BRB No. 02-0823 BLA-A

STANFORD LUH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEER RUN MINING COMPANY	)	DATE ISSUED: 09/16/2003
	)	
and	)	
	)	
W-P COAL COMPANY/OMAR DIVISION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS= PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

George L. Partain, Logan, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers= Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: McGRANERY, HALL, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0375) of Administrative Law Judge Robert J. Lesnick 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).[1] In this duplicate claim, the administrative law judge found the newly submitted evidence sufficient to establish a material change in conditions because it established the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant. Crediting claimant with twenty-six years of coal mine employment, the administrative law judge considered all the evidence of record and found it sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability, but insufficient to establish that claimant=s total disability was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that his pneumoconiosis contributed to his total disability. Carrier urges affirmance but also contends that the administrative law judge erred in finding that the biopsy and medical opinion evidence supported a finding of the existence of pneumoconiosis and thereby a material change in conditions. The Director, Office of Workers= Compensation Programs, (the Director) responds, contending that, if the Board affirms the finding of pneumoconiosis, the case must be remanded for reconsideration of disability causation in light of the administrative law judge=s errors in evaluating the medical opinion evidence.

The Board=s scope of review is defined by statute. The administrative law judge=s Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

In order to establish entitlement to benefits in a living miner=s claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 one 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*).

[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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant contends that the administrative law judge erred in according less weight to Dr. Thavaradhara=s opinion because Dr. Thavaradhara did not specifically state that claimant=s pneumoconiosis was a Asubstantially contributing@ cause of claimant=s total disability. Claimant asserts that the law requires only that a physician find that claimant=s total disability is in part due to pneumoconiosis. The administrative law judge accorded less weight to Dr. Thavaradhara=s opinion on causation because Dr. Thavaradhara did not specifically state that claimant=s pneumoconiosis was a Asubstantially contributing@ cause of his disability as required by 20 C.F.R. '718.204(c).

A review of Dr. Thavaradhara=s opinion shows that he did not directly address the cause of claimant=s disability. Claimant=s Exhibit 1. Instead, Dr. Thavaradhara diagnosed the existence of coal workers= pneumoconiosis, chronic obstructive pulmonary disease, and respiratory impairment, and opined that claimant=s disability was due to his significant respiratory impairment. Claimant=s Exhibit 1. Accordingly, we affirm the administrative law judge=s finding that Dr. Thavaradhara=s opinion does not directly state that coal workers= pneumoconiosis was the cause of claimant=s total disability. *See* 20 C.F.R. '718.204(c); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). We need not, therefore, address claimant=s argument that the administrative law judge erred in rejecting the opinion because it did not address whether pneumoconiosis Asubstantially contributed@ to claimant=s disability. Nevertheless, because there is evidence which directly addresses causation, which the administrative law judge did not properly weigh, this case must, as the Director contends, be remanded.

Specifically, the Director contends that the administrative law judge erred in rejecting Dr. Ranavaya=s opinion on causation solely because of Dr. Ranavaya did not diagnose total disability. In finding that claimant failed to establish that pneumoconiosis was a substantially contributing cause of his total disability, the administrative law judge stated that Dr. Ranavaya=s opinion on causation could be accorded little weight because Dr. Ranavaya found that claimant had the respiratory capacity to perform his last coal mine employment. Decision and Order at 17. As the Director contends, however, the fact that Dr. Ranavaya found that claimant=s moderate pulmonary impairment would not, by itself, preclude claimant from performing coal mine employment does not necessarily undermine Dr. Ranavaya=s opinion as to the cause of claimant=s moderate pulmonary impairment. We agree. *See generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469, 1-471 (1984).

Dr. Ranavaya opined that claimant=s pneumoconiosis, pneumonectomy, and hypertension all contributed Ato a major extent@ to his moderate pulmonary impairment. Director=s Exhibit 11. Accordingly, we vacate the administrative law judge=s finding

regarding Dr. Ranavaya=s opinion and we remand the case for reconsideration of Dr. Ranavaya=s opinion on the issue of causation. Although the administrative law judge found the record does not contain evidence of Dr. Ranavaya=s credentials, claimant correctly argues that the carrier conceded in its post-hearing brief that Dr. Ranavaya was a Board-certified pulmonologist, hence, the administrative law judge should consider this credential on remand. Likewise, claimant contends that the administrative law judge should have considered the finding of the West Virginia Occupational Pneumoconiosis Board that claimant was 20% disabled due to pneumoconiosis in 1993. On remand the administrative law judge should consider this finding as well as the opinion of Dr. Ranavaya and determine the appropriate weight each should be accorded. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stanley v. Eastern Assoc. Coal Corp.*, 6 BLR 1-1157 (1984).

We disagree with the Director, however, who contends that the administrative law judge erred in rejecting Dr. Zaldivar=s opinion. Dr. Zaldivar found no evidence of coal workers= pneumoconiosis, but diagnosed the presence of a severe pulmonary impairment which was the result of a pneumonectomy as well as emphysema. Director=s Exhibit 38. The Director citing *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) and *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299(4th Cir 1994) contends that since Dr. Zaldivar stated that his opinion, that pneumoconiosis did not cause claimant=s disability, would not change, even if claimant were diagnosed with pneumoconiosis, the fact that Dr. Zaldivar did not diagnose the existence of pneumoconiosis does not, as the administrative law judge found, render his opinion incredible.

In finding the existence of pneumoconiosis established, the administrative law judge credited evidence showing the existence of clinical pneumoconiosis, *i.e.*, biopsy reports showing the existence of anthracosis and the opinion of Dr. Thavaradhara finding coal workers= pneumoconiosis. This finding was correct. *See* discussion, *infra*. Turning to disability causation, the administrative law judge accorded little weight to Dr. Zaldivar=s opinion because Dr. Zaldivar found no evidence of coal workers= pneumoconiosis, and opined that claimant=s severe pulmonary impairment was the result of a pneumonectomy and emphysema.

In *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-384 (4th Cir. 2002) the court discussed its decisions in *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995)(*Hobbs II)* and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), holding that the administrative law judges in those cases properly relied on the opinions of doctors who did not diagnose the existence of clinical pneumoconiosis to find that claimant failed to establish the causation element, because those opinions did not necessarily contradict the administrative law judge=s determination that claimant had legal pneumoconiosis. The court concluded that because the legal definition of

pneumoconiosis was much broader than the medical definition of pneumoconiosis the opinions of doctors who diagnosed claimants with symptoms consistent with legal pneumoconiosis, but not clinical pneumoconiosis could not necessarily be rejected. *Scott*, 289 F.3d at 269, 22 BLR at 2-383.

In the case before us, however, the administrative law judge=s finding of pneumoconiosis was based on evidence showing the existence of clinical pneumoconiosis alone, *i.e.*, biopsy evidence showing anthracosis and the opinion of Dr. Thavaradhara diagnosing coal worker=s pneumoconiosis. The administrative law judge did not find the existence of legal pneumoconiosis. Thus, the administrative law judge properly rejected the opinion of Dr. Zaldivar who found that the evidence did not establish the existence of clinical pneumoconiosis. *See Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 115-116, 19 BLR at 2-83.[2]

Further, in *Scott*, the court held that the Board had erred when it upheld the administrative law judge=s reliance on the opinions of doctors who had stated that their opinions on the cause of claimant=s disability would not change even if claimant had contracted pneumoconiosis. The court held that reliance on an opinion based on such a hypothetical was not valid when the doctor=s diagnosis of no pneumoconiosis contradicts the administrative law judge=s finding of pneumoconiosis. Hence, we must reject the Director=s contention that Dr. Zaldivar=s negative answer to the hypothetical question, *i.e.*, would he attribute claimant=s disability to coal workers= pneumoconiosis if claimant had been diagnosed with coal workers= pneumoconiosis, constitutes substantial evidence upon which the administrative law judge could rely. Thus, contrary to the Director=s assertion, the administrative law judge did not err in rejecting Dr. Zaldivar=s hypothetical opinion. *Scott*, 289 F.3d at 269, 22 BLR at 2-384. The administrative law judge properly accorded less weight to the opinion of Dr. Zaldivar on the issue of causation because his opinion that claimant did not have clinical pneumoconiosis was contrary to the administrative law judge=s determination that the evidence established the existence of clinical pneumoconiosis. The administrative law judge=s findings regarding the opinions of Drs. Thavaradhara and Zaldivar are, therefore, affirmed, but the administrative law judge=s finding regarding Dr. Ranavaya=s opinion is vacated, and the administrative law judge=s finding that disability causation was not established is vacated. The case must, therefore, be remanded for reconsideration of Dr. Ranavaya=s opinion. On remand, the administrative law judge may also consider the finding of the West Virginia Occupational Pneumoconiosis Board relevant to causation.

[2] Although finding no evidence of coal workers= pneumoconiosis, Dr. Zaldivar did find that claimant had a severe pulmonary impairment as the result of pneumonectomy as well as emphysema. Dr. Zaldivar did not address the cause of the emphysema, however. Director=s Exhibit 38.

In support of the denial of benefits, carrier argues that the administrative law judge erred in finding the existence of pneumoconiosis established based on biopsy reports diagnosing anthracosis since only two of the five biopsy reports contained a diagnosis of anthracosis and the qualifications of the pathologists who conducted the biopsies were not in the record. Likewise, carrier contends that the administrative law judge erred in crediting the opinion of Dr. Thavaradhara on the existence of pneumoconiosis because Dr. Thavaradhara relied exclusively on biopsy evidence for his diagnosis of pneumoconiosis.

The administrative law judge found the existence of pneumoconiosis established at Section 718.202(a)(2) based on biopsy reports diagnosing the existence of anthracosis and at Section 718.202(a)(4) based on Dr. Thavaradhara=s opinion diagnosing the existence of coal workers= pneumoconiosis, which he noted was supported by an unequivocal and uncontradicted biopsy report identifying the presence of anthracosis. Carrier argues, however, that because only two of five biopsy reports diagnose the existence of anthracosis, claimant has not carried his burden of proof.

The administrative law judge noted that claimant underwent several biopsies on March 16, 2000 for the evaluation of lung cancer in his left lung. The administrative law judge stated that the various biopsy reports showed the presence of anthracosis, the presence of coal pigments, the presence of fibrosis and the presence of coal macules on various parts of the miner=s lung. There was no evidence that the miner did not have anthracosis. Accordingly, we conclude that the administrative law judge properly found that the biopsy evidence established the existence of coal workers= pneumoconiosis as definded by the Act. 20 C.F.R. ''718.201, 718.202(a)(2). Further, contrary to carrier=s contention, the administrative law judge is not precluded from crediting the opinions of pathologists solely because their qualifications are not in the record, especially where, as here, the record does not contain the credentials of any of the pathologists. *See Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985); Claimant=s Exhibits 2-6. Likewise, employer has not proven that Dr. Thavaradhara relied exclusively on biopsy evidence to find the existence of coal workers= pneumoconiosis when he stated, after considering the miner=s history, symptoms, and findings on examination, that the biopsy findings Ashould clinch the diagnosis of coal workers= pneumoconiosis.@ *See* Claimant=s Exhibit 1. Thus, the administrative law judge concluded that, on weighing the x-ray evidence, which did not establish the existence of pneumoconiosis, along with the biopsy and medical opinion evidence which did, pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), he found the existence of pneumoconiosis established. We, therefore, affirm the administrative law judge=s finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. '718.202(a)(2) and (4). *Clark*, 12 BLR at 1-154; *Anderson*, 12 BLR at 113; *Brown*, 7 BLR at 1-730.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge