BRB No. 07-0157 BLA

B.H. Claimant-Petitioner v. GOLDEN OAK MINING and UNDERWRITERS SAFETY AND CLAIMS Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/19/2007 Decision and Order

Appeal of the Decision and Order on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Timothy J. Wilson (Wilson, Polites & McQueen), Lexington, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (98-BLA-0678) of Administrative Law Judge Joseph E. Kane denying 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 has been before the Board on three prior occasions.[2] Pursuant to the last appeal, filed by employer, the Board vacated the administrative law judge's finding that the evidence established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(c), and remanded the case for further consideration of the evidence. [*B.H.*] *v. Golden Oak Mining Co*., BRB No. 05-0414 BLA (Mar. 30, 2006)(unpub.).

On remand, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief 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 applicable 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to

---

[1] Claimant died on November 6, 2004. His widow is pursuing the claim.

[2] The full procedural history of this case is set forth in the following Board decisions: [*B.H.*] *v. Golden Oak Mining Co*., BRB No. 99-1263 BLA (Nov. 30, 2000)(unpub.); [*B.H.*] *v. Golden Oak Mining Co*., BRB No. 02-0137 BLA (Oct. 31, 2002)(unpub.); and [*B.H.*] *v. Golden Oak Mining Co*., BRB No. 05-0414 BLA (Mar. 30, 2006)(unpub.).

[3] The administrative law judge found that the issues of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis were moot, based on his finding that the evidence did not establish the existence of pneumoconiosis. Decision and Order on Remand at 6.

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 (1989).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Caudill, Baker, Myers, White, Broudy, Westerfield, Dineen, Lockey, Branscomb, and Kleinerman. Drs. Caudill, Baker, and Myers opined that claimant had pneumoconiosis, Director's Exhibits 18, 41, 52, while Drs. Broudy, Westerfield, Dineen, Lockey, Branscomb, and Kleinerman opined that claimant did not have pneumoconiosis. Director's Exhibits 15, 44, 51, 54-58; Employer's Exhibits 1-3. Dr. White diagnosed chronic bronchitis and opined that cigarette abuse could be the cause of this condition. Director's Exhibit 48.

The administrative law judge gave no weight to Dr. White's opinion because "Dr. White never discussed whether [c]laimant's condition could have been related to coal dust exposure." Decision and Order on Remand at 4. Further, the administrative law judge discounted Dr. Westerfield's opinion because it was not reasoned and not documented, discounted the opinions of Drs. Myers, Broudy, and Kleinerman because they were not reasoned, and discounted Dr. Lockey's opinion because it was based on inconclusive biopsy evidence. *Id*. at 4, 5. However, the administrative law judge found the opinions of Drs. Caudill, Baker, Dineen, and Branscomb, to be well-reasoned and well-documented. *Id*. Based upon the administrative law judge's determination that "there are two well-reasoned and well-documented opinions finding pneumoconiosis and two finding no pneumoconiosis," *id*. at 5, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Claimant argues that the administrative law judge did not comply with the specific dictates of the Board's decision remanding the case. Specifically, claimant asserts that "the [administrative law judge] failed to address any evidence regarding the treating physician's opinion, Dr. Caudill." Claimant's Brief at 4. Claimant's contends that "[e]xplicit in the remand was [the requirement] that the [administrative law judge] was to explain his preference for Dr. Caudill's opinion over the other physician's [sic] opinions of record," not reconsider the weight of the relevant evidence. *Id*. at 3. We disagree.

In the January 12, 2005 Decision on Motion for Reconsideration, the administrative law judge accorded greatest weight to Dr. Caudill's opinion that claimant had pneumoconiosis, based on Dr. Caudill's status as claimant's treating physician. Decision on Motion for Reconsideration at 45. Hence, the administrative law judge concluded that "pneumoconiosis is established by Dr. Caudill's probative, credible

opinion, which is entitled to substantial weight under *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002)." *Id*. at 49.

In its March 30, 2006 Decision and Order, the Board held that "the administrative law judge failed to adequately explain his preference for Dr. Caudill's opinion, that interstitial fibrosis was due to coal dust exposure, over the contrary opinions of record." [*B.H.*] *v. Golden Oak Mining Co*., BRB No. 05-0414 BLA, slip op. at 5 (Mar. 30, 2006)(unpub.). The Board explained that "[a]lthough the administrative law judge recognized that Dr. Caudill had treated claimant for over twenty years, he did not consider whether Dr. Caudill had ever previously diagnosed claimant with coal workers' pneumoconiosis or a coal-dust related respiratory disorder." *Id*. Further, the Board determined that "there is merit to employer's argument that Dr. Caudill was not in a better position to render an opinion as to the cause of claimant's interstitial fibrosis than the other doctors of record who reviewed the same medical information in formulating their opinions." *Id*. Citing *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), the Board determined that "[t]o the extent that Dr. Caudill based his opinion on a review of evidence that was equally available to the non-treating physicians, the administrative law judge has not explained why Dr. Caudill's status as a treating physician gave him any advantage in diagnosing pneumoconiosis in this case." *Id*. The Board also stated that "the administrative law judge rejected Dr. Dineen's opinion [that claimant's interstitial lung disease was not due to coal dust exposure] in favor of Dr. Caudill's [contrary opinion] with no valid explanation discernable from his decision, other than Dr. Caudill's status as a treating physician." *Id*. at 6. Hence, the Board concluded that the administrative law judge erred in his analysis of the medical opinion evidence at 20 C.F.R. §718.202(a)(4). *Id*. The Board instructed the administrative law judge, on remand, to explain the weight accorded to the conflicting medical opinion evidence on all the relevant issues of entitlement at 20 C.F.R. §§718.202(a)(4), 718.203, and 718.204(c). *Id*. at 8. In addition, the Board instructed the administrative law judge to discuss and weigh all of the record evidence and make findings of fact and conclusions of law in compliance with 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), to determine whether the evidence satisfied claimant's burden of proof and the applicable case law. *Id*.

In the Decision and Order on Remand, the administrative law judge noted that "Dr. Caudill based his opinion on objective medical data and his treatment of [c]laimant throughout the years," and found that Dr. Caudill's opinion was "well-reasoned and well-documented." Decision and Order on Remand at 4. The administrative law judge also found that the opinions of Drs. Baker, Dineen, and Branscomb were well-reasoned and well-documented. *Id*. at 4, 5. In concluding that claimant failed to prove that the evidence established the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge found that there were two well-reasoned and well-documented

medical opinions that claimant had pneumoconiosis and two well-reasoned and well-documented medical opinions that claimant did not have pneumoconiosis. *Id*. at 5.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Williams*, 338 F.3d 513, 22 BLR 2-647; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

In the instant case, the administrative law judge reasonably determined that Dr. Caudill's opinion was well-reasoned and well-documented, because it was supported by the underlying objective medical data. *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). The administrative law judge also recognized that Dr. Caudill had treated claimant throughout a period of years.[4] Decision and Order on Remand at 4. Contrary to claimant's assertion, the Board did not remand the case to the administrative law judge for the limited purpose of explaining his preference for Dr. Caudill's opinion over the other medical opinions of record. Rather, the Board instructed the administrative law judge to explain the weight accorded to the conflicting medical opinion evidence at Section 718.202(a)(4) in accordance with the APA, based on its determination that the administrative law judge failed to provide a valid explanation for crediting Dr. Caudill's opinion over the other medical opinion evidence of record. Thus, because the administrative law judge's consideration of Dr. Caudill's opinion complied with both the APA and the Sixth Circuit's decision in *Williams*, we reject claimant's assertion that the administrative law judge's decision on remand does not comply with the specific dictates of the Board's decision.

Claimant also argues that the administrative law judge relied on an impermissible presumption that claimant's medical opinions had to be numerically superior in order for claimant to establish the existence of pneumoconiosis. At Section 718.202(a)(4), as discussed *supra*, the administrative law judge found that four medical reports of record were well-reasoned and well-documented. Decision and Order on Remand at 4, 5. Further, the administrative law judge found that of the four well-reasoned and well-documented medical opinions, two opinions stated that claimant had pneumoconiosis and two opinions stated that claimant did not have pneumoconiosis. *Id*. at 5. Hence, the

[4] The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are not applicable to medical evidence developed in this case, because the medical evidence was developed before January 19, 2001. *See* 20 C.F.R. §718.101(b).

administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), the United States Supreme Court held that when evidence is equally balanced, claimant must not prevail. Thus, because the administrative law judge reasonably considered both the quantitative nature and the qualitative nature of the conflicting medical opinion evidence, *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), we reject claimant's assertion that the administrative law judge engaged in a nose count of the medical opinion evidence.

Claimant additionally argues that the administrative law judge's decision is arbitrary and capricious because the administrative law judge did not give a basis for "reversing his reliance upon the opinion of Dr. Caudill." Claimant's Brief at 6. Contrary to claimant's assertion, the administrative law judge was not required to reconcile his current finding on remand with his prior finding, as the Board vacated the administrative law judge's prior finding and remanded the case for further consideration. *Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). The administrative law judge properly conducted a *de novo* review of the medical opinion evidence of record, and rendered new findings in accordance with the Board's instructions. *See* 20 C.F.R. §802.405(a); *cf. Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Consequently, we reject claimant's assertion that the administrative law judge's decision is arbitrary and capricious.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

____

ROY P. SMITH
Administrative Appeals Judge

____

JUDITH S. BOGGS
Administrative Appeals Judge