BRB No. 99-0241 BLA

JOHN E. STILTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration and Modifying Previous Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Jill M. Otte (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration and Modifying Previous Order (97-BLA-1506) of Administrative Law Judge Alexander Karst awarding 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). The administrative law judge determined that this claim involved a request for modification of the Decision and Order denying benefits of Administrative Law Judge Robert M. Glennon, dated November 3, 1992, and affirmed by the United States Court of Appeals for the Fourth Circuit on June 7, 1996, pursuant to 20 C.F.R. §725.310.[1]

[1] Claimant filed his original application for benefits on November 9, 1979. Director's Exhibit 1. In a Decision and Order dated November 3, 1992, Administrative Law Judge Robert M. Glennon credited claimant with more than forty years of coal mine employment and found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) and rebuttal at 20 C.F.R. §727.203(b)(3). Accordingly, benefits were denied. Director's Exhibit 93. On appeal, the Board affirmed Judge Glennon's decision to credit claimant with more than forty years of coal mine employment and his findings under Sections 727.203(a)(2) and 727.203(b)(3), holding that he acted within his discretion as fact-finder in crediting Dr. Renn's opinion, as corroborated by both examining and non-examining specialists. *Stiltner v. Island Creek Coal Co.*, BRB No. 93-0461 BLA (Dec. 20, 1994)(unpublished); Director's Exhibit 98. In a decision dated June 7, 1996, the United States Court of Appeals for the Fourth Circuit affirmed the denial of benefits. *Stiltner v. Island Creek Coal Co.*, 6 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); Director's Exhibit 99. Thereafter, on April 2, 1997, claimant filed his request for modification. Director's Exhibit 101.

On modification, the case was reassigned to Administrative Law Judge Karst who held a hearing and issued a Decision and Order. In his Decision and Order Awarding Benefits dated September 16, 1998, the administrative law judge considered claimant's request for modification and discussed the newly submitted x-ray, pulmonary function study, blood gas study and medical opinion evidence submitted in conjunction with the motion for modification. After considering all of the evidence of record, including both the evidence submitted with the previous claim and the newly submitted evidence, the administrative law judge found no mistake in a determination of fact. The administrative law judge further found, however, a change in conditions which warranted modification of the previous denial of benefits based on his finding that the preponderance of the more credible medical evidence demonstrated that claimant has pneumoconiosis and that his total disability arose in whole or in part out of his coal mine employment. Accordingly, benefits were awarded. In his Order Granting Motion for Reconsideration and Modifying Previous Order dated October 23, 1998, the administrative law judge reiterated his finding that there was no mistake in a determination of fact in the prior denial. The administrative law judge also found that February 1991 was the month of onset of claimant's total disability, based upon the administrative law judge's inference that Dr. Robinette found claimant totally disabled at that time.[2]

On appeal, employer raises several challenges regarding the administrative law judge's weighing of the medical opinion evidence in finding the existence of pneumoconiosis and total disability due to pneumoconiosis established. Employer also alleges that the administrative law judge erred in his onset date determination. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter wherein he urges that the Board reject employer's suggestion that the administrative law judge erred in espousing the principle that pneumoconiosis is progressive.[3]

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

[2] The administrative law judge also revised a sentence at page 12 of his Decision and Order wherein he had found the opinions of Drs. Castle and Caday to be well reasoned and changed it to reflect a finding that the opinions of Drs. Robinette and Caday were well reasoned.

[3] The Director also states his view that 20 C.F.R. §718.202(a) should be read to provide for alternative, but not exclusive, methods of proving the existence of pneumoconiosis. The regulations contained in 20 C.F.R. Part 727, however, apply to the instant case.

evidence, are rational, and are consistent with applicable law, they are binding upon the 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).

Employer contends that the administrative law judge provided erroneous reasons for rejecting the opinions of Drs. Sargent, Castle, Morgan, Renn, Fino and Wiot and crediting the opinions of Drs. Robinette and Caday. Initially, employer contends that the administrative law judge mischaracterized Dr. Sargent's opinion and erroneously applied the principle that pneumoconiosis is a progressive disease. Employer argues that in his discussion of the doctor's opinion, the administrative law judge failed to recognize the doctor's expertise, that his opinion was not merely an opinion but uncontradicted medical evidence, which the administrative law judge was bound to credit. We reject employer's contention. The administrative law judge correctly examined the premise of the doctor's opinion, that claimant's total disability was not due to pneumoconiosis because simple pneumoconiosis does not progress absent exposure. We likewise reject employer's assertion that the administrative law judge mechanically applied the decision of the United States Court of Appeals for the Third Circuit in *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), which was adopted by the United States Court of Appeals for the Fourth Circuit in *Lane Hollow Coal Co. v. Director, OWCP* [Lockhart], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), in rejecting Dr. Sargent's opinion on that basis. Employer contends that the legal precedent cited by the administrative law judge is medically inaccurate and medically ungrounded, and that the concept of simple pneumoconiosis as progressive has been imposed by relatively recent legal decisions developed in the absence of a scientific record. Thus, employer asserts that the courts were wrong when they described pneumoconiosis, both simple and complicated, as a progressive disease. Employer urges the Board to find that questions of science are beyond its appellate purview, a position articulated by the United States Court of Appeals for the Seventh Circuit in *Freeman United Mining Co. v. Hilliard*, 65 F.3d 667, 19 BLR 2-282 (7th Cir. 1995). The administrative law judge rejected Dr. Sargent's opinion on two grounds; that the doctor's view regarding the progressive nature of pneumoconiosis was hostile to the Act and that Dr. Sargent relied on an inaccurate smoking history. Decision and Order at 9. The administrative law judge discussed Dr. Sargent's statement that simple pneumoconiosis "is not felt to progress" once coal dust exposure ceases and concluded that this statement rendered Dr. Sargent's opinion on causation hostile to the Act.[4] Decision and Order at 8-9; Employer's Exhibit 12, at 12. The

[4] The administrative law judge accurately stated that Dr. Sargent testified that:

administrative law judge correctly noted that the progressive nature of pneumoconiosis has been recognized by the courts. *See* Decision and Order 8-9; *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987) *reh'g denied*, 484 U.S. 1047 (1988); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976); *Swarrow*, *supra*; *Lockhart*, *supra*; *Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990); *Belcher v. Beth-Elkorn Corp.*, 6 BLR 1-1180 (1984). Consequently, we agree with the Director that the administrative law judge did not make an erroneous assumption when he noted that pneumoconiosis is a progressive disease as employer has not introduced compelling medical evidence to the contrary into the record. Hence, we reject employer's argument that the administrative law judge improperly discredited Dr. Sargent's opinion on causation because it was premised on his belief that simple pneumoconiosis does not progress after a miner leaves the mines. *Id*. Congress, the courts and the Department of Labor have all recognized that pneumoconiosis is a latent and progressive disease. Consequently, we affirm the administrative law judge's rejection of the opinion of Dr. Sargent.

There is, however, merit to employer's contention that the administrative law

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> Well, simple coal workers['] pneumoconiosis is not felt to progress after cessation of mining employment. So if this man did not have impairment due to pneumoconiosis in 1991 and he has not been exposed to subsequent coal dust, and then he has an impairment in 1997, then I would look for causes other than coal workers['] pneumoconiosis as a cause for the deterioration in lung function in that intervening time. So knowing the clinical history, it would be unlikely that this impairment is due to simple pneumoconiosis.

Decision and Order at 8-9; Employer's Exhibit 12, at 11-12.

judge's rationale for rejecting Dr. Castle's opinion was erroneous. The administrative law judge noted Dr. Castle's testimony that pneumoconiosis does not cause pure obstruction, Decision and Order at 11-12; Employer's Exhibit 3 at 48, and interpreted this to mean that Dr. Castle believed legal pneumoconiosis cannot cause a purely obstructive disease in a miner with a smoking history. Decision and Order at 11. The administrative law judge therefore found Dr. Castle's opinion to be hostile to the Act and that it had to be rejected based on the court's holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). In *Warth*, the court held that doctors' opinions which are premised upon a belief that pneumoconiosis is only a restrictive disease are erroneous, and therefore worthy of little or no weight under 20 C.F.R. §718.202(a)(4). In *Stiltner*, *supra*, the court held that the central holding in *Warth* does not apply when a physician states that a restrictive component would also be seen if the impairment were related to coal dust exposure rather than simply stating that chronic obstructive pulmonary disease can never result from coal dust exposure in coal mine employment. The court distinguished its prior holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 174, 19 BLR 2-265 (4th Cir. 1995), "caution[ing] ALJs not to rely on medical opinions that rule out coal mine employment as a causal factor based on the erroneous assumption that pneumoconiosis causes a purely restrictive form of impairment, thereby eliminating the possibility that coal dust exposure also can cause COPD." The court upheld the crediting of reports under Section 727.203(b)(3) that "merely opined that Stiltner *likely* would have exhibited a restrictive impairment in addition to COPD if coal dust exposure were a factor," noting that the diagnosis was based on a thorough review of all of the medical evidence rather than an erroneous assumption. We agree with employer that the administrative law judge's interpretation of Dr. Castle's testimony is not supported by the record. Dr. Castle's opinion and testimony do not indicate that he believes pneumoconiosis cannot contribute to an obstructive impairment, or that, as a rule, pneumoconiosis never causes obstructive lung disease. Dr. Castle testified that pneumoconiosis does not cause pure obstruction, and this testimony is consistent with his consultative report that stated, one would expect a restrictive impairment with pneumoconiosis. Decision and Order at 12; Employer's Exhibit 3. Furthermore, Dr. Castle concluded that claimant had an obstructive impairment as well as a restrictive impairment and relied on additional factors in reaching his conclusion. Thus, the administrative law judge erred in finding Dr. Castle's opinion hostile to the Act. *See Stiltner*, *supra*.

Employer next argues that the administrative law judge erred when he automatically disregarded the opinions of Drs. Renn, Morgan, Wiot and Fino because they were non-examining, consulting physicians and automatically credited the opinion of Dr. Caday, the miner's treating physician. In addition, employer argues that the opinions of Drs. Robinette and Caday are not well-reasoned and

documented, and that the administrative law judge erred in failing to adequately explain his reasons for crediting these opinions over the contrary opinions in contravention of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), and the decision of the United States Court of Appeals for the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Employer asserts that the administrative law judge must consider all relevant evidence in light of the decision of the Fourth Circuit in *Hicks*, *supra*. In *Hicks*, as well as *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the Fourth Circuit held that an administrative law judge should not automatically credit the testimony of a treating or an examining physician merely because the physician treated or personally examined the miner; rather, the administrative law judge should also consider the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions. *Hicks*, *supra*; *Akers*, *supra*. The administrative law judge identified and reviewed in detail the medical opinions of Drs. Renn, Morgan, Wiot and Fino, each of whom provided consultative opinions after reviewing all evidence of record.[5] In evaluating the medical opinion evidence, the administrative law judge should assess "the qualifications of the

[5] Dr. Renn provided three medical reports dated March 31, 1987, August 29, 1988 and December 16, 1997 based on the medical evidence submitted to him by employer. *See* Decision and Order at 7; Director's Exhibits 35, 62, 87; Employer's Exhibits 10,14. Dr. Renn also provided additional testimony in a deposition taken on March 15, 1991. *See* Director's Exhibit 88. In each report, Dr. Renn opined that the evidence was negative for pneumoconiosis and that claimant had a mild ventilatory impairment due to bronchitis due to smoking and that the impairment was not related to his coal mine employment. *Id.* Dr. Morgan rendered two medical opinions dated December 17, 1997 and January 13, 1998. *See* Decision and Order at 7; Employer's Exhibits 9, 14. Dr. Morgan also opined that the evidence was negative for pneumoconiosis and that claimant suffered from a pulmonary or respiratory impairment which was not related to his years of coal mine employment but instead was caused by his weight gain, smoking and aging. *Id.* Dr. Wiot testified in a deposition on January 7, 1998, that he found that the x-ray evidence was negative for pneumoconiosis or any coal dust related disease. Decision and Order at 7; Director's Exhibit 90; Employer's Exhibit 11. Dr. Fino provided three medical reports dated September 6, 1988, December 17, 1997 and January 20, 1998. Decision and Order at 7; Director's Exhibit 63; Employer's Exhibits 9, 14. Dr. Fino opined that there was insufficient evidence to justify a diagnosis of pneumoconiosis, that there was no respiratory impairment or total disability and that claimant was disabled due to age and cardiovascular disease. *Id*.

respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Akers*, *supra*; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). In this case, the administrative law judge did not consider and discuss the weight he accorded the various credentials of the physicians of record and, in view of case law from the Fourth Circuit, we vacate the administrative law judge's findings that the existence of pneumoconiosis and disability causation were established, and remand this case to the administrative law judge for a full review of the record as a whole in light of these authorities. Furthermore, the administrative law judge must consider all factors relevant to the quality of the evidence in determining whether the opinions of Drs. Caday and Robinette, as well as the opinions of Drs. Renn, Morgan, Wiot and Fino, are supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999). Moreover, in determining whether the evidence establishes the existence of pneumoconiosis, the administrative law judge must weigh the x-ray evidence and medical opinion evidence together. *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- , (4th Cir. 2000).

In addition, as employer argues, the administrative law judge erred in weighing the medical opinion evidence, having merely credited the opinions of Drs. Robinette and Caday as well-reasoned and well-documented, without adequately evaluating the relative merits of these opinions in light of the contrary and probative opinions of employer's physicians. *See Hicks, supra; Akers, supra*; Decision and Order 11-12. A physician's disability causation opinion which is premised upon an understanding that the miner does not have pneumoconiosis may still have probative value when the opinion acknowledges the miner's pulmonary or respiratory impairment. *See DeHue Coal Co. v. Ballard,* 65 F.3d 1189, 19 BLR 2-304, (4th Cir. 1995). The court explained that such an opinion is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *Ballard, supra.* Inasmuch as Dr. Castle opined that claimant suffers from an obstructive impairment, his opinion may still have probative value under *Ballard*.

Employer's final contention that the administrative law judge erred in determining the onset date of claimant's total disability has merit as well. In the administrative law judge's Order Granting Motion for Reconsideration and Modifying Previous Order dated October 23, 1998, the administrative law judge found entitlement as of February 1991 based on testimony in the January 13, 1998, deposition of Dr. Robinette which indicated that he found that claimant was totally disabled due to pneumoconiosis at the time of his initial examination in February 1991. *See* Claimant's Exhibits 2-3. The administrative law judge's statement, that he had found no mistake in a determination of fact in the prior decision, wherein it

was determined that claimant did not have pneumoconiosis or total disability due to pneumoconiosis, is undermined by the fact that Dr. Robinette's February 1991 medical report was considered and rejected by Judge Glennon. As it is unclear whether the administrative law judge actually found a mistake in a determination of fact, in spite of his statement that he found a change in conditions, remand for resolution of this issue is also required so that the administrative law judge, if he again awards benefits, can make a finding with regard to the date of onset of total disability due to pneumoconiosis and the date of commencement of benefits. Consequently, we vacate the administrative law judge's onset date determination and remand the case to the administrative law judge for reconsideration of the credible evidence relevant to this issue to determine if the medical evidence establishes an onset date of total disability due to pneumoconiosis. *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986).

Accordingly, the Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration and Modifying Previous Order of the administrative law judge are vacated and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge