BRB No. 02-0179 BLA

| | | |
|---|---|---|
| BRUCE M. ERDMAN | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| MERCURY COAL COMPANY | ) | DATE ISSUED: |
| | ) | |
| 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 Remand - Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

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

Rita Roppolo (Eugene Scalia, 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.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand - Denying Benefits (97-BLA-1243) of Administrative Law Judge Paul H. Teitler on a claim[1] filed pursuant to the

[1] Claimant, Bruce M. Erdman, filed his application for benefits on February 22, 1994. Director's Exhibit 1.

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).[2] This case is on appeal to the Board for the fourth time. The procedural history of this case is set forth in the Board's prior decision. *Erdman v. Mercury Coal Co.*, BRB No. 00-0636 BLA (May 30, 2001) (unpub.). In that decision, the Board affirmed the administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment because those determinations were unchallenged on appeal. The Board also affirmed the administrative law judge's findings regarding the opinions of Drs. Galgon, Cable and Kaplan. Specifically, the Board rejected claimant's arguments: that the opinions of these physicians were not credible because the doctors did not have the benefit of seeing the positive x-ray readings of record and because they did not see the x-ray evidence as a whole; that the opinions of Drs. Cable and Kaplan were incredible because they were remote in time; that Dr. Galgon's opinion was not well-reasoned and was inimical to the Act; and that the opinions of Drs. Galgon and Kaplan were incompetent to address the role that pneumoconiosis played in claimant's respiratory impairment as they failed to diagnose the existence of pneumoconiosis. The Board, however, vacated the administrative law judge's finding on disability causation and remanded the case for further consideration because the administrative law judge improperly rejected Dr. Kraynak's causation opinion and because the administrative law judge improperly transferred his earlier findings regarding the credibility of the medical opinion evidence on the issue of pneumoconiosis to the issue of causation.

Addressing the issue of disability causation on remand, the administrative law judge accorded greater weight to the opinions of Drs. Galgon and Kaplan, as corroborated by the opinion of Dr. Cable, because they were better supported and reasoned than Dr. Kraynak's opinion since the former discussed with specificity the results of pulmonary function studies which supported their conclusions that claimant was disabled as a result of cigarette smoking, while Dr. Kraynak did not discuss how the results of his testing and findings on physical examination supported his conclusion that the pulmonary changes seen were due to pneumoconiosis. The administrative law judge also accorded greater weight to the opinions of Drs. Galgon and Kaplan based on their qualifications as pulmonary specialists and less weight to the opinion of Dr. Kraynak, despite the fact that he was claimant's treating

[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.

physician, because his medical file on claimant was incomplete. Consequently, the administrative law judge found that claimant failed to establish disability causation and, therefore, failed to demonstrate a basis for modification of the denial of his claim. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erroneously found that total disability due to pneumoconiosis was not established: by mischaracterizing the evidence of record; by applying stricter standards to claimant's evidence than to employer's evidence; and by rendering findings of fact that are unsupported by the record, contrary to law, or lacking adequate explanation as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant that the administrative law judge erred in crediting the opinions of Drs. Galgon and Kaplan on the issue of disability causation because both Drs. Galgon and Kaplan believed that claimant did not have pneumoconiosis, contrary to the finding of pneumoconiosis made by the administrative law judge. The Director further argues that the Board misinterpreted the holding in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), when it previously remanded this case; the Director argues that the Board should revisit its interpretation of both *Ballard* and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), in light of the Fourth Circuit's more recent holding in *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).

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 the 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).

Claimant contends that the administrative law judge erred in crediting the opinions of Drs. Galgon and Kaplan, who conducted only one-time examinations of claimant, over the opinion of Dr. Kraynak, a treating physician, who had seen claimant every two months since August 30, 1994. Claimant contends that, "[i]t is inconceivable, and illogical, for the administrative law judge to conclude that Dr. Kaplan had a "better supported and better reasoned" opinion tha[n] Dr. Kraynak in this matter." Claimant's Brief at 10.

In finding that the medical opinions did not establish disability causation, the administrative law judge found the opinions of Drs. Galgon and Kaplan to be better supported and reasoned than the opinion of Dr. Kraynak, because they "discussed with specificity the findings on pulmonary function study which support[ed] their conclusions that [c]laimant is disabled by an obstructive condition related to his history of cigarette

smoking[,]" while Dr. Kraynak "does not discuss findings in particular [that] support his conclusion that the pulmonary changes present are due to pneumoconiosis." Decision and Order at 5. Additionally, the administrative law judge concluded that the opinions of Drs. Galgon and Kaplan were "entitled to great weight in recognition of their qualifications as pulmonary specialists." Decision and Order at 5. While noting that Dr. Kraynak was the claimant's treating physician, the administrative law judge found "no basis to accord greater weight to his report as the miner's treating physician[,]" because "his medical file was incomplete and included only some of the tests he has conducted over the years on this miner." Decision and Order at 5.

After reviewing the record and the relevant law, however, we agree with claimant that the administrative law judge erred in according greater weight to the opinions of Drs. Galgon and Kaplan over the opinion of Dr. Kraynak solely because of their superior qualifications and their interpretation of the pulmonary function studies, *Balsavage v. Director, OWCP*, 295 F.3d 390, BLR (3d Cir. 2002)(credentials alone do not determine the credibility of a medical opinion); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997)(pulmonary function studies relevant to assessing degree of disability); *see Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19, 1-22 (1990); *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987)(pulmonary function studies and blood gas studies not diagnostic of etiology of respiratory impairment, but diagnostic only of severity of impairment) without adequately addressing the import of the opinion of Dr. Kraynak, claimant's treating physician for seven years. *Balsavage*, *supra*; *Mancia*, *supra*; *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Coburn v. Director, OWCP*, 7 BLR 1-632 (1985); *see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *but see Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-20 (3d Cir. 1997); *Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989).

We next turn to the Director's argument on appeal. The Director argues that the Board should revisit its interpretation of the holding of the United States Court of Appeals for the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) in light of the more recent holding of the Fourth Circuit in *Curry v. Beatrice Pocohontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), *rev'g on other grds*, 18 BLR 1-59 (1994)(*en banc*). Citing *Ballard*, the Board held that a physician's opinion may be probative on the issue of causation despite the fact that it is premised on the understanding that a miner does not have coal workers' pneumoconiosis. 67 F.3d at 1193, 20 BLR at 2-13, 2-14. As the Director contends, however, the Fourth Circuit explained in *Curry* that a physician's opinion, which was premised on the belief that claimant does not have pneumoconiosis cannot be credited when it contradicts the administrative law judge's finding that claimant has clinical pneumoconiosis. At issue in *Curry* was whether such an opinion could support rebuttal at 20 C.F.R. §727.203(b)(4) when the administrative law judge found

invocation at Section 727.203(a)(1), *assuming arguendo*, that when the presumption has been invoked at Section 727.203(a)(1), it can be rebutted at Section 727.203(b)(4).

The only case of which we are aware which squarely addresses the issue currently before the Board is *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, BLR (4th Cir. 2002), in which the Fourth Circuit recently held that where the existence of clinical pneumoconiosis is established, medical opinions finding neither clinical nor legal pneumoconiosis can be given no more than little weight and cannot outweigh an opinion based on a correct diagnosis of pneumoconiosis, even if that opinion is poorly documented. Thus, applying the analysis of *Scott* to the facts of this case in which the administrative law judge found the existence of clinical pneumoconiosis established by x-ray evidence, it follows that the causation opinions of Drs. Galgon and Kaplan, who failed to diagnose the existence of clinical or legal pneumoconiosis, cannot overcome the causation opinion of Dr. Kraynak, who correctly found the existence of pneumoconiosis established. *Scott, supra*. The administrative law judge erred, therefore, in relying on the opinions of Drs. Kaplan and Galgon to deny benefits.[3]

[3] We recognize that the instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); we also recognize that the Third Circuit frequently cites as relevant authority the Fourth Circuit's black lung decisions, *e.g. Consolidation Coal Co. v. Kramer*, F.3d , 2002 WL 31111838 (3d Cir. 2002), *citing*: *Shuff v. Cedar Creek Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998; *Kirk v. Director, OWCP*, 86 F.3d 1151, 20 BLR 2-276 (4th Cir. 1996); and *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993).

When the Fourth Circuit determined in *Scott* that the record indicated three possible sources for the claimant's impairment, namely, pneumoconiosis, cigarette smoking and cardiac problems, and that there was no substantial evidence to eliminate pneumoconiosis, indeed, the only evidence which could be accorded substantial weight indicated pneumoconiosis as the cause of the disability, the court held that the administrative law judge's denial of benefits must be reversed. In the instant case the record suggests three causes for claimant's disability, pneumoconiosis, smoking and bronchial asthma, and as in *Scott*, the only evidence which can be accorded substantial weight indicates pneumoconiosis as the cause of the disability. We are persuaded by the court's reasoning in *Scott* that the administrative law judge's denial of benefits must be reversed.[4]

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is reversed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from my colleagues' decision to reverse the administrative law judge's Decision and Order on Remand - Denying Benefits.

I would reject those of claimant's arguments which were previously addressed and rejected by the Board: that the administrative law judge erred in crediting the opinions of

[4] In view of our disposition of this case, we need not address claimant's other allegations of error regarding the administrative law judge's crediting of the opinions of Drs. Galgon and Kaplan over that of Dr. Kraynak.

Drs. Galgon and Kaplan because they did not have the benefit of reviewing the positive chest x-rays of record and did not consider the x-ray evidence as a whole; and that he erred in crediting Dr. Galgon's opinion, because it is inimical to the Act. *Erdman*, slip op. At 4, n.5, 5-6; *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *overruled on other grounds, Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (2-1 opinion with Brown, J., dissenting); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984).

However, while I agree with my colleagues that in light of the recent holding of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Balsavage v. Director, OWCP*, 295 F.3d 390, BLR (3d Cir. 2002)(credentials alone do not determine credibility of a medical opinion), the administrative law judge erred in according greater weight to the opinions of Drs. Galgon and Kaplan over the opinion of Dr. Kraynak solely because of their superior qualifications and their interpretation of the pulmonary function studies, without adequately addressing the import of the opinion of Dr. Kraynak, claimant's treating physician, I would vacate the administrative law judge's Decision and Order denying benefits and remand the case for reconsideration of this evidence pursuant to *Balsavage, supra*. *See also Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997)(pulmonary function studies relevant to assessing degree of disability); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19, 1-22 (1990); *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987)(pulmonary function studies and blood gas studies not diagnostic of etiology of respiratory impairment, but diagnostic only of severity of impairment); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Coburn v. Director, OWCP*, 7 BLR 1-632 (1985); *see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *but see Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-20 (3d Cir. 1997); *Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989).

Likewise, while the administrative law judge may consider the Fourth Circuit's teaching in *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, BLR (4th Cir. 2002) insofar as he finds it helpful to resolving the issue of disability causation in this case, I do not believe that that Fourth Circuit case mandates the reversal of the administrative law judge's denial of benefits in this case, which arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. Consequently, unlike my colleagues, I would affirm in part, and vacate in part the Decision and Order on Remand - Denying Benefits, and remand this case for further consideration in light of the relevant law discussed herein.

ROY P. SMITH
Administrative Appeals Judge