

BRB No. 02-0319 BLA

W. WAYNE IRWIN)
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 Claimant-Respondent)
)
 v.)
)
 NORTH CAMBRIA FUEL COMPANY) DATE ISSUED:
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 and)
)
 ROCKWOOD CASUALTY INSURANCE)
 COMPANY)
)
 Employer/Carrier-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski, Jr. (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (01-BLA-0440) of Administrative Law Judge Robert J. Lesnick rendered 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 The administrative law judge found 31.9 years of coal

¹ The Department of Labor has amended the regulations implementing the Federal

mine employment established and concluded that the evidence of record established the existence of pneumoconiosis arising out of coal mine employment, and total disability due to pneumoconiosis.² Benefits were, accordingly, awarded.³ The administrative law judge further found that since it was not clear from the evidence of record precisely when claimant became totally disabled, benefits would commence from July 1, 2001, the month in which the claim was filed.

On appeal, employer contends that the administrative law judge erred in finding disability causation established and specifically in discrediting the opinion of Dr. Strother as hostile to the Act. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, is not participating 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith*,

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 administrative law judge's findings regarding the existence of coal workers' pneumoconiosis, total disability, responsible operator, length of coal mine employment, and onset date are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Employer does not challenge the administrative law judge's findings that the existence of coal workers' pneumoconiosis and total disability were established. Employer's Brief at 2.

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erred in discrediting Dr. Strother's opinion as hostile to the Act because the record reflects that Dr. Strother did not foreclose the possibility that claimant's level of simple coal workers' pneumoconiosis could cause total disability.

In considering the medical opinions relevant to disability causation, the administrative law judge accorded little weight to Dr. Bizousky's opinion because Dr. Bizousky was not clear as to what role pneumoconiosis played in claimant's disabling respiratory impairment, and credited Dr. Schaff's opinion as Dr. Schaff was "clear in stating that pneumoconiosis is a substantially contributing cause of the miner's total disability." Decision and Order at 14. This was rational. *See* 20 C.F.R. §718.204(c)(1); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Turning to Dr. Strother's opinion, the administrative law judge accorded it little weight because he found it hostile to the Act inasmuch as Dr. Strother opined "that simple coal workers' pneumoconiosis at claimant's level is rarely, if ever, totally disabling." Decision and Order at 15.

The administrative law judge may reject the opinion of a physician whose basic medical assumptions are contrary to or in conflict with the spirit and the purposes of the Act. *Wetherill v. Green Construction Co.*, 5 BLR 1-248, 1-252 (1982). A medical report is deemed contrary to the spirit of the Act if the physician forecloses all possibility that simple pneumoconiosis can be totally disabling. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988); *Butela v. United States Coal Corp.*, 8 BLR 1-48, 1-49 (1985); *Cunningham v. Pittsburg & Midway Coal Co.*, 7 BLR 1-93 (1984); *Guy v. United States Steel Corp.*, 6 BLR 1-556 (1983).

In the instant case, however, as employer contends, Dr. Strother's opinion is not in conflict with the Act as Dr. Strother appears to acknowledge the possibility that simple pneumoconiosis could be totally disabling. Employer's Exhibit 1-Strother Deposition at 27, 36, 37, 48; *see Searls*, 11 BLR at 1-164; *Butela*, 8 BLR at 1-50; *Cunningham*, 7 BLR at 1-95. We, therefore, vacate the administrative law judge's discrediting of Dr. Strother's opinion,

see Searls, supra; Butela, supra; Cunningham, supra; and remand this case to the administrative law judge to reconsider Dr. Strother's opinion pursuant to the cases cited herein and, if reached, reweigh the opinions of Drs. Strother and Schaaf in determining whether the evidence was sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c)(1).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge