

BRB No. 97-0505 BLA

ROTHEL ARTHUR)
)
 Claimant-Respondent)
)
 v.)
)
 IKERD BANDY COMPANY,)
 INCORPORATED)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order on Remand-Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Charley Greene Dixon, Jr., Barbourville, Kentucky, for claimant.

Terri L. Bowman (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand-Award of Benefits (90-BLA-0352) of Administrative Law Judge Daniel J. Roketenetz, 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 claim previously has been before the Board.¹ In

¹The relevant procedural history of this case is as follows: Claimant filed his claim for Black Lung benefits with the Department of Labor on October 11, 1988. Director's Exhibit 1. The claim was initially denied by the district director (formerly entitled "deputy commissioner") on March 3, 1989, Director's Exhibit 15, and again on April 26, 1989. Director's Exhibit 16. Subsequent to an informal conference, the district director reversed

his initial Decision and Order, the administrative law judge awarded benefits under 20 C.F.R. Part 718, in part relying on the true doubt rule to find the existence of pneumoconiosis under Section 718.202(a)(1). On appeal, the Board affirmed the administrative law judge's award of benefits. See *Arthur v. Ikerd Bandy Company, Inc.*, BRB No. 91-2023 BLA (Aug. 26, 1993)(unpub.). Employer filed a Motion for Reconsideration. Subsequent to the Board's initial decision, the United States Supreme Court issued its decision in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 117 S.Ct. 2251, 18 BLR 2A-1 (1994), which invalidated the true doubt rule. In light thereof, the Board granted employer's Motion for Reconsideration, and vacated its previous decision. The Board instructed the administrative law judge to re-weigh the x-ray evidence pursuant to *Ondecko*, and if the existence of pneumoconiosis could not be established thereunder, to re-examine the evidence of record pursuant to 20 C.F.R. §718.202(a)(2)-(4). The Board further instructed the administrative law judge that if the existence of pneumoconiosis was established, the administrative law judge needed to reconsider the medical opinion evidence regarding the issue of disability causation under Section 718.204(b). Finally, the Board noted its agreement with employer's contention that the administrative law judge committed prejudicial error in failing to address whether the inaccurate coal mine employment and smoking histories recorded by Dr. Moore affected the credibility of his opinion. *Arthur v. Ikerd Bandy Company, Inc.*, BRB No. 91-2023 BLA (June 28, 1996)(Decision and Order on Reconsideration)(unpub.).

his initial finding of non-eligibility. Director's Exhibit 27. On September 29, 1989, employer requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 28. The case was transferred to the OALJ for a hearing on November 14, 1989. Director's Exhibit 30. Administrative Law Judge Daniel J. Roketenetz conducted a hearing on the claim in London, Kentucky, on October 25, 1990. Decision and Order at 1; Hearing Transcript at 1. Judge Roketenetz issued his initial decision on July 31, 1991. Decision and Order at 1; Decision and Order on Remand at 1.

On remand, the administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). Additionally, the administrative law judge found the evidence of record sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment under Section 718.203. The administrative law judge also found the evidence of record sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c), and disability causation under Section 718.204(b). Accordingly, he awarded benefits. Employer appeals, arguing that the administrative law judge committed several errors in his weighing of the medical opinion evidence. Claimant responds, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed. Employer replies, reiterating its arguments. The Director, Office of Workers' Compensation Programs, has not filed a brief on appeal.²

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

Employer contends that the administrative law judge erred in crediting the medical opinion of Dr. Moore under 20 C.F.R. §§718.202(a)(4) and 718.204(b). Employer argues that the administrative law judge has failed to furnish an adequate rationale for his decision to credit Dr. Moore's opinion as reasoned, and that the administrative law judge's opinion, therefore, violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by means of 33 U.S.C. §919(d) and 30 U.S.C. §932(a), 5 U.S.C. §554(c)(2). We agree. In our previous Decision and Order, we instructed the administrative law judge to consider the effect of Dr. Moore's inaccurate coal mine employment and smoking histories on the credibility of his opinion. On remand, the administrative law judge merely noted that Dr. Moore misreported the two histories, but found his report documented and reasoned anyway, noting that it was also based on a

²Inasmuch as neither party challenges the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1)-(3), 718.203, 718.204(c), they are hereby affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

physical examination. See Decision and Order on Remand at 6. This terse commentary is insufficient under the APA. Consequently, we vacate the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.204(b). On remand, the administrative law judge must furnish a decision which both complies with the APA and our remand instruction. The administrative law judge must specifically address the substantial discrepancy between the eleven years of coal mine employment found by the administrative law judge, and Dr. Moore's notation of twenty years of coal mine employment, and determine what effect it may have on the credibility of Dr. Moore's opinion. See *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Hunt v. Director, OWCP* 7 BLR 1-709 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Cf. *Smith v. Director, OWCP*, 12 BLR 1-156 (1989); *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). Additionally, the administrative law judge is instructed to reconsider the other physicians' opinions in the record, as several of their reports also contain coal mine employment histories which conflict with the administrative law judge's finding. See Director's Exhibits 24-26.

Finally, the record reflects that the various physicians reported a wide array of smoking histories. Compare Director's Exhibits 9, 24-26; Claimant's Exhibits 1, 2. On remand, the administrative law judge must also make a determination regarding claimant's true smoking history, and consider the impact, if any, on the probative value of the physicians' opinions which rely on an inaccurate smoking history. See *Fitch, supra*; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Consequently we vacate the administrative law judge's weighing of the medical opinion evidence, and remand the case for reconsideration under Section 718.202(a)(4), and Section 718.204(b), if necessary.³

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

³ Employer's argument that the administrative law judge erred in relying on physicians' opinions which were partially supported by positive x-ray interpretations, even though the administrative law judge found the weight of the x-ray evidence to be negative for pneumoconiosis, is rejected. See *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Winters v. Director's OWCP*, 6 BLR 1-877 (1984). Given our disposition of this case, we decline to address employer's other assignments of error.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge