BRB No. 00-0996 BLA

THEODORE M. LATUSEK, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Sue Anne Howard, Wheeling, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (1995-BLA-2096) of Administrative Law Judge Daniel L. Leland 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 the second

[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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction).The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by

time. In the initial Decision and Order, the administrative law judge found that employer stipulated that claimant[2] has twenty-four years of qualifying coal mine employment, pneumoconiosis which arose out of his coal mine employment, and a totally disabling pulmonary impairment. *See* 20 C.F.R. §§718.202, 718.203, 718.204(c) (2000). The administrative law judge then found that the weight of the evidence established that claimant's total disability was due to pneumoconiosis, as defined in 20 C.F.R. §718.201 (2000), pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000) and the award of benefits. *Latusek v. Consolidation Coal Co.*, BRB No. 97-1454 BLA (Jul. 17, 1998)(unpub.). On further appeal to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, the Court vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to fully consider the entire record and provide adequate reasons for discounting significant expert medical testimony. *Consolidation Coal Co. v. Latusek*, No. 98-2336 (4th Cir., Aug. 6, 1999)(unpub.). On remand, the administrative law judge again found that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000). Accordingly, benefits were awarded.

In the present appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence regarding disability causation pursuant to Section 718.204(b) (2000). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on 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).

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the parties regarding the impact of the challenged regulations.

[2]Claimant is Theodore M. Latusek, Jr., the miner, who filed a claim for benefits on July 5, 1994. Director's Exhibit 1.

Employer challenges the administrative law judge's finding that the weight of the evidence establishes that claimant's interstitial pulmonary fibrosis (IPF), the condition which all physicians agree is the cause of claimant's totally disabling respiratory impairment,[3] arose out of dust exposure in coal mine employment. Specifically, employer argues that the administrative law judge did not consider all factors relevant to the quality of the respective medical opinions, nor did he give sufficient reason for either crediting or discrediting the conflicting evidence as instructed by the Fourth Circuit Court. Employer maintains that the administrative law judge again failed to provide a valid reason for discounting the testimony of employer's experts that claimant's mild clinical pneumoconiosis is a separate disease entity which does not contribute to his totally disabling respiratory impairment caused entirely by IPF of unknown etiology, and that there is nothing in the medical literature which demonstrates a scientifically established link between IPF and dust exposure in coal mine employment. Employer also argues that, before crediting the opinions of Drs. Rose and Jennings as well reasoned, the administrative law judge must determine the credibility of the statistical analysis provided by Dr. Carpenter and the criticisms by employer's experts of the three published studies cited by Drs. Rose and Jennings in support of their theory that dust exposure in coal mine employment can cause, contribute to, or aggravate IPF. Employer's arguments have merit.

[3]Dr. Jennings additionally testified at her deposition that claimant's pneumoconiosis and emphysema were not clinically insignificant and were contributing to his overall impairment. Decision and Order at 3; Employer's Exhibit 15 at 49-50. Similarly, Dr. Rose testified that claimant's profound pulmonary impairment was in part related to his pneumoconiosis and emphysema. Employer's Exhibit 12 at 16-17.

In finding disability causation established pursuant to Section 718.204(b) (2000), the administrative law judge permissibly accorded little weight to the opinions of Drs. Spagnolo and Naeye because they did not explicitly address whether claimant's coal dust exposure caused, contributed to or aggravated his IPF.[4] Decision and Order on Remand at 5; *see* 20

[4]We reject employer's assertion that the opinions of Drs. Spagnolo and Naeye adequately address whether a causal relationship existed between coal dust exposure and claimant's IPF. Employer's Brief at 13-14. While Dr. Spagnolo diagnosed coal workers' pneumoconiosis that was too mild to have resulted in any clinically significant pulmonary impairment, and stated that he was in general agreement with the assessments and conclusions of Drs. Morgan, Fino, Kleinerman and Naeye, as summarized in his report, *see* Employer's Exhibit 8, the administrative law judge acted within his discretion in according Dr. Spagnolo's opinion little weight because the physician did not explain his reasoning and specify the conclusions with which he agreed. Decision and Order on Remand at 5; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *see also Risher v. OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also permissibly assigned little weight to Dr. Naeye's opinion that claimant's main pulmonary problem was a chronic inflammatory disorder of unknown etiology that did not resemble any occupational disorder that the physician could recognize,

C.F.R. §718.201 (2000). The administrative law judge's weighing of the remaining medical opinions of record, however, cannot be affirmed.

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because Dr. Naeye did not explicitly opine that dust exposure in coal mine employment did not cause, contribute to or aggravate claimant's IPF. Decision and Order on Remand at 5-6; Director's Exhibit 25; *see* 20 C.F.R. §718.201. The administrative law judge's credibility determinations regarding the opinions of Drs. Spagnolo and Naeye are supported by substantial evidence, and thus are affirmed.

The administrative law judge found that the opinions of Drs. Renn, Fino, Morgan and Kleinerman were not well reasoned and were entitled to little weight on the ground that, despite their concession that little was known about the disease and that research was continuing, these physicians ruled out coal dust exposure as a cause of IPF because no studies established a connection. Decision and Order on Remand at 6. The administrative law judge further found it illogical for Drs. Renn, Fino, Morgan and Kleinerman to state that it was premature to draw any conclusions from the three studies cited by Drs. Rose and Jennings in support of such a connection, yet they did not hesitate to conclude that IPF was unrelated to coal dust exposure. *Id.* Employer reasonably counters, however, that it is claimant's burden to establish that IPF is caused or aggravated by coal dust exposure, and employer argues that a possible connection between IPF and coal mine employment is not proof of such connection from which scientifically valid medical judgments can be made. Employer also correctly maintains that the administrative law judge did not explain why the reasons provided by employer's experts for ruling out coal dust exposure and/or silicates as a cause of claimant's IPF were less persuasive than the contrary rationales provided by Drs. Jennings and Rose, which the administrative law judge found to be well reasoned and entitled to greater weight. Further, although the administrative law judge determined that Drs. Jennings and Rose had superior credentials in regard to IPF and considered more than the three studies in forming their conclusions,[5] inasmuch as employer's experts assert that Drs. Jennings and Rose base their theory of a link between IPF and coal dust exposure upon flawed epidemiological studies, the administrative law judge must determine whether the statistical analysis by Dr. Carpenter and the criticisms of these studies by employer's experts are credible and, if so, their impact upon the reliability of the opinions of Drs. Jennings and Rose. We, therefore, vacate the administrative law judge's findings pursuant to Section 718.204(b) (2000), and remand this case for the administrative law judge to reevaluate the evidence of record thereunder consistent with *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).[6]

[5]The administrative law judge determined that Drs. Jennings and Rose are employed by the National Jewish Center for Immunology and Respiratory Medicine, a leading center for the study of IPF, and that both physicians explained that claimant's comparative youth, his heavy exposure to coal dust, histologic evidence of coal workers' pneumoconiosis and silicate deposition, as well as their extensive experience with IPF, led them to form their conclusions. Decision and Order on Remand at 6.

[6] In light of the amendments to the regulations, the administrative law judge has discretion to reopen the record on remand if he deems it appropriate.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, 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

REGINA C. McGRANERY
Administrative Appeals Judge