BRB No. 99-0806 BLA

IMAJEAN PRICE (Widow of HALBERT D. PRICE)	)	
Claimant-Respondent	)	
v.	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

George P. Surmaitis (Crandall, Pyles, Haviland & Turner, LLP), Charleston, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-0527 and 97-BLA-0528) of Administrative Law Judge Richard A. Morgan awarding benefits on a miner's claim and a survivor's 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 on appeal before the Board for a second time. In his initial Decision and Order issued on April 18, 1989, the administrative law judge credited the miner with at least twenty-three years of qualifying coal mine employment, and adjudicated the miner's claim, filed on June 14, 1994, and the survivor's claim, filed on July 26, 1996, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that the parties agreed the miner was totally

disabled at the time of his death, and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2), 718.203(b); that the miner's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b); and that pneumoconiosis substantially contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded in both claims.

On appeal, the Board affirmed the administrative law judge's finding that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(2), 718.203(b). The Board vacated his findings pursuant to Sections 718.204(b) and 718.205(c), however, because the administrative law judge provided invalid reasons for discounting the opinions of Drs. Crisalli, Naeye, Fino, Hutchins and Kleinerman, and for crediting the opinion of Dr. Fleer. The Board thus remanded this case for a reevaluation and weighing of the evidence thereunder. *Price v. Bethenergy Mines, Inc.*, BRB No. 98-0271 BLA (Nov. 12, 1998)(unpub.).

In a Decision and Order on Remand issued on March 29, 1999, the administrative law judge found that the weight of the evidence established disability causation at Section 718.204(b) and death due to pneumoconiosis at Section 718.205(c). Consequently, the administrative law judge awarded benefits on both the miner's and survivor's claims.

In the present appeal, employer challenges the administrative law judge's findings pursuant to Sections 718.204(b) and 718.205(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not participated 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 law. 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).

Employer maintains that, while the administrative law judge properly concluded that the miner's total respiratory disability and death were unrelated to clinical pneumoconiosis, chronic obstructive pulmonary disease or emphysema, his finding that the miner's diffuse interstitial pulmonary fibrosis (IPF) constituted "legal" pneumoconiosis which contributed to the miner's disability and death at Sections 718.204(b) and 718.205(c) cannot be affirmed. Specifically, employer argues that the administrative law judge provided invalid reasons for discounting the opinions of Drs. Kleinerman, Castle, Fino and Naeye, and for crediting the contrary opinion of Dr. Green. Employer further maintains that the administrative law judge substituted his opinion for those of the medical experts, went outside the record to research matters which were fully addressed by the medical experts, and lacked a complete record on remand. Employer's arguments have merit. Initially, the administrative law judge stated that

Employer's Exhibits 8-12 and Claimant's Exhibit 3 were not returned from the Board and were not found as part of the current record although he had previously examined them. Decision and Order on Remand at 1, n. 1. While the administrative law judge summarized this evidence in his original Decision and Order, employer correctly asserts that the administrative law judge was required to review a complete record on remand in order to comply with the statutory mandate that "[i]n determining the validity of claims...all relevant evidence shall be considered." 30 U.S.C. §923(b); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000). We therefore vacate the administrative law judge's findings pursuant to Sections 718.204(b), 718.205(c), and remand this case for a review of the complete record herein and reevaluation of all relevant evidence.

With regard to employer's specific assignments of error in the administrative law judge's weighing of the medical evidence, we reject, as unsupported by the record, employer's assertion that the administrative law judge mischaracterized Dr. Kleinerman's opinion by concluding that the physician admitted in his deposition testimony that interstitial fibrosis has on rare occasions occurred as a component of pneumoconiosis. Decision and Order on Remand at 7; Employer's Exhibit 4 at 44. We agree, however, with employer's argument that, in according less weight to Dr. Kleinerman's opinion on the ground that "Dr. Green's report concerning the histologic slides appears more consistent with Dr. Plata's histologic observations than does Dr. Kleinerman's report," Decision and Order on Remand at 15, the administrative law judge did not explain the relevance of the conflicting histologic observations or provide a rationale for crediting the histologic observations of Drs. Green and Plata over those of Dr. Kleinerman. *See McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987).[1]

[1]Additionally, the administrative law judge's observation that "the fact Dr. Kleinerman's curriculum vitae does not list subject area publications after 1986 and Dr. Green's does, through 1996, is some indication that the latter may be somewhat more current in the field," Decision and Order on Remand at 15, is both equivocal and speculative.

We also agree with employer's argument that the administrative law judge, in several instances, impermissibly substituted his opinion for that of a qualified physician. In discounting the opinions of the physicians who opined that the miner's IPF was unrelated to dust exposure in coal mine employment, the administrative law judge noted that IPF has hundreds of possible etiologies, and indicated that it "strains credulity" that employer's physicians could admit that the miner had a severely disabling respiratory affliction, state that his clinical pneumoconiosis was too mild to have contributed to the miner's disability or death, report that the miner's IPF was idiopathic and not identify any cause for it, yet, at the same time, rule out coal mine dust exposure as a cause. Decision and Order on Remand at 12, 15-16. Employer correctly maintains, however, that medical experts can reasonably rule out a specific cause of a disease even though the actual cause is not known, that its experts explained how they ruled out coal dust exposure in this particular case, and that an adjudicator may not reject an opinion merely because it does not accord with his own medical conclusions. *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). The administrative law judge additionally gave less weight to the opinions of Drs. Crisalli, Castle, Fino, Naeye, Hutchins and Kleinerman, that the miner's IPF was unrelated to dust exposure in coal mine employment, in part because they reported a rapid onset of the miner's IPF and deterioration of lung function in 1993, three years after his retirement, when the miner's pulmonary function study results began to decline significantly and his blood gas studies all produced qualifying values, whereas the administrative law judge concluded that the onset of IPF was not sudden because the evidence established some severe respiratory affliction in the late 1980s, based on a general decline in the miner's pulmonary function study values between 1981 and 1992, abnormal x-ray interpretations[2] and lay testimony.[3] Decision and

[2]In this regard, the administrative law judge noted that a 1981 x-ray reading by the West Virginia Occupational Pneumoconiosis Board reflected a finding of nodular fibrosis consistent with occupational pneumoconiosis; Dr. Wheeler found nodular infiltrate or fibrosis compatible with TB in 1986, 1993, and 1995; Dr. Spitz found TB in November 1993; and in 1989, Dr. Shah noted his impression of IPF on his report of an abdominal CT scan. The administrative law judge then noted that no pathologist subsequently found or diagnosed active TB existing at the time of death, and the administrative law judge concluded that between 1986 and 1995, more likely than not, Dr. Wheeler was seeing the IPF "which he eventually discovered and reported in late 1995." Decision and Order on Remand at 11. Absent an explicit diagnosis of IPF by a physician, however, the administrative law judge may not provide such a diagnosis from a physician's description of radiographic findings. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

[3]The administrative law judge reviewed the miner's testimony that he first noticed shortness of breath in the mid-to-late 1970s, and the widow's testimony that the miner had a breathing problem in 1985 which was much worse by 1989 and caused him to retire in 1990 because he was exhausted with shortness of breath and could not do his job. Decision and

Order on Remand at 10-12. The interpretation of objective data, however, is a medical determination, and an administrative law judge may not independently interpret medical tests and thereby substitute his conclusions for those of the physician. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). The administrative law judge also substituted his opinion for that of the experts by researching the possible etiologies of IPF, and then giving less weight to those medical opinions which did not provide him with information he gathered independently.[4] Consequently, on remand, the administrative law judge must reevaluate the medical opinions of record and their underlying documentation in accordance with the principles enunciated by the United States Court of

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Order on Remand at 11. The administrative law judge then gave less weight to the opinions of the non-examining pulmonologists, that the miner had totally normal lung function until 1993, on the ground that they did not have the benefit of this lay testimony. Decision and Order at 11. In the present case, however, we agree with employer's argument that the lay testimony is not relevant to the pulmonogists' interpretations of objective test results, and cannot be used to discredit medical opinions addressing the central issue of whether the miner's IPF arose out of dust exposure in coal mine employment.

[4]The administrative law judge indicated that witness credibility was affected by the fact that employer's experts failed to point out that chest x-rays may be normal even in the presence of significant symptoms or functional abnormalities, and that the physical signs of IPF may be absent early in the course, Decision and Order on Remand at 12; and the administrative law judge questioned the candidness of the opinions of Drs. Fino and Naeye "based upon their failure to inform me that IPF may arise from inorganic dusts," Decision and Order on Remand at 15, n. 25.

Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Compton, supra; 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); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997)*; see also Collins v. J & L Steel*, 21 BLR 1-181 (1999).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge