BRB No. 99-1118 BLA

CHARLES EDWARD O'QUINN (deceased)	)	
Claimant-Petitioner	)	DATE ISSUED:
v.	)	
CROYE AND MOORE CONSTRUCTION COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order on Fourth Remand of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia.

William H. Howe, Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Fourth Remand (87-BLA-0818) of Administrative Law Judge Alfred Lindeman awarding 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 case is before the Board for the fifth time. In our previous decision, we discussed fully this claim's procedural history. *O'Quinn v. Croye and Moore Constr. Co*., BRB No. 98-0718 BLA (Mar. 2, 1999)(unpub.). We now focus only on those procedural aspects relevant to the issues raised in this appeal.

In a Decision and Order on Remand issued on September 30, 1996, the administrative law judge found the existence of pneumoconiosis established by the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and found that employer failed to prove that claimant's totally disabling respiratory impairment was not due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.203(b), 718.204(b). Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established by x-ray evidence pursuant to Section 718.202(a)(1), but vacated the administrative law judge's finding pursuant to Section 718.204(b) and remanded the case for him to determine whether claimant carried his burden of proof to establish that pneumoconiosis was at least a contributing cause of his total disability pursuant to Section 718.204(b). *O'Quinn v. Croye and Moore Constr. Co.*, BRB No. 97-0257 BLA (Oct. 23, 1997)(unpub.); *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195-96, 19 BLR 2-304, 2-320 (4th Cir. 1995); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990). On remand, the administrative law judge adopted his prior finding pursuant to Section 718.204(b) and awarded benefits, but did so without engaging in a specific analysis of the relevant medical evidence. Therefore, pursuant to employer's appeal, the Board vacated the administrative law judge's finding and remanded the case for him to reweigh the medical opinions pursuant to Section 718.204(b). [1999] *O'Quinn, supra*.

On remand, the administrative law judge considered the medical opinions of seven physicians. Dr. Hatfield examined claimant in 1978 and diagnosed pneumoconiosis with a moderate impairment. Director's Exhibit 17. Dr. Taylor examined claimant in 1983 and diagnosed "Black Lung." Director's Exhibit 18. He also provided a medical assessment of claimant's physical limitations due to pulmonary disease. *Id*. Dr. Cardona examined claimant in 1986 and opined that claimant was totally disabled due to pneumoconiosis. Claimant's Exhibit 2. Dr. Ranavaya examined claimant and reviewed his medical records in 1990 and also concluded that claimant was totally disabled due to pneumoconiosis. Claimant's Exhibits 3, 6. By contrast, Dr. Garzon examined claimant in 1986 and opined that he was mildly impaired by smoking-related chronic obstructive pulmonary disease (COPD). Employer's Exhibit 2. Dr. Endres-Bercher examined claimant in 1990 and concluded that claimant was disabled due to COPD secondary to tobacco smoke exposure. Employer's Exhibit 17. Dr. Bennett did not examine claimant but reviewed his medical records and also concluded that claimant was disabled due to the effects of cigarette smoking. Employer's Exhibit 31.

The administrative law judge accorded greatest weight to Dr. Ranavaya's opinion as well documented and reasoned. Although the administrative law judge found that Dr. Bennett gave a well reasoned and persuasive opinion attributing claimant's disability to a smoking-related condition, he credited Dr. Ranavaya's opinion over Dr. Bennett's because Dr. Ranavaya examined claimant. The administrative law judge discounted the conclusions of Drs. Garzon and Endres-Bercher because they did not diagnose pneumoconiosis, and because the administrative law judge found that they premised their opinions on the erroneous assumption that coal mine employment never causes obstructive disorders. For these reasons, the administrative law judge concluded that

the opinions of Drs. Ranavaya, Hatfield, and Taylor outweighed those of Drs. Bennett, Garzon, and Endres-Bercher. The administrative law judge therefore found that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b), and awarded benefits.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical evidence pursuant to Section 718.204(b). Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In this case, the administrative law judge found the existence of pneumoconiosis established based solely on the x-ray evidence pursuant to Section 718.202(a)(1). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, recently held that the administrative law judge must weigh all evidence relevant to the existence of pneumoconiosis together, rather than merely within discrete subsections of Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, BLR , (4th Cir. 2000). Because the administrative law judge weighed only the x-ray evidence, rather than weighing the x-ray and medical opinion evidence together, we must vacate the administrative law judge's finding that the existence of pneumoconiosis was established and remand this case for him to reweigh the evidence under Section 718.202(a), consistently with *Compton*.

Pursuant to Section 718.204(b), employer contends that the administrative law judge did not provide valid reasons for according less weight to Drs. Endres-Bercher, Garzon, and Bennett. Employer challenges the administrative law judge's application of *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), to find that the disability causation opinions of Drs. Endres-Bercher and Garzon lacked probative value because they did not diagnose pneumoconiosis. Decision and Order on Fourth Remand at 5 n.12. Where a physician acknowledges that a claimant has a respiratory or pulmonary impairment, but explains that an ailment other than pneumoconiosis caused claimant's total disability, the physician's opinion is relevant to disability causation and should not be discounted merely because the physician did not diagnose pneumoconiosis. *Ballard*, 65 F.3d at 1193-94, 19 BLR at 2-315-16. Here, Drs. Garzon and Endres-Bercher concluded that claimant had a respiratory impairment, and explained why they believed that claimant's total disability was unrelated to pneumoconiosis, but was instead related to the effects of smoking. In view of the erroneous reason the administrative law judge provided for according these opinions less weight, and because we have vacated the administrative law judge's finding that the existence of

pneumoconiosis was established pursuant to Section 718.202(a), we must also vacate the administrative law judge's finding pursuant to Section 718.204(b).

Additionally, there is merit in employer's contention that the administrative law judge misapplied *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) to discount the opinions of Drs. Garzon and Endres-Bercher. A medical opinion based on the assumption that obstructive disorders cannot be caused by coal mine employment merits no weight in determining disability causation. *Warth, supra*. However, *Warth* does not preclude consideration of a disability causation opinion that is based in part on the absence of a restrictive impairment where the opinion is documented and reasoned and is not premised on the assumption that coal mine employment cannot cause obstructive disorders. *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 341, 20 BLR 2-246, 2-254-55 (4th Cir. 1996). Here, Drs. Endres-Bercher and Garzon based their conclusion that claimant's obstructive impairment was due solely to smoking upon an examination of claimant, and consideration of claimant's medical history, coal mine employment and smoking histories, blood gas studies, pulmonary function studies, and chest x-rays. Employer's Exhibits 2, 17. Neither physician assumed that coal mine employment cannot cause obstructive disorders. Therefore, their opinions should not have been discounted under *Warth*.

Finally, there is merit in employer's contention that the administrative law judge did not perform a full, comparative analysis of the opinions of Drs. Ranavaya and Bennett. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). An administrative law judge may not discredit a physician's opinion solely because the physician did not examine claimant. *Compton*, 211 F.3d at 212, BLR ; *Akers*, 131 F.3d at 441, 21 BLR at 2-275. Although the administrative law judge noted that Drs. Ranavaya and Bennett reached different conclusions as to the cause of claimant's total disability, the only reason given by the administrative law judge for crediting Dr. Ranavaya's conclusion over Dr. Bennett's was that Dr. Ranavaya examined claimant. On remand, the administrative law judge should reweigh and fully analyze these opinions consistently with *Hicks*, *Akers*, and *Compton*.

Therefore, we remand this case for the administrative law judge to determine whether all of the relevant evidence weighed together establishes the existence of pneumoconiosis pursuant to Section 718.202(a). *See Compton, supra*. If the administrative law judge finds the existence of pneumoconiosis established, he must reweigh the evidence to determine whether pneumoconiosis was a contributing cause of claimant's totally disabling respiratory impairment pursuant to Section 718.204(b). *See Ballard, supra*.

Accordingly, the administrative law judge's Decision and Order on Fourth Remand is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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[1] We reject employer's contention that the administrative law judge may not consider the opinions of Drs. Hatfield and Taylor relevant to disability causation. The administrative law judge reasonably read their opinions as indicating that the respiratory impairments they assessed were related to pneumoconiosis. Additionally, because Drs. Cardona and Ranavaya based their opinions on claimant's coal dust exposure and smoking histories, medical history, physical examination of claimant, and objective test results, we reject employer's contention that their opinions are unreasoned as a matter of law. It will be for the administrative law judge on remand to assess the quality of their reasoning and determine the weight to be accorded their opinions. *See Hicks, supra*; *Akers, supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993).