BRB No. 03-0114 BLA

BENJAMIN WITMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BARREN CREEK COAL COMPANY	)	DATE ISSUED: 10/08/2003
	)	
Employer -Petitioner	)	
	)	
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 of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Maureen Hogan Krueger, Jenkintown, Pennsylvania, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (1987-BLA-00991) of Administrative Law Judge Ralph A. Romano 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).[1] This case is before the Board for a fifth time.[2]

[1] 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.

[2] The history of this case is set forth in the Board=s prior Decision and Order in *Witmer v. Barren Creek Coal Co.*, BRB No. 01-0463 BLA (Feb. 21, 2002)(unpub.).

When this case was most recently before the Board, the Board affirmed the administrative law judge=s finding of total disability but vacated the administrative law judge=s award of benefits and remanded the case for reconsideration on the issue of disability causation, concluding that the administrative law judge erred in finding that claimant had established disability causation pursuant to 20 C.F.R. '718.204(b)(2000) because the administrative law judge had failed to properly characterize the opinions of Drs. Kraynak, Kruk and Dittman. *Witmer v. Barren Creek Coal Co.*, BRB No. 01-0463 BLA (Feb. 21, 2002)(unpub.).[3] On remand, the administrative law judge, after considering the opinions of Drs. Kraynak, Kruk, and Dittman, concluded that the medical opinion evidence of record supported a finding of total disability due to pneumoconiosis based on the conclusions of Drs. Kraynak and Kruk. Decision and Order on Remand at 5-9. Accordingly, benefits were again awarded.

On appeal, employer contends that the administrative law judge erred in failing to comply with the Board=s remand instructions by adequately resolving the dispute in the medical evidence as to whether claimant had heart disease, especially since the administrative law judge relied on the opinions of Drs. Kraynak and Kruk, who stated that their opinions that claimant=s coal mine employment contributed to claimant=s disability were based on their belief that claimant did not have heart disease. Employer also argues that the case should be reassigned to a different administrative law judge on remand in light of the Astalemated posture@ the case has reached after numerous times before the administrative law judge.[4] Claimant responds and urges that the administrative law judge=s award of benefits be affirmed. The Director, Office of Workers= Compensation Programs (the Director), has not

[3] The regulatory provisions governing proof of total respiratory or pulmonary disability previously set forth in 20 C.F.R. '718.204(c), now appear in 20 C.F.R. '718.204(b). The regulatory provisions regarding proof of total disability due to pneumoconiosis, *i.e.*, disability causation, previously set forth in 20 C.F.R. '718.204(b), are now found in 20 C.F.R. '718.204(c).

[4] Employer also argues that the Board erred in affirming the administrative law judge=s finding of total disability in its prior Decision and Order. Employer=s Brief at 12 n.2. The objections raised by employer, however, were addressed and rejected by the Board in its prior Decision and Order. *Witmer*, BRB No. 01-0463 BLA.

filed a brief in this appeal.

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 this Board and may not be 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 order to establish disability causation, claimant must affirmatively establish that pneumoconiosis is a substantially contributing cause of the miner=s totally disabling respiratory or pulmonary impairment. 20 C.F.R. '718.204(c)(1); *see Bonessa v. United States Steel Corp.*, 884 F.2d 756, 13 BLR 2-23 (3d Cir. 1989). Here, the administrative law judge concluded, on remand, that claimant carried his burden.

Employer asserts that the administrative law judge again failed to resolve the conflicting evidence as to whether claimant had heart disease, and that resolution of this issue was necessary to assess the credibility of the physicians= opinions on causation. When this case was most recently before the Board, the Board recognized that the record contained three opinions relevant to the issue of disability causation, *i.e.*, the opinions of Drs. Kraynak, Kruk and Dittman, Claimant=s Exhibits 8, 20; Employer=s Exhibits 3, 6. *Witmer*, 01-0463 BLA slip op. at 8. In its previous Decision and Order, the Board had held that Dr. Dittman=s diagnosis of heart disease was consistent with his underlying documentation, contrary to the administrative law judge=s finding. *Witmer*, 01-0463 BLA slip op. at 8. The Board had further held that in crediting Dr. Kruk=s opinion that claimant did not have heart disease, Athe administrative law judge did not resolve the conflict between Dr. Kruk=s opinion and Dr. Dittman=s allegation that Dr. Kruk=s examination was flawed because the stress test upon which he relied was not conducted to claimant=s maximum capacity.@ *Witmer*, 01-0463 BLA slip. op. at 8. The administrative law judge was, therefore, directed to resolve this conflict.

On remand, the administrative law judge noted that the difference between Drs. Dittman=s and Kruk=s diagnoses was based upon their disagreement about the significance of claimant=s treadmill stress test. Dr. Kruck relied upon the test to rule out cardiac disease because it showed a Aresting cardiogram within normal limits.@ Claimant=s Exhibit 8 at 2. Dr. Dittman rejected this interpretation, declaring the stress test was Areally not diagnostic,@ because it was conducted at less than maximum effort. Employer=s Exhibit 6 at 31. Dr. Kruk interpreted claimant=s inability to complete the stress test as a further indication that claimant was disabled from coal workers= pneumoconiosis, a diagnosis he had already made based on other variables, *i.e.*, two pulmonary function studies, two chest x-rays, and a physical examination. Decision and Order on Remand at 9. The administrative law judge stated that it was unclear whether Dr. Kruk had actually relied on the stress test in reaching

his conclusion that claimant=s complaints were due to pneumoconiosis rather than heart disease.

Employer contends, however, that while the administrative law judge discussed claimant=s disputed stress test, the administrative law judge failed to consider the validity of the stress test and if it were invalid, how this affected the credibility of Dr. Kruk=s and Kraynak=s causation opinions. Thus, employer contends that the case must be remanded for further consideration.

We reject employer=s argument that the administrative law judge erred in failing to determine whether the stress test was valid and how its validity or invalidity affected the credibility of the opinions of Drs. Kraynak and Kruk, *i.e.*, that claimant=s disability was due to pneumoconiosis. In discussing the stress test, the administrative law judge noted that it was unclear whether Dr. Kruk had actually relied on the stress test in reaching his conclusion that claimant=s complaints were due to pneumoconiosis. Instead, the administrative law judge noted that it was clear that Dr. Kruk had relied on several chest-x-rays, valid pulmonary function studies and a physical examination when he concluded that claimant was totally disabled by pneumoconiosis. Contrary to employer=s argument, it was not crucial for the administrative law judge to determine whether the stress test was valid or invalid in order to determine whether the opinions of Drs. Kraynak and Kruk were credible since he found that both opinions were based on other reliable factors, *i.e.*, examination and other objective testing, and not on the results of claimant=s stress test. Moreover, the administrative law judge acknowledged that Dr. Dittman=s testimony and report certainly Aindicated the possibility, perhaps even the probability, that claimant suffered from heart disease.@ Decision and Order on Remand at 8. The administrative law judge reasonably opined that the diagnoses of heart disease and pneumoconiosis Aare not mutually exclusive@; that Dr. Dittman was equivocal about claimant=s pulmonary diagnosis; and that Dr. Dittman had not reviewed much of the evidence the administrative law judge credited to find that pneumoconiosis was Aat minimum, a >substantial contributor= to Claimant=s disability.@[5] Decision and Order at 8. This was rational. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985); *see Balsavage v. Director, OWCP*, 295 F.3d 390, 397, 22 BLR 2-386, 397 (3d Cir. 2002)(AThe issueYis not whether the coronary heart disease from which the [m]iner suffered caused his death but, rather, whether his pneumoconiosis (which is not disputed) contributed to or hastened his death[.]@); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 217, 20 BLR 2-360, 2-371 (6th Cir. 1996)(Athe fact that claimant may, or may not,

[5] The Third Circuit had previously observed that Dr. Dittman=s ignorance of the valid pulmonary function testing undermined the persuasive force of his opinion. *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 355, 21 BLR 2-83, 2-89 (3d Cir. 1997).

also be disabled by back injury is not grounds for denying his claim for benefits@). Accordingly, employer=s argument that the administrative law judge failed to adequately evaluate claimant=s stress test and its impact on the credibility of the opinions by Drs. Kraynak and Kruk is rejected.

Employer next argues that the opinions of Drs. Kruk and Kraynak, that claimant was disabled due to pneumoconiosis, cannot be credited because neither physician provided any explanation of how or why the objective evidence supported their findings. Instead, employer contends that the doctors improperly concluded that pneumoconiosis was the cause of claimant=s impairment because they could not find another possible etiology for his shortness of breath and the doctors improperly failed to rule out the presence of heart disease.

In addressing the medical opinions of record, the administrative law judge found that Dr. Kraynak=s opinion was based on the length of claimant=s coal mine employment, the lack of any other disabling medical condition, the physical examination of claimant and the diagnostic studies. The examination revealed several non-specific findings which the doctor associated with coal workers= pneumoconiosis, including: an increase in the AP diameter of the chest, diagnosis of the lips, complaints of exertional dyspnea, productive cough and shortness of breath. Claimant=s Exhibit at 8, 13. The administrative law judge further noted that although Dr. Kraynak was not board-certified in internal or pulmonary medicine, he had treated claimant since September 10, 1986 and that 50% of his practice was devoted to the treatment of pneumoconiosis. In addition, the administrative law judge stated that Dr. Kraynak had opined that claimant exhibited no evidence of cardiac disease on examination, and that in his opinion claimant had coal workers= pneumoconiosis and was totally disabled by it. Although the administrative law judge acknowledged that while Dr. Kraynak admitted that various objective studies he reviewed did not demostrate the existence of pneumoconiosis, *i.e.*, negative readings of claimant=s November 15, 1984 and April 30, 1985 x-rays and claimant=s March 15, 1985 pulmonary function study which resulted in normal values, Dr. Kraynak nonetheless concluded, even after considering this contrary objective evidence, that he believed, on the basis of claimant=s history and physical examination, that claimant had coal workers= pneumoconiosis. The administrative law judge noted that Dr. Kraynak had, in fact, performed several valid pulmonary function studies and reviewed several x-rays which were strongly indicative of pneumoconiosis.

Turning to Dr. Kruk=s opinion, the administrative law judge noted that Dr. Kraynak had referred claimant to Dr. Kruk for the purpose of determining whether there was any cardiac etiology to claimant=s non-specific complaints. The administrative law judge=s decision reflects that on October 12, 1987, Dr. Kruk obtained an overview of claimant=s history and conducted a physical examination. As part of the examination, Dr. Kruk reported that x-rays taken on September 10, 1986, and November 15, 1984 showed the existence of

coal workers= pneumoconiosis, and that the results of pulmonary function studies on September 1, 1987 and September 10, 1986, indicated Asevere restrictive disease with no significant obstruction@ which is consistent with coal workers= pneumoconiosis. Claimant=s Exhibit 8 at 2. The administrative law judge also observed that Dr. Kruk had performed a stress test to Arule out any potential cardiac problems and to objectively observe [claimant=s] degree of dyspnea with exertion.@ Claimant=s Exhibit 8 at 2. Based upon the results of claimant=s chest x-rays and pulmonary function studies, his extensive coal mine employment history and minimal smoking history, Dr. Kruk concluded that claimant was Adefinitely disabled secondary to coal workers= pneumoconiosis.@ Claimant=s Exhibit 8 at 2-3.

The administrative law judge concluded that the opinions of Drs. Kraynak and Kruk were sufficiently reasoned to support their finding that claimant=s disability was due to pneumoconiosis. This was rational. 20 C.F.R. '718.204(c)(1); *Bonessa*, 884 F.2d 756, 13 BLR 2-23; *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8 (1996); *Anderson*, 12 BLR at 1-113; *Clark* at12 BLR at 1-155; *Brown v. Director, OWCP*, 7 BLR at 1-732 (1985); *see Balsavage*, 295 F.3d at 397, 22 BLR at 397; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162, 2-176 (4th Cir. 2000); *Cross Mountain*, 93 F.3d at 217, 20 BLR at 2-371. Further, contrary to employer=s argument, while the administrative law judge may not rely on qualifying results of pulmonary function studies to establish causation, *see Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987), the administrative law judge could, as he did in this case, credit opinions on the issue of causation when he finds them supported by underlying documentation, including medical interpretations of pulmonary function studies. *Clark*, 12 BLR at 1-155.

Likewise, contrary to employer=s argument, the administrative law judge did not credit the opinion of Dr. Kraynak because he was a treating physician. Rather, the administrative law judge credited Dr. Kraynak=s opinion on causation, along with that of Dr. Kruk, because it was reasoned. *See Clark*, 12 BLR at 1-155. We reject employer=s argument that the administrative law judge erred in crediting the opinions of Drs. Kraynak and Kruk on the issue of disability causation and employer=s argument that the administrative law judge=s decision 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 U.S.C. '932(a).

Accordingly, the administrative law judge=s Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

_____

ROY P. SMITH
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge