finding of the existence of pneumoconiosis must be vacated and remanded pursuant to *Williams*, we must also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis under Section 718.204(b). If, on remand, the administrative law judge again finds the existence of pneumoconiosis established, he must reconsider whether pneumoconiosis is a substantial contributor to claimant's total disability under Section 718.204(b).[7] *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

[7] We note that the Fourth Circuit recognized that even though an administrative law judge has found that a claimant suffers from pneumoconiosis, a physician's disability causation opinion premised on an understanding that the claimant does not have pneumoconiosis may still have probative value. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 790, 19 BLR 2-86 (4th Cir. 1995). The court further explained that a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *Ballard*, *supra*. Thus, any discussion of *Toler* on remand must include a discussion of these later cases as well.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and vacated in part, and remanded for further consideration by the administrative law judge.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge