BRB No. 99-1287 BLA

PAUL G. BENSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits (Upon Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Jeffrey S. Goldberg (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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (Upon Remand by the Benefits Review Board)(96-BLA-1881) of Administrative Law Judge Robert D. Kaplan 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 second time. In his initial Decision and Order, the administrative law judge found that claimant established seven and three-quarters years of coal mine employment, and based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) and accordingly denied benefits. Claimant

appealed, and in *Benson v. Director, OWCP*, BRB No. 98-0411 BLA (Apr. 30, 1999) (unpub.), the Board affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3), but vacated his finding at Section 718.202(a)(4) and his finding regarding the length of coal mine employment, and remanded the case for further consideration. Specifically, the Board affirmed the administrative law judge's crediting of the opinions of Drs. Levinson and Sahillioglu, who did not diagnose the existence of pneumoconiosis, as they were well-reasoned and well-documented, and affirmed the administrative law judge's discrediting of the opinions of Drs. Harasym and Fasciana, who diagnosed the existence of pneumoconiosis, because their opinions were not sufficiently documented or explained. The Board vacated the administrative law judge's weighing of the medical opinions of Dr. Aquilina, who found pneumoconiosis, and Dr. Cali, who found no pneumoconiosis, as the reasons given for discrediting these opinions were not rational, and remanded the case for reconsideration of the evidence at Section 718.202(a)(4). Benson slip op. 3-4. Director's Exhibits 17, 19, 30. The Board also instructed the administrative law judge to render a finding as to claimant's years of smoking to the extent that he finds claimant's smoking history a relevant factor in weighing the credibility of the medical opinions. Benson slip op. at 4-5; Director's Exhibits 11, 30.

On remand, the administrative law judge found that claimant established at least ten years of coal mine employment based on the parties's stipulation,[1] but again found the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a), concluding that the opinions of Drs. Levinson, Sahillioglu and Cali "outweigh the opinion of Dr. Aquilina," and that after weighing all the evidence of record together at Section 718.202(a)(1)-(4) pursuant to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), claimant had failed to establish the presence of pneumoconiosis." Decision and Order on Remand at 3. Accordingly, benefits were again denied.

Claimant appeals, contending that the administrative law judge erred in failing to find the existence of pneumoconiosis at Section 718.202(a)(4), that pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b) and that claimant was totally disabled due to pneumoconiosis at Section 718.204(b), (c). The Director, Office of Workers' Compensation Programs (the Director), responds, requesting that the Board vacate the

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[1] The administrative law judge's finding that the parties stipulated to at least ten years of coal mine employment is affirmed as unchallenged on appeal. Decision and Order at 2; *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge's Decision and Order and remand the case for further consideration at Section 718.202(a) as the administrative law judge's weighing of the evidence at Section 718.202(a)(4) does not comply with the requirements of the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Further, although the Director argues that remand is warranted in this case, he, nonetheless, concedes that if the administrative law judge should find, on remand, that Dr. Aquilina's opinion is reasoned and documented, he could still find it outweighed by the contrary opinions of Drs. Levinson, Sahillioglu and Cali based on their superior qualifications.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim 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. *See*, 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*).

Claimant and the Director contend that the administrative law judge failed to properly weigh the medical opinions at Section 718.202(a)(4). Specifically, claimant contends that the opinion of Dr. Aquilina is entitled to greater weight than the opinions of the other physicians because he was claimant's treating physician. Further, claimant contends that the record shows that Dr. Aquilina's opinion that claimant "has a coal dust induced pulmonary disease," is based on examination findings, abnormal blood gas studies and pulmonary function studies, as well as subjective complaints and that Dr. Aquilina did not rely solely on positive x-rays to find pneumoconiosis. The Director contends that the administrative law judge does not provide sufficient reasons for his evaluation of the medical opinions at Section 718.202(a)(4).

On remand, the administrative law judge weighed all the medical opinions together, and concluded that the opinions of Drs. Levinson, Sahillioglu and Cali "outweigh the opinion of Dr. Aquilina." Decision and Order on Remand at 3. As the Director notes, however, this evidentiary weighing does not fully comply with the Administrative Procedure Act as the conclusion lacks any sort of explanation or examination of the evidence. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir.

1997); *Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989); *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding at Section 718.202(a)(4) and remand this case for a reweighing of the medical opinions at Section 718.202(a)(4), and reconsideration of all the evidence at Section 718.202(a) pursuant to *Williams*, *supra*, if reached, assigning particular weight to each piece of evidence, with an explanation as to his findings and conclusions. Likewise, if, on remand, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), he must then address whether the evidence establishes the other elements of entitlement. *See* Benson at 5, n.8.

Contrary to claimant's argument, however, the administrative law judge is not required to give dispositive weight to Dr. Aquilina's opinion solely because he is a treating physician. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-104 (1994). Rather, as the Director contends, even if the administrative law judge should find the opinion of Dr. Aquilina, reasoned and documented, he may still find it outweighed by the contrary opinions of Drs. Levinson, Sahillioglu and Cali based on their superior qualifications. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *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).

Accordingly, the administrative law judge's Decision and Order Denying Benefits (Upon Remand by the Benefits Review Board) is vacated in part, affirmed in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge