BRB No. 98-0692 BLA

JAMES R. RAMSEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND 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 on Remand of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Douglas A Smoot and Kathy L. Snyder (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, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-1898) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) on a duplicate 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 has been before the Board on two prior occasions. In a decision dated February 15, 1995, Administrative Law Judge Julius A. Johnson credited claimant with at least twenty-one years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Johnson found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.[1] Judge Johnson also found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Further, although Judge Johnson found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), he found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Johnson denied benefits. In response to claimant's appeal, the Board vacated Judge Johnson's finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. Although the Board affirmed Judge Johnson's finding of no pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), the Board vacated Judge Johnson's finding of no pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remanded the case for further consideration of the evidence on this issue. The Board also vacated Judge Johnson's finding of no total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), and remanded the case for further consideration of the evidence on this issue. *Ramsey v. Westmoreland Coal Co.*, BRB No. 95-1186 BLA (Oct. 26, 1995)(unpub.).

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[1]Claimant filed his initial claim on December 7, 1987. Director's Exhibit 26. On April 26, 1990, Administrative Law Judge David A. Clarke, Jr. issued a Decision and Order denying benefits. *Id*. The bases of Judge Clarke's denial were claimant's failure to establish pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id*. The Board affirmed Judge Clarke's denial of benefits. *Ramsey v. Westmoreland Coal Co.*, BRB No. 90-1538 BLA (May 27, 1992)(unpub.). Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on August 31, 1993. Director's Exhibit 1.

On the first remand, the case was transferred to the administrative law judge, who found the evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge also found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b). Additionally, the administrative law judge found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(4), and sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. In disposing of employer's appeal, the Board affirmed the administrative law judge's finding of total disability at 20 C.F.R. §718.204(c)(1) and (c)(4). However, the Board vacated 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), and thus, her finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. The Board also vacated 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). *Ramsey v. Westmoreland Coal Co.*, BRB No. 96-1620 BLA (Sept. 26, 1997)(unpub.). On the most recent remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, the administrative law judge again awarded benefits, which she ordered to commence as of August 1993, the date the claim was filed.

On appeal, 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). Employer also contends that the administrative law judge erred in finding the onset date of disability to be August 1993, the date the claim was filed. The Director, Office of Workers' Compensation Programs (the Director), contends that a diagnosis of a chronic coal dust related disease, standing alone, is sufficient to satisfy the regulatory definition of pneumoconiosis. The Director further contends that 20 C.F.R. §725.503 validly implements the directives of the Black Lung Disability Act and is consistent with the Administrative Procedure Act (APA). Claimant has not filed a brief in this appeal.[2]

[2]Inasmuch as the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Initially, 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). We disagree. The administrative law judge considered the medical opinions of Drs. Loudon, Rasmussen, Renn, Stewart and Zaldivar.[3] Whereas Dr. Rasmussen opined that claimant suffers from pneumoconiosis, Director's Exhibits 10, 26, Drs. Loudon, Renn, Stewart and Zaldivar opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 26; Employer's Exhibits 1-5. The administrative law judge properly accorded determinative weight to the opinion of Dr. Rasmussen over the contrary opinions of Drs. Loudon, Renn, Stewart and Zaldivar because she found Dr. Rasmussen's opinion to be better reasoned.[4] *See Clark v.*

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[3]Employer did not raise the administrative law judge's failure to consider the medical opinions of Drs. Abraham, Daniel, Maramba, MacCullum and Leef. Dr. Abraham opined that claimant suffers from chronic obstructive pulmonary disease and pneumoconiosis. Director's Exhibit 26; Claimant's Exhibit 1. Drs. Daniel and Maramba opined that claimant suffers from chronic obstructive pulmonary disease. Director's Exhibit 26. Drs. MacCullum and Leef opined that claimant does not suffer from occupational pneumoconiosis. Employer's Exhibit 1.

[4]Employer, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), asserts that the administrative law judge's finding that the opinion of Dr. Rasmussen is well reasoned violates the Administrative Procedure Act (APA) since she failed to provide any basis for her conclusion. In *Hicks*, the administrative law judge cited no valid reasons for crediting Dr. Rasmussen's opinion over Dr. Zaldivar's opinion. In addition, the administrative law judge did not provide adequate reasons for discrediting Dr. Zaldivar's opinion. Hence, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Hicks* that the administrative law judge failed to adequately explain why he credited certain evidence and discredited other evidence. However, in the case at hand, the administrative law judge stated that "Dr. Rasmussen...has had the benefit of examining the Claimant on more than one occasion, and he has each time thoroughly discussed the clinical evidence pertinent to the Claimant's individual

Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject employer's assertions that the administrative law judge erred in failing to explain why she found Dr. Rasmussen's opinion to be more persuasive than the contrary opinions of Drs. Loudon, Renn, Stewart and Zaldivar, and that the administrative law judge erred by selectively analyzing the medical evidence.[5]

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claim." 1998 Decision and Order on Remand at 5. In contrast, the administrative law judge stated that Drs. Loudon, Renn, Stewart and Zaldivar "have not adequately explained how the documentation contained within their reports supports their conclusions." *Id*. at 7. The administrative law judge observed that Dr. Zaldivar's "discussion of whether the claimant had pneumoconiosis (either coal workers' pneumoconiosis or chronic bronchitis resulting from coal mine dust exposure) was perfunctory by comparison." *Id*. at 6. Thus, we reject employer's assertion that the administrative law judge's finding that the opinion of Dr. Rasmussen is well reasoned violates the APA since she failed to provide any basis for her conclusion.

[5]Employer, citing *Hicks*, also asserts that the administrative law judge erred in failing to provide an explanation for according greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar, in view of Dr. Zaldivar's superior qualifications. In *Hicks*, the administrative law judge ignored the respective qualifications of the physicians. Whereas, in that case, Dr. Rasmussen was Board-certified in only Internal Medicine, Dr. Zaldivar was Board-certified in both Internal Medicine and Pulmonary Disease. Although the administrative law judge noted the relative qualifications of Drs. Rasmussen and Zaldivar, he attributed no importance to the comparative credentials of the physicians. The administrative law judge also completely ignored the medical opinions of the other physicians, despite their credentials. Hence, the United States Court of Appeals for the Fourth Circuit held that the administrative law judge improperly discounted the respective qualifications of the physicians. In the instant case, the administrative law judge properly considered the respective qualifications of the physicians. The administrative law judge observed that Dr. Rasmussen's curriculum vitae "reflects that Dr. Rasmussen has been [B]oard certified in Internal Medicine since 1961 and has impressive credentials." 1998 Decision and Order on Remand at 5. The administrative law judge also observed that "[w]hile Dr. Rasmussen may lack a [B]oard certification in the subspecialty of pulmonary diseases, he has extensive experience in pulmonary medicine and the pulmonary diseases of coal miners (including 'black lung') and I find him to be as qualified as any of the other physicians rendering opinions, including Drs. Zaldivar, Stewart, and Renn, who are [B]oard certified in the subspecialty of pulmonary medicine." *Id*. Therefore, we reject employer's assertion that the administrative law judge erred in failing to provide an explanation for

according greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar, in view of Dr. Zaldivar's superior qualifications. Moreover, we reject employer's assertion that the administrative law judge erred by failing to explain the reversal in her prior finding that Dr. Rasmussen's credentials are not impressive to her current finding that Dr. Rasmussen's credentials are impressive, inasmuch as the Board remanded the case to the administrative law judge to reconsider the evidence at 20 C.F.R. §718.202(a)(4).

Next, employer asserts that the administrative law judge erred by discrediting the opinions of Drs. Loudon, Renn, Stewart and Zaldivar because their opinions are in conflict with the holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). The administrative law judge stated that Drs. Loudon, Renn, Stewart and Zaldivar "appear to believe that an obstructive impairment due to chronic bronchitis/COPD could never be caused by coal mine dust exposure." 1998 Decision and Order on Remand at 6. In *Warth*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an assumption that an obstructive disorder, rather than a restrictive disorder, cannot be caused by coal mine employment, is erroneous. Subsequently, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit explained that an administrative law judge is not precluded from relying on a physician's opinion which is not based upon the erroneous assumption that coal mine employment can never cause a chronic obstructive pulmonary disease. In the instant case, Dr. Loudon opined that "neither chronic obstructive pulmonary disease nor asthma is caused by coal workers' pneumoconiosis or coal dust exposure." Employer's Exhibit 5. Thus, we reject employer's assertion that the administrative law judge erred by discrediting the opinion of Dr. Loudon because Dr. Loudon's opinion is in conflict with the holding in *Warth*. However, Drs. Renn, Stewart and Zaldivar did not assume that coal mine employment can never cause chronic obstructive pulmonary disease. Rather, the doctors provided explanations for concluding that claimant's pulmonary impairment is due to his cigarette smoking and not coal dust exposure. Nonetheless, since the administrative law judge provided a valid alternate basis for according greater weight to the opinion of Dr. Rasmussen than to the contrary opinions of Drs. Renn, Stewart and Zaldivar, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that she accorded greater weight to Dr. Rasmussen's opinion because she found it to be better reasoned, *see Clark, supra*; *Fields, supra*; *Fuller, supra*, we hold that the administrative law judge's error in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).[6]

[6]Employer asserts that the administrative law judge erred by discrediting Dr. Zaldivar's opinion based on the inaccurate conclusion that Dr. Zaldivar did not diagnose chronic obstructive pulmonary disease/chronic bronchitis. The administrative law judge discounted Dr. Zaldivar's opinion because "Dr. Zaldivar's failure to include chronic bronchitis as a component of COPD is inconsistent with the opinions of the other physicians." Decision and Order on Remand at 8 n.6. The administrative law judge observed that "COPD [chronic obstructive pulmonary disease] includes bronchitis, as Drs. Loudon and Stewart indicated." *Id*. However, an examination of the record indicates that whereas Drs. Loudon, Rasmussen and Renn diagnosed chronic bronchitis, Dr. Stewart did not diagnose chronic bronchitis.

Nonetheless, since the administrative law judge provided a valid alternate basis for according greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that she accorded greater weight to Dr. Rasmussen's opinion because she found it to be better reasoned, *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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), we hold that any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We also reject employer's assertion that the administrative law judge erred by including all chronic pulmonary diseases within the regulatory definition of pneumoconiosis since claimant must show a significant relationship between the respiratory impairment and coal dust exposure to satisfy the regulatory definition of pneumoconiosis. Contrary to employer's assertion, the administrative law judge did not include all chronic pulmonary diseases within the regulatory definition of pneumoconiosis. Rather, the administrative law judge stated that "any chronic pulmonary disease will qualify as pneumoconiosis **if** it is either related to or aggravated by coal mine dust exposure." 1998 Decision and Order on Remand at 4 (emphasis added). Further, the administrative law judge observed that 20 C.F.R. §718.201 provides that "[f]or purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment **significantly related to, or substantially aggravated by**, dust exposure in coal mine employment." *Id*. (emphasis added). Moreover, we reject employer's assertion that a physician must find an *impairment* caused by coal dust exposure in order to satisfy the statutory meaning of coal workers' pneumoconiosis. Although chronic pulmonary *impairments* are included in the regulatory definition of pneumoconiosis, the regulations did not limit the definition of pneumoconiosis to pulmonary *impairments* caused by coal dust exposure. To the contrary, the regulations include all *diseases* arising out of coal dust exposure. 20 C.F.R. §718.201.

In addition, employer, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), asserts that the administrative law judge erred by summarily incorporating the prior flawed findings of fact into the decision on remand rather than independently re-analyzing all of the relevant evidence of record. In *Hicks*, the administrative law judge reviewed the miner's claim on three separate occasions since the Board remanded the claim twice for reconsideration. In his third order, the administrative law judge incorporated all non-inconsistent findings of fact from his previous two orders and awarded benefits based solely upon Dr. Rasmussen's opinion. Instead of specifying the bases for his determination to award benefits in his third order, the administrative law judge merely incorporated the findings of fact from his two previous orders. The United States Court of Appeals for the Fourth Circuit in that case held that the administrative law judge's final order, incorporating all previous findings, violated the APA because the administrative law judge relied upon summary conclusions that were not fully explained or supported. The court stated that it is difficult for a reviewing body to ascertain exactly what evidence and conclusions the administrative law judge relied upon to determine total disability and causation. The court also observed that many of the administrative law judge's previous findings, such as his reasons for discrediting Dr. Zaldivar's opinion, had been expressly vacated by the Board. Further, the court observed that

some of the administrative law judge's conclusions of law were also reversed by later court rulings, such as the United States Supreme Court's holding that the 'true doubt' rule is invalid.

The facts in the instant case are distinguishable from the facts in *Hicks*. Here, the administrative law judge stated that "[t]he facts, pertinent evidence, and procedural background are set forth in detail in [her 1996] decision, which is incorporated by reference herein, and I adopt my prior decision except to the extent modified herein." 1998 Decision and Order on Remand at 1. Further, as instructed by the Board, the administrative law judge independently considered the relevant medical evidence of record on the merits at 20 C.F.R. §§718.202(a)(4) and 718.204(b). Thus, we reject employer's assertion that the administrative law judge erred by summarily incorporating the prior flawed findings of fact into the decision on remand rather than independently re-analyzing all of the relevant evidence of record.

Finally, employer contends that the administrative law judge erred in finding the onset date of disability to be August 1993, the date the claim was filed. We disagree. The administrative law judge stated, "As explained in my [prior] decision,[7] benefits shall be payable from August 1993, the date the claim was filed." *Id*. at 9. In her previous decision, the administrative law judge stated that "[a]lthough the Claimant stopped working in 1985, the evidence is not entirely clear as to the date of onset of the disability due to pneumoconiosis." 1996 Decision and Order on Remand at 16. Hence, the administrative law judge stated that "benefits should be payable from the month during which the claim was filed, or August 1993." *Id*. The pertinent regulations provide that "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b).

Employer asserts that the provision of 20 C.F.R. §725.503(b), which allows an administrative law judge to utilize the filing date of a claim to establish the onset date of disability when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates Section 7(c) of the APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The regulations generally provide that

[7]Although the administrative law judge referred to her September 1997 decision, the administrative law judge's prior decision was dated August 22, 1996.

"[e]xcept as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. §554 *et seq.*" 20 C.F.R. §725.452(a). Further, the APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). As the Director asserts, since 20 C.F.R. §725.503(b) specifically provides that the onset date of disability is to be determined by the date that the claim is filed when the record does not contain evidence which can establish the onset date of disability, 20 C.F.R. §725.503(b), we hold that the APA is inapplicable to 20 C.F.R. §725.503(b), 5 U.S.C. §556(d). Therefore, we reject employer's assertion that the provision of 20 C.F.R. §725.503(b), which allows an administrative law judge to utilize the filing date of a claim to establish the onset date of disability when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates Section 7(c) of the APA.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge