BRB No. 00-1072 BLA

HENRIETTA SUE HAPNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
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 of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Edward Waldman (Howard M. Radzely, Acting 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, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0903) of Administrative Law Judge Robert J. Lesnick 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).[1] The administrative law judge credited claimant with ten and one-half years

[1]The Department of Labor has amended the regulations implementing the Federal

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000), the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and 718.203(b) (2000). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).[2] Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge ordered benefits to commence as of July 1, 1998.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

On appeal, employer contends that the Board does not have jurisdiction of this appeal. Further, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). The Director, Office of Workers' Compensation Programs (the Director), urges the Board to reject employer's contention that it does not have jurisdiction of this appeal. The Director also urges the Board to reject employer's contention that claimant's pre-existing nonrespiratory total disability precludes an award of benefits. Employer filed a brief in reply to the response brief of the Director, Office of Workers' Compensation Programs, reiterating its prior contentions. Claimant has not filed a brief in response to employer's appeal.[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 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).

[3]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(1)-(3) (2000) and 718.204(c) (2000) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(b).

Initially, we address employer's contention that the Board does not have jurisdiction of this appeal. Employer's contention is based on the premise that since claimant died recently, there is no party-in-interest in this case. The pertinent regulation provides that "[e]xcept as provided in §725.361, no person other than the Secretary of Labor and authorized personnel of the Department of Labor shall participate at any stage in the adjudication of a claim for benefits under this part, unless such person is determined by the appropriate adjudication officer to qualify under the provisions of this section as a party to the claim." 20 C.F.R. §725.360(a). The record does not indicate that claimant died or that a substitution of party-in-interest has been filed in this case. *See* 20 C.F.R. §725.360(b).[4] As argued by the Director, the district director ordered the Black Lung Disability Trust Fund (Trust Fund) to commence paying interim benefits to claimant as of March 1999. Director's Exhibit 27. Moreover, the administrative law judge's decision obligates employer to reimburse the Trust Fund for the payment of the interim benefits. The Director has standing as party-in-interest to ensure the proper enforcement and the lawful administration of the Black Lung program. *See Reed v. United Coal Co.*, 10 BLR 1-67 (1987). Thus, inasmuch as the Director may defend the claim on behalf of the Trust Fund as a party-in-interest, we reject employer's assertion that the Board does not have jurisdiction of this appeal. *See Reed, supra*; *see generally Brown v. Director, OWCP*, 7 BLR 1-730 (1985).

Next, we address employer's contentions with regard to the administrative law judge's findings on the merits. Employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Whereas Drs. Rasmussen and Patel opined that claimant suffers from pneumoconiosis, Director's Exhibit 10; Claimant's Exhibits 7, 9; Employer's Exhibit 5, Drs. Fino and Zaldivar opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 24; Employer's Exhibits 6, 7. The administrative law judge properly accorded greater weight to the opinion of Dr. Rasmussen than to the contrary opinions of Drs. Fino and Zaldivar because he found Dr. Rasmussen's opinion to be better reasoned and documented.[5]

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[4]20 C.F.R. §725.360(b) provides that "[a] widow, child, parent, brother, or sister, or the representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to benefits may be prejudiced by a decision of an adjudication officer, may be made a party."

[5]We reject employer's assertion that Dr. Rasmussen's opinion is not reasoned because it is based solely on an x-ray reading and a coal mine employment history. Contrary to employer's assertion, Dr. Rasmussen's opinion is based on a physical examination, a smoking history, a coal mine employment history, a pulmonary function study, an arterial blood gas study and an x-ray. *See* Director's Exhibit 10; Claimant's Exhibit 7. The administrative law judge stated, "I find the opinion of Dr. Rasmussen...to be the best reasoned and documented because it is most consistent with [c]laimant's complaints of

See Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also properly accorded greater weight to Dr. Rasmussen's opinion because he found it to be supported by Dr. Patel's opinion. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we reject employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Fino and Zaldivar.

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shortness of breath, her histories of cigarette smoking and coal mine employment, the abnormalities on the more recent chest x-rays and the qualifying results on pulmonary function studies before and after bronchodilator, which reveal only partial reversibility." Decision and Order at 13; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Ogozalek v. Director, OWCP*, 5 BLR 1-309 (1982).

In addition, we reject employer's assertion that administrative law judge erred in according greater weight to the opinion of Dr. Patel than to the contrary opinion of Dr. Fino based upon Dr. Patel's status as claimant's treating physician. *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); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge did not mechanically rely on Dr. Patel's opinion because he treated claimant. Rather, the administrative law judge rationally found that Dr. Patel's treatment of claimant provided Dr. Patel with a better perspective of claimant's condition with respect to the existence of pneumoconiosis. The administrative law judge considered that although Dr. Fino reviewed medical evidence of claimant's pulmonary condition, Dr. Patel actually treated claimant's pulmonary condition for at least a year.[6]

[6]We reject employer's assertion that Dr. Patel's opinion is not reasoned. The administrative law judge stated, "Dr. Patel is [c]laimant's treating pulmonologist and Dr. Fino did not personally examine the [c]laimant." Decision and Order at 12. The administrative law judge observed that "Dr. Patel's treatment notes cover the period from July 9, 1998 through July 12, 1999." *Id*. at 11. The administrative law judge also observed that "Dr. Patel's medical notes sets (sic) forth complaints of shortness of breath and productive cough; various abnormalities on chest examination; a one pack per day cigarette smoking history for 20 years; and an 11 year coal mine employment history." *Id*. The administrative law judge additionally observed that "Dr. Patel cited various clinical test results, such as x-ray interpretations and pulmonary function results." *Id*. The administrative law judge therefore stated, "[b]ased upon the foregoing, Dr. Patel diagnosed the following respiratory and pulmonary conditions: acute bronchitis, severe COPD, pneumoconiosis, pulmonary fibrosis, pulmonary fibrosis most probably coal workers pneumoconiosis, severe COPD without any evidence of CHF or pneumonia, Coal Worker's Pneumoconiosis, and

Thus, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4).

Citing *Island Creek Coal Co. v. Compton*, 211 F.3d 303, BLR (4th Cir. 2000), employer further contends that the administrative law judge erred in failing to weigh all the relevant evidence together at 20 C.F.R. §718.202(a) (2000). Based on his finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000), the administrative law judge found that claimant established the existence of pneumoconiosis. However, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, recently held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a) (2000) to determine whether claimant has established the existence of pneumoconiosis. *Compton, supra*; *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In the instant case, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) (2000), but found it sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). However, the administrative law judge did not weigh all of the relevant evidence together in determining whether claimant established the existence of pneumoconiosis. Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis, and remand the case for further consideration of all of the relevant evidence in accordance with *Compton*. *See* 20 C.F.R. §718.202(a).

Finally, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Whereas Dr. Rasmussen opined that claimant suffers from a disabling respiratory impairment due to pneumoconiosis, Director's Exhibit 10; Claimant's Exhibit 7, Drs. Fino and Zaldivar opined that claimant does not suffer from a disabling respiratory impairment due to pneumoconiosis, Director's Exhibit 24; Employer's Exhibits 6, 7. Citing *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), the administrative law judge stated, "for the reasons outlined above, I find that the better reasoned medical opinion evidence [of Dr. Rasmussen] establishes that pneumoconiosis was at least a contributing cause of her totally disabling respiratory impairment." Decision and Order at 14. The Fourth Circuit has held that pneumoconiosis must be at least a contributing cause of a miner's totally disabling respiratory impairment in order to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). *See Robinson, supra.*

Chronic hypoxemia." *Id*.

Employer asserts that Dr. Rasmussen's opinion is insufficient to meet claimant's burden of establishing total disability solely from a respiratory impairment since claimant became disabled from work in 1988 because of a back injury, and not coal dust exposure. During the hearing, claimant testified that she became disabled from work in 1988 because of a back injury. Hearing Transcript at 24. In a report dated October 14, 1998, Dr. Rasmussen noted claimant's myocardial infarction and back injury. Director's Exhibit 10. Nonetheless, Dr. Rasmussen opined that coal mine dust exposure is a significant contributing factor in claimant's totally disabling respiratory insufficiency. *Id*. In relying on Dr. Rasmussen's opinion with respect to the issue of disability causation, the administrative law judge did not indicate that he considered claimant's nonpulmonary or nonrespiratory conditions. However, the revised regulations explicitly provide that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). Thus, we reject employer's specific assertion that Dr. Rasmussen's opinion is insufficient to meet claimant's burden of establishing total disability.

Notwithstanding our rejection of employer's specific arguments, we decline to affirm the administrative law judge's disability causation finding. The disability causation standard established by the revised regulation at 20 C.F.R. §718.204(c) is as follows:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) 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). We hereby vacate the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis in accordance with *Robinson,* and remand the case to the administrative law judge. The administrative law judge is instructed, on remand, to consider the evidence under the revised disability causation regulation at 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge