BRB No. 04-0920 BLA

CARL J. COBB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHREWSBURY COAL COMPANY	)	DATE ISSUED: 09/21/2005
	)	
Employer-Respondent	)	
	)	
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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin and Zahid M. Raja (Washington & Lee University School of Law, Legal Clinic), Lexington, Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand Denying Benefits (01-BLA-0877) of Administrative Law Judge Richard A. Morgan on a duplicate 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 before the Board for a second time.

When this case was previously before the Board, the Board affirmed the administrative law judge's findings: that claimant had thirty-two years of coal mine employment; that the existence of both clinical and legal pneumoconiosis arising out of coal mine employment was established; and that claimant was totally disabled, as those findings were unchallenged on appeal. The Board held that the only issue to be decided

in this duplicate claim was whether the new evidence established that the pneumoconiosis was totally disabling (disability causation).[1] In vacating the administrative law judge's denial of benefits and remanding the case for reconsideration, the Board held that the administrative law judge erred in according little weight to the opinions of Drs. Rasmussen, Ward, and Koenig, who concluded that claimant's totally disabling respiratory impairment was due to pneumoconiosis, for the reason that they failed to sufficiently discuss the effects of asthma on claimant's respiratory disability, because doctors are not required to "rule out" the effects of other causes of disability in order to establish that pneumoconiosis is a substantially contributing cause of total disability. Further, citing *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), the Board held that the administrative law judge erred in crediting the opinions of Drs. Fino, Crisalli, Zaldivar, Hippensteel and Branscomb, who concluded that claimant did not have pneumoconiosis and that even if claimant had pneumoconiosis it would not have contributed to disability, for the reason that their opinions were in direct contradiction of the administrative law judge's own finding that claimant suffered from both clinical and legal pneumoconiosis. *Cobb v. Shrewsbury Coal Co.*, BRB No. 03-0419 BLA (Feb. 25, 2004) (unpub.). Furthermore, the law is clear, the fact that the doctors stated that their opinions would not change even if they assumed claimant had pneumoconiosis does not restate the probative value which the opinions had by contradicting the administrative law judge's findings of clinical and legal pneumoconiosis. *Scott*, 289 F.3d at 267, 22 BLR at 2-384.

On remand, the administrative law judge found that even if the opinions of Drs. Fino, Crisalli, Zaldivar, Hippensteel and Branscomb were not entitled to any weight under *Scott* and *Toler*, claimant still failed to carry his burden of establishing disability causation because the opinions of Drs. Rasmussen, Ward, and Koenig, which supported a finding of disability causation, were discredited. The administrative law judge acknowledged that it is not claimant's burden to "rule out" the effect of other conditions on his respiratory disability, but nonetheless concluded that the opinions of Drs. Rasmussen, Ward and Koenig did not establish disability causation because they did not sufficiently consider evidence of claimant's asthma. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge failed to comply with the Board's remand instructions and, in so doing, erred in evaluating the medical opinion evidence on the issue of disability causation. Specifically, claimant asserts that the opinions of Drs. Rasmussen, Ward, and Koenig established disability causation and

[1] The history of this case is set forth in the Board's prior decision in *Cobb v. Shrewsbury Coal Co.*, BRB No. 03-0419 BLA (Feb. 25, 2004)(unpub.).

the administrative law judge erred in discrediting their opinions. In response, employer urges that the denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first contends that, contrary to the administrative law judge's characterization, Dr. Koenig did consider the historical diagnosis and possibility of asthma, but explained that the evidence supported a diagnosis of chronic obstructive pulmonary disease rather than asthma, *i.e.*, Dr. Koenig opined, "even if [claimant] were found to have an asthmatic component, his chronic obstructive pulmonary disease alone is sufficient to render him totally and permanently disabled…." Claimant's Brief at 15; Claimant's Exhibit 11.

The administrative law judge's rejection of Dr. Koenig's opinion that even if he were to accept a history of asthma, chronic obstructive pulmonary disease caused claimant's total disability is tantamount to a finding that a doctor must rule out other causes of disability in order to find claimant totally disabled by pneumoconiosis which is incorrect. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). As we previously held, medical opinions are not required to "rule out" other causes of disability in order to be credited on the issue of disability causation. Rather, pursuant to Section 718.204(c), claimant is required to show only that pneumoconiosis is a substantially contributing cause of total disability and pneumoconiosis is a "substantially contributing" cause, if it has a material adverse effect on the miner's respiratory or pulmonary condition or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii).

Claimant also contends that the administrative law judge erred in discrediting Dr. Ward's opinion because the doctor did not provide a detailed explanation of why or to what degree each of claimant's conditions contributed to his respiratory impairment. Decision and Order on Remand at 6. As claimant contends, Dr. Ward was not required to demonstrate that pneumoconiosis was the "exclusive" cause of disability, where the doctor opined that "it is very clear…that…prolonged coal dust exposure did substantially and materially contribute to [claimant's] severe respiratory impairment." Claimant's Exhibit 10 at 2; 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross*, 23 BLR 1-8, 1-18-19.

Likewise, for the reasons discussed above, the administrative law judge also erred in discrediting the opinion of Dr. Rasmussen. The administrative law judge's finding that disability causation was not established is, therefore, vacated and the case is remanded for the administrative law judge to reconsider the medical opinion evidence on the issue of disability causation pursuant to the proper standard. 20 C.F.R. §718.204(c); *Gross*, 23 BLR 1-8.

If, on remand, the administrative law judge determines that none of the opinions supportive of a finding of disability causation is credible, claimant would not be entitled to benefits. If, however, the administrative law judge determines that one or more of those opinions is credible, he must consider the opinion(s) together with the contrary opinions of Drs. Zaldivar, Crisalli, Fino, Branscomb and Hippensteel. The latter opinions must be reconsidered pursuant to the standard set forth in *Scott* and *Toler*. Contrary to the administrative law judge's finding, even if he were to provide a sufficient rationale for crediting those opinions, "opinions that may hold no weight, or at most may hold the little weight allowed by *Toler*, cannot suffice as substantial evidence to support" a determination that claimant's respiratory impairment "was not caused at least in part by pneumoconiosis." *Scott*, 289 F.3d at 270, 22 BLR at 2-384; *see Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004). If on remand, the administrative law judge finds that the weight of the newly submitted medical opinion evidence supports a finding of disability causation, a material change in conditions is established and claimant would, therefore, have established entitlement to benefits. 20 C.F.R. §725.309; *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1363, 20 BLR 2-227, 2-237 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied* 510 U.S. 1090 (1997).

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully disagree with my colleagues. I would affirm the administrative law judge's denial of benefits. While I agree that the applicable standard at 20 C.F.R. §718.204(c) is whether the evidence shows that pneumoconiosis is a substantially contributing cause of total disability and that claimant cannot be required to "rule out" other causes of disability, the administrative law judge did not require claimant to "rule out" other causes of disability. Rather, the administrative law judge explicitly acknowledged that claimant does not have the burden of "ruling out" other medical conditions as the cause of disability, Decision and Order on Remand at 6, but determined that the opinions of Drs. Koenig, Ward, and Rasmussen, attributing claimant's disability to pneumoconiosis, were not credible. This was a proper basis for finding that claimant did not establish that his pneumoconiosis was totally disabling. Decision and Order on Remand at 6; *see 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); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. U.S. Steel Corp.*, 7 BLR 1-842 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Specifically, the administrative law judge found: Dr. Koenig was the only physician of record to find that claimant did not have asthma; Dr. Ward, while noting that claimant smoked throughout his thirty-two years of coal mine employment, referred to claimant's smoking history as "minimal;" and Dr. Rasmussen did not sufficiently discuss both claimant's lengthy smoking history as well as his lengthy coal mine employment. Accordingly, as these were the only physicians who attributed claimant's disability to pneumoconiosis, claimant has failed to carry his affirmative burden of establishing causation and the administrative law judge's Decision and Order on Remand denying benefits must be affirmed. 20 C.F.R. §§718.1; 718.204(c); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v.Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

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ROY P. SMITH
Administrative Appeals Judge