

BRB No. 03-0187 BLA

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| RAYMOND E. SISNEROS |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| U.S. STEEL FUEL COMPANY |) | DATE ISSUED: 10/30/2003 |
| c/o ARAVA NATURAL RESOURCES |) | |
| |) | |
| and |) | |
| |) | |
| LIBERTY MUTUAL INSURANCE |) | |
| COMPANY |) | |
| |) | |
| Employer/Carrier-Respondents |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Scott M. Busser (Zarlengo, Mott, Zarlengo & Winbourn, P.C.), Denver, Colorado, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

DOLDER, J., Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (2001-BLA-00905) of Administrative Law Judge Daniel J. Roketenetz 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 After determining that the instant claim was a duplicate claim, the administrative law judge found, based upon stipulation by the parties, that claimant established forty-two years of qualifying coal mine employment.² Decision and Order at 4; Hearing Transcript at 8; Director's Exhibit 27. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that although the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 4-14. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis, as he failed to give proper weight to the medical opinion evidence pursuant to Sections 718.202(a)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in the instant appeal.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 this Board and

¹The 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.

²Claimant filed his initial application for benefits on June 3, 1991 and the Department of Labor denied the claim on August 20, 1991. Director's Exhibit 24. Claimant filed a second application for benefits on July 26, 1996, which was finally denied on December 27, 1996. Director's Exhibit 27. Claimant filed his most recent application for benefits, the subject of the instant appeal, on August 28, 2000, and the district director awarded benefits on April 27, 2001. Director's Exhibits 1, 23. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges on June 12, 2001. Director's Exhibits 25, 27.

³The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.204(b)(2)(i)-(iv) and his credibility determinations with respect to the opinions of Drs. Perkins and Hardy are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 addressing the medical opinions of record pursuant to Section 718.202(a)(4), the administrative law judge reviewed each physician's opinion, including the underlying documentation and the physicians' respective qualifications, and concluded that Dr. Repsher's opinion, that claimant has chronic obstructive pulmonary disease (COPD) caused solely by cigarette smoking, was entitled to greater weight than the opinions of Drs. Poitras and Lincoln. The administrative law judge found that Dr. Repsher's opinion was well-documented and well-reasoned, as it was based upon an examination of claimant, objective data obtained during that examination, and a review of the other medical evidence of record. The administrative law judge also noted that Dr. Repsher's opinion was consistent with the negative x-ray evidence and that Dr. Repsher is Board-certified in internal medicine and pulmonary disease.⁴

Claimant contends that the administrative law judge's subsequent determination that Dr. Repsher's opinion as to the presence of a totally disabling respiratory or pulmonary impairment was unreasoned renders the administrative law judge's crediting of Dr. Repsher's opinion under Section 718.202(a)(4) irrational. Claimant's argument has merit.

When considering Dr. Repsher's opinion pursuant to Section 718.202(a)(4), the administrative law judge stated that:

Dr. Repsher acknowledged that the blood gas study results met the disability requirements but attributed that to COPD and not to coal workers' pneumoconiosis. He concluded that Mr. Sisneros'[s] shortness of breath is due to inadequately treated high blood pressure.

Decision and Order at 10; Employer's Exhibit 1; Hearing Transcript at 51, 56. Pursuant to Section 718.204(b)(2)(iv), however, the administrative law judge indicated that:

Dr. Repsher opined that from a pulmonary or respiratory standpoint, [claimant] could perform his last coal mine employment and that he had no respiratory disability caused by coal dust inhalation. He attributed Mr. Sisneros'[s] total disability to his age and high blood pressure...Dr. Repsher's opinion that [claimant's] disability is not respiratory in nature

⁴Dr. Repsher is Board-certified in internal medicine and pulmonary disease. Hearing Transcript at 37. The credentials of Drs. Poitras and Lincoln are not in the record.

fails to account for the myriad qualifying blood gas studies.

Decision and Order at 14. Because the administrative law judge did not reconcile the apparent contradiction in Dr. Repsher's conclusions regarding the qualifying blood gas studies and because he weighed Dr. Repsher's opinion in an inconsistent manner under Sections 718.202(a)(4) and 718.204(b)(2)(iv), we must vacate the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(4). The case is remanded to the administrative law judge for reconsideration of Dr. Repsher's opinion. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984).

Claimant also argues that the administrative law judge erred in according greatest weight to Dr. Repsher's opinion because it is contrary to the Act and regulations, as it is based on the erroneous assumption that only restrictive disorders can be caused by coal mine employment. This contention is without merit. Dr. Repsher opined that claimant has a "pure obstructive disease, which is characteristic of cigarette smoking," but further stated that the inhalation of coal mine dust may cause chronic obstructive pulmonary disease. Employer's Exhibit 1. The physician did not assume that coal mine employment cannot cause obstructive disorders such as claimant's chronic obstructive pulmonary disease or that such a disorder will never be totally disabling. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); Hearing Transcript at 44-47, 51, 54. In addition, in setting forth his opinion, Dr. Repsher identified the data that supported his conclusion regarding the source of claimant's COPD and explained why it was not related to coal dust exposure. We, therefore, reject claimant's contention.⁵ *See Stiltner*, 20 BLR 2-246; *Warth*, 19 BLR 2-265.

Claimant also argues that the administrative law judge, in considering the evidence at Section 718.202(a)(4), misinterpreted the February 22, 2001 letter in which Dr. Poitras indicated that claimant has COPD related to smoking and coal dust exposure, erroneously stating that it was based on a blood gas study that did not conform to the applicable technical requirements. Decision and Order at 11; Director's Exhibit 13. Claimant is correct. Thus, we must vacate the administrative law judge's finding with respect to Dr.

⁵We also reject claimant's contention that Dr. Repsher demonstrated bias in favor of employer in this case by ignoring the qualifying blood gas study evidence. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Zamora v. C.F.&I. Steel Corp.*, 7 BLR 1-568 (1984). The doctor did not ignore this evidence, but rather expressed conflicting conclusions regarding its significance. Employer's Exhibit 1; Hearing Transcript at 37-57.

Poitras's opinion. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge must reconsider this opinion on remand.

Finally, claimant asserts that the administrative law judge erred in relying upon Dr. Lincoln's June 16, 1997 opinion as the physician erred in finding that claimant continued to smoke. Claimant's Brief at 5. Dr. Lincoln offered opinions in 1991 and 1996 in which he opined that claimant suffered from chronic obstructive pulmonary disease due in part to smoking and coal dust inhalation. Director's Exhibits 25, 26. After reviewing additional medical evidence, Dr. Lincoln opined on June 16, 1997 that claimant's impairment seemed to be due mostly to smoking rather than coal dust exposure based upon the rapid decline in the vital capacity values of the pulmonary function studies. Director's Exhibit 26. Even assuming that Dr. Lincoln relied upon an incorrect understanding of claimant's smoking history in rendering his most recent opinion, the administrative law judge acted within his discretion in finding that "when viewed chronologically," Dr. Lincoln's opinions were "less than definitive" and entitled to less weight. Decision and Order at 10; Director's Exhibits 25, 26; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). As claimant makes no other specific challenge to the administrative law judge's findings with respect to the weighing of Dr. Lincoln's opinion, we affirm the administrative law judge's finding that this opinion is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. See *Justice*, 11 BLR 1-91; *Campbell*, 11 BLR 1-16; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, J., Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues' decision to hold that the administrative law judge did not weigh Dr. Repsher's opinion in a consistent manner under 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2)(iv) and did not accurately characterize Dr. Poitras's opinion. I also concur with the majority's decision to affirm the administrative law judge's finding with respect to Dr. Lincoln's opinion.

I must respectfully dissent, however, from the portion of the decision in which my colleagues find no merit in claimant's argument that Dr. Repsher's opinion was rendered suspect by his statements about the relationship between coal dust inhalation and measurable obstructive impairments in individual miners. Employer's Exhibit 1. Rather than reject claimant's allegations in their entirety on the ground that Dr. Repsher's opinion is not hostile to the Act, I would instruct the administrative law judge to address Dr. Repsher's statements regarding the link between coal dust exposure and obstructive impairments and render a finding as to whether they detract from the weight to which his opinion is entitled.

BETTY JEAN HALL
Administrative Appeals Judge

