BRB No. 97-0547 BLA

EUGENE P. WAMPLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MICHAEL TRUCKING COMPANY	)	DATE ISSUED:
	)	
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 of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

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

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

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (91-BLA-2370) of Administrative Law Judge Clement J. Kichuk 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 third time. In a Decision and Order dated September 11, 1992, Administrative Law Judge Julius A. Johnson, after crediting claimant with twenty-one years of coal mine employment, found the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Judge Johnson also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Judge Johnson further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1). However, Judge Johnson found that claimant failed to establish that his total disability was due to pneumoconiosis

pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Johnson denied benefits. By Decision and Order dated September 28, 1994, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(c)(1) as unchallenged on appeal. *Wampler v. Michael Trucking Co.*, BRB No. 93-0166 BLA (Sept. 28, 1994)(unpublished). The Board, however, vacated Judge Johnson's finding regarding the length of claimant's coal mine employment. *Id.* The Board also vacated Judge Johnson's finding pursuant to 20 C.F.R. §718.204(b) and remanded the case for further consideration in light of *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). *Id.*

On remand, Judge Johnson credited claimant with twenty-six and one-half years of coal mine employment and found that claimant satisfied his burden under 20 C.F.R. §718.204(b). In his consideration of whether the medical opinion evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis, Judge Johnson accorded the greatest weight to Dr. Paranthaman's opinion. Citing the decision of the United States Court of Appeals for the Fourth Circuit in *Grigg*, Judge Johnson accorded less weight to the opinions of the other physicians regarding the cause of claimant's disability because he found that their opinions were undermined by the fact that they had failed to diagnose pneumoconiosis. Judge Johnson, therefore, found that Dr. Paranthaman's opinion was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Johnson awarded benefits. By Decision and Order dated April 24, 1996, the Board noted that at the time that Judge Johnson issued his Decision and Order on Remand, the Fourth Circuit had not yet issued its decision in *Dehue Coal Co. v. Ballard [Ballard]*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) wherein the court of appeals recognized that even though an administrative law judge has found that a claimant suffers from pneumoconiosis, a physician's disability causation opinion premised on an understanding that the claimant does not have pneumonoconiosis may still have probative value.[1] *Wampler v. Michael Trucking Co.*, BRB No. 95-1654 BLA (Apr. 24, 1996) (unpublished). The Board, therefore, vacated Judge Johnson's finding pursuant to 20 C.F.R. §718.204(b) and instructed him to reconsider the opinions of Drs. Abernathy, Tuteur, Lane, Fino and Sargent in light of *Ballard*.[2]

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[1]The Fourth Circuit further explained that a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193, 19 BLR 2-304, 2-315-2-316 (4th Cir. 1995); *see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

[2]The Board also advised Judge Johnson that the Fourth Circuit had held that chronic obstructive lung disease is encompassed within the definition of pneumoconiosis under the Act. *Wampler v. Michael Trucking Co.*, BRB No. 95-1654 BLA (Apr. 24, 1996) (unpublished) (citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995)).

Due to Judge Johnson's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. The administrative law judge found the evidence insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding the evidence insufficient to establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). In finding the evidence insufficient to establish total disability due to pneumoconiosis, the administrative law judge credited the opinions of Drs. Sargent, Fino and Tuteur over that of Dr. Paranthaman. Decision and Order on Remand at 7-9. Claimant argues that the administrative law judge should have discredited the opinions of Drs. Sargent, Fino and Tuteur that claimant's total disability was not due to his pneumoconiosis as inconsistent with the holding of the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). In *Warth*, the Fourth Circuit held that an administrative law judge should not rely on a physician's opinion that a miner does not suffer from pneumoconiosis when it is based on an assumption that obstructive disorders cannot be caused by coal mine employment. *Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269. However, subsequent to the Board's April 24, 1996 Decision and Order, the Fourth Circuit clarified its holding in *Warth*. In *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit explained that administrative law judges are not precluded from relying on physicians' opinions that are not based upon the erroneous assumption that coal mine employment can never cause chronic obstructive pulmonary disease. Unlike the medical opinions in *Warth,* Drs. Sargent, Fino and Tuteur did not assume that coal mine employment can never cause chronic obstructive pulmonary disease.[3] *See* Director's Exhibits 53, 68; Employer's Exhibits 1, 7, 18, 19, 22. To the contrary, each of these doctors provided explanations for concluding that claimant's pulmonary impairment was due to his cigarette smoking and not his coal dust exposure.[4] *Id.* These doctors based their opinions

[3]Dr. Fino acknowledged that "[i]f there is sufficient fibrosis present, [coal workers' pneumoconiosis] may cause obstructive lung disease." Director's Exhibit 68.

[4]Dr. Sargent concluded that claimant's ventilatory impairment was due to smoking because the preponderance of claimant's x-rays were negative for pneumoconiosis and

not only on the absence of a restrictive impairment, but also on their review of claimant's medical record, including his objective test results and x-ray readings. *Id.*

Moreover, in his consideration of whether the medical opinion evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), the administrative law judge acted within his discretion in according less weight to Dr. Paranthaman's opinion because he failed to explain his basis for concluding that claimant's chronic obstructive pulmonary disease was caused by both coal dust exposure and cigarette smoking. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 9; Director's Exhibit 15. Inasmuch as it is based on substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

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because when pneumoconiosis causes a ventilatory impairment, it causes a mixed obstructive and restrictive impairment, a pattern which claimant did not have. Employer's Exhibit 22. Dr. Fino explained that the etiology of claimant's obstructive lung disease could be determined based "on the history and pattern of abnormality in the pulmonary function studies." Director's Exhibit 68. Dr. Fino opined that the combined abnormality in both the large and the small airways was not consistent with chronic bronchitis due to coal dust inhalation. *Id.* Dr. Tuteur concluded that claimant's total disability was not due to pneumoconiosis not solely because of the absence of a restrictive ventilatory defect, but also because of his findings on physical examination and the absence of changes compatible with coal workers' pneumoconiosis on x-ray. Employer's Exhibit 18.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge