BRB No. 95-0781 BLA

CHARLES HUNSUCKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
FLAT GAP MINING COMPANY	)	
	)	
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 Pursuant to Remand of Victor J. Chao, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Pursuant to Remand (90-BLA-

[1] Claimant is Charles B. Hunsucker, the miner, whose claim for benefits filed on August 30, 1982 was denied in a Decision and Order issued on June 15, 1987. Director's Exhibits 1, 49. Claimant filed a petition for modification on June 14, 1988 which was denied in a Decision and Order issued on March 5, 1991. Director's Exhibit 51.

0936) of Administrative Law Judge Victor J. Chao 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). This case is before the Board for the second time. In *Hunsucker v. Flat Gap Mining Co*., BRB No. 91-0998 BLA (Jan. 31, 1994)(unpub.), the Board affirmed the administrative law judge's Decision and Order denying modification and benefits, upholding the administrative law judge's discrediting

of Dr. Robinette's opinion at 20 C.F.R. §718.202(a)(4) as based solely on an x-ray reading.[2]

Claimant appealed, and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, vacated the Board's order, finding Dr. Robinette's report sufficiently documented to constitute probative evidence of pneumoconiosis at Section 718.202(a)(4). *Hunsucker v. Flat Gap Mining Co*., No. 94-1225 (4th Cir. Aug. 26, 1994)(unpub.) The court remanded the case for the administrative law judge to reweigh Dr. Robinette's opinion against the conflicting evidence at Section 718.202(a)(4). *Hunsucker*, slip op. at 3.

On remand, the administrative law judge reconsidered the three medical opinions added to the record since the original denial in 1987, found the evidence insufficient to establish pneumoconiosis and, accordingly, denied benefits.

On appeal, claimant asserts that the administrative law judge selectively analyzed Dr. Robinette's opinion. Claimant's Brief at 3-4, 6. Claimant further contends that the administrative law judge erred by crediting the opinions of Drs. Sargent and Fino that claimant did not have pneumoconiosis because their opinions were based on the erroneous assumption that an obstructive impairment cannot be pneumoconiosis. Claimant's Brief at 6. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate 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 into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge considered the opinions of Drs. Robinette, Sargent, and Fino, all of whom the record indicates are board-certified internists, pulmonologists, and B-readers. Director's Exhibits 50, 51; Employer's Exhibits 4, 13, 14. Drs. Robinette and Sargent examined claimant and administered diagnostic

[2] The Board also affirmed as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), (2). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

tests while Dr. Fino based his opinion on a review of all the medical evidence of record. *Id*.

Dr. Robinette diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis. Director's Exhibits 50, 63. Dr. Sargent diagnosed chronic obstructive pulmonary disease secondary to smoking, explaining that he did not believe that claimant suffered from pneumoconiosis because the x-ray he read was negative and because the pulmonary function study showed a purely obstructive impairment. Employer's Exhibit 4. At his deposition, Dr. Sargent stated that pneumoconiosis causes a mixed obstructive and restrictive impairment, whereas claimant had no evidence of restriction. Employer's Exhibit 14 at 11. Dr. Sargent added that there is no medical or scientific evidence that pneumoconiosis causes chronic obstructive pulmonary disease, but that cigarette smoking can cause chronic obstructive pulmonary disease. Employer's Exhibit 14 at 12. Dr. Fino diagnosed chronic bronchitis due to cigarette smoking, noting that the pulmonary function studies showed claimant's obstructive impairment to be located mainly in the small airways. Employer's Exhibit 13 at 11. Dr. Fino stated that although coal dust inhalation can cause bronchitis, he believed the studies were more consistent with smoking as the cause of claimant's obstructive impairment because coal dust does not cause small airways abnormalities. Employer's Exhibit 13 at 10-11.

The administrative law judge discredited Dr. Robinette's opinion because he found that Dr. Robinette did not adequately explain his positive x-ray reading. Decision and Order Pursuant to Remand at 3. The administrative law judge noted that both Dr. Robinette and Dr. Sargent were B-readers and had read the March 3, 1988 x-ray differently. *Id*. The administrative law judge found that Dr. Sargent's negative reading was supported by the pulmonary function studies because "the results showed no restrictive impairment, and Dr. Sargent explained that if claimant had a coal dust-induced disease, it would manifest a mixed obstructive and restrictive impairment," noting that Dr. Robinette "cited no corroborative evidence in support of his positive reading, other than stating that claimant's 'substantial dust exposure would account'" for the x-ray findings. *Id*. The administrative law judge concluded that "since Dr. Fino's opinion is consistent with Dr. Sargent's opinion, I find that the existence of pneumoconiosis is not established" at Section 718.202(a)(4). *Id*.

Claimant contends that the administrative law judge selectively analyzed Dr. Robinette's opinion by discrediting it based only on his positive x-ray reading. Claimant's Brief at 3-4, 6. Claimant's argument has merit.

Dr. Robinette incorporated physical findings, objective study interpretations,

an x-ray reading, and the extent of claimant's coal dust exposure as a roof bolter into his opinion as support for his diagnosis. Director's Exhibits 50, 63. The administrative law judge's focus on the x-ray reading to discredit Dr. Robinette's opinion as a whole ignores most of the evidence and reasoning Dr. Robinette included as corroboration for his diagnosis, and thus amounts to impermissible selective analysis. *See Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co*., 7 BLR 1-295 (1984). Further, the administrative law judge gave no explanation for crediting the opinion of Dr. Fino over that of the equally qualified Dr. Robinette. *See Ridings v. C & C Coal Co*., 6 BLR 1-227 (1983). Therefore, we vacate the administrative law judge's finding at Section 718.202(a)(4) and remand the case for him to reconsider all the medical opinions in light of *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, BLR (4th Cir. 1995)(administrative law judge erred by relying on physician's opinion that claimant did not have pneumoconiosis where the physician based his opinion on erroneous assumption that obstructive disorders cannot be caused by coal mine employment).[3]

The administrative law judge is also instructed to reconsider claimant's request for modification pursuant to Section 725.310 and in accord with *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), and *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

[3] A review of the record indicates that Dr. Robinette is one of claimant's treating physicians, [1991] Hearing Transcript at 29; Claimant's Exhibits 2, 3, a factor the administrative law judge may in his discretion consider in weighing the opinions on remand. *See Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-129 (4th Cir. 1993)(no requirement that treating physician's opinion be given greater weight, but court has often stated that opinions of treating physicians deserve "especial consideration."); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____JAMES F. BROWN
Administrative Appeals Judge

_____REGINA C. McGRANERY
Administrative Appeals Judge