BRB No. 99-0464 BLA

JOEL T. COMPTON	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED: _____
	)	
	)	
Employer-Petitioner	)	
	)	
and	)	
	)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

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

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (98-BLA-0014) of Administrative Law Judge Richard A. Morgan 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 credited claimant with at least thirty years of coal mine employment. The administrative law judge further found that claimant established a mistake in a determination of fact in the prior decision and a change in conditions. On the merits of the case, the administrative law judge found that claimant established the existence of pneumoconiosis by a preponderance of the evidence at 20 C.F.R.

§718.202(a). The administrative law judge further found that claimant established the requisite etiology at 20 C.F.R. §718.203, and total respiratory disability at 20 C.F.R. §718.204(c). Further, the administrative law judge determined that claimant met his burden to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) under *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990)[ALJ decision on remand rev'd No. 92-2106, 17 BLR 2-158 (4th Cir. June 21, 1993)(unpub.)]. Accordingly, benefits were awarded. The administrative law judge also found that July 1, 1990 was the appropriate date from which benefits commence.

On appeal, employer contends that the administrative law judge committed reversible error in finding disability causation established at Section 718.204(b). Employer also asserts that the administrative law judge's failure to discuss the contents of two documents of which he took judicial notice may amount to harmless error, unless the case is remanded. Employer also alleges error in the administrative law judge's determination regarding the date from which benefits commence. Claimant responds in support of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.[1]

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

Employer initially contends that the administrative law judge mischaracterized Dr. Rasmussen's opinion, and did not set forth a basis for finding that Dr. Rasmussen's opinion is reasoned and documented, as required by the Administrative Procedure Act, 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). Dr. Rasmussen examined claimant on July 13, 1990 and opined that both claimant's coal workers' pneumoconiosis and his previous smoking habit could cause his disabling obstructive ventilatory impairment. Dr. Rasmussen added, "One must conclude that CWP is a major contributing factor." Director's Exhibit 10. In his consultative report dated January

[1]We affirm the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.203 and 718.204(c), as well as his determinations relevant to the length of claimant's coal mine employment and modification, as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

13, 1992, Dr. Rasmussen opined, "Based on the current medical knowledge, one must conclude that this patient's coal mine dust exposure with its resultant pneumoconiosis has been at least a major contributing factor to this patient's totally disabling respiratory insufficiency." Director's Exhibit 46. Dr. Rasmussen subsequently reviewed Dr. Fino's letter dated September 14, 1993, and on November 24, 1993 reported,

> Based on all of the above, I am unimpressed with Dr. Fino's arguments. I believe the overwhelming evidence to date supports the contention that coal mine dust exposure is fully capable of producing disabling chronic obstructive lung disease. It remains my opinion that Mr. Compton suffers from chronic disabling lung disease which is, at least in significant part, the consequence of his coal mine dust exposure.

Director's Exhibit 77.

Crediting Dr. Rasmussen's opinion at Section 718.204(b), the administrative law judge noted his disagreement with employer's argument that Dr. Rasmussen linked claimant's disability to his coal mine employment "solely on the basis of years of exposure, unreliable x-ray evidence, and the theory that coal dust exposure can cause an obstructive lung disease and is not excludable as a significant contributor in a miner's lung disease." Decision and Order at 37. The administrative law judge indicated, "Having set forth his opinion, I do not agree. Dr. Rasmussen's opinion is well-documented and well-reasoned." Decision and Order at 37. The administrative law judge then discussed Dr. Rasmussen's findings in detail. In this regard, he initially indicated, "Dr. Rasmussen examined the miner many times and conducted many objective tests on him over the years as noted in detail above." *Id.* The administrative law judge also characterized as "comprehensive" Dr. Rasmussen's 1992 report. *Id.* The administrative law judge further found, "There was considerable disagreement over the cause of the COPD with the employer's physicians believing that coal mine dust exposure cannot cause disabling COPD. Dr. Rasmussen took the view that it could; a position adopted by the courts." *Id.* In a footnote, the administrative law judge indicated that he ranked Dr. Rasmussen's qualifications higher than those of Dr. Sobieski "because of the former's extensive writing in the field." Decision and Order at 37 n.41.

Employer argues that the administrative law judge's finding that Dr. Rasmussen examined claimant many times and conducted many objective tests on him is inaccurate inasmuch as Dr. Rasmussen examined claimant only once. Employer's argument has merit. The record shows that Dr. Rasmussen examined claimant only once, in 1990, and conducted several objective tests at that time. Director's Exhibits 9, 10. He did not subsequently examine the miner but submitted two consultative reports. Director's Exhibits 46, 77. Inasmuch as the administrative law judge relied on Dr. Rasmussen's opinion in finding that

claimant met his burden on disability causation at Section 718.204(b), we hold that the administrative law judge's mischaracterization mandates a remand of the case.

Employer further contends that the administrative law judge erroneously shifted the burden of proof to employer to explicitly rule out the possibility that claimant's lung disease is aggravated by or related to his coal dust exposure. Employer also argues that while the administrative law judge recognized that Dr. Naeye opined that any link between claimant's lung disease and his coal dust exposure was inconsequential, the administrative law judge erroneously found that Dr. Naeye did not state explicitly that claimant's emphysema is not significantly related to his coal mine employment.

Contrary to employer's contention, the administrative law judge specifically recognized that it is claimant's burden to establish that his pneumoconiosis is a contributing cause of his disability under *Robinson*. Decision and Order at 26, 27, 34-37. Further, the administrative law judge did not shift this burden of proof to employer when he indicated the following:

> It is established that the miner has chronic bronchitis and that his total disability is due in part to chronic bronchitis. The question remains whether and to what extent chronic bronchitis arises from coal mine dust exposure. While the employer has convinced me that Mr. Compton's chronic bronchitis arose in large measure and primarily from his history of cigarette smoking, I find the former's evidence does not overcome the claimant's evidence establishing that it arose from a combination of coal dust exposure and smoking.
>
> While the employer's experts are adamant that Mr. Compton's disability does not arise from CWP or centrilobular emphysema caused by coal dust exposure they, other than Dr. Tuteur, do not explicitly rule out the possibility that the miner's lung disease is "*substantially aggravated*" by or significantly related to dust exposure in coal mine employment. *See Hobbs, supra*. I find it more likely than not that the miner's centrilobular emphysema is significantly related to his coal mine dust exposure. Further, although Dr. Naeye calls it "inconsequential," i.e. trivial, he does not explicitly state that Mr. Compton's focal emphysema is not significantly related to his coal mine dust exposure.

Decision and Order at 42. It is apparent from the context of the administrative law judge's findings that he was discussing employer's evidence in relation to the fact that the medical definition of pneumoconiosis is narrower that the legal definition of pneumoconiosis, as provided in 20 C.F.R. §718.201. Further, Dr. Naeye testified that there is "no good

evidence" that coal mine employment causes centrilobular emphysema, but one in forty or fifty soft coal miners do develop severe focal emphysema, "and that is a constituent disease of coal workers' pneumoconiosis..." Employer's Exhibit 8 at 26. Dr. Naeye also testified that claimant's "focal emphysema constituted less than three percent of the total emphysema, so it's inconsequential in terms of its affects (sic) on lung function. I'm sure you couldn't measure the affect (sic)." Employer's Exhibit 8 at 26. Dr. Naeye added that claimant's coal workers' pneumoconiosis, as opposed to claimant's focal emphysema as suggested by employer, Employer's Brief at 12 n.3, had no effect or influence on his disability whatsoever. *Id.* at 27. Given this testimony, we hold that the administrative law judge did not err in finding that Dr. Naeye did not explicitly state that claimant's focal emphysema is not significantly related to his coal mine employment. We thus reject employer's contentions.

Employer further asserts that the case must be remanded as the administrative law judge erroneously combined the issue of the existence of pneumoconiosis with the disability causation issue. Employer also argues that the administrative law judge mischaracterized the standard under which claimant must establish that he is totally disabled due to pneumoconiosis. Employer's contentions lack merit. Employer has conceded the existence of "coal workers' pneumoconiosis" based on the biopsy evidence, Employer's Brief at 12; 20 C.F.R. §718.202(a)(2).[2] In addressing the disability causation issue under Section

[2]The administrative law judge's finding of the existence of pneumoconiosis is consistent with the recent decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). Specifically, the administrative law judge found that the existence of pneumoconiosis was not established by the x-ray evidence alone at 20 C.F.R. §718.202(a)(1) and was established at Section 718.202(a)(2). After reviewing the medical reports at 20 C.F.R. §718.202(a)(4), the administrative law judge concluded that claimant established the existence of the disease pursuant to *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993)(a claimant must establish each

718.204(b), the administrative law judge found,

> The evidence establishes that the miner's clinical CWP is too mild to *cause* his total disability. The question remains whether and to what extent it contributes to it. Secondly, it is established that the miner's disability is due in part to his advanced COPD which includes emphysema and chronic bronchitis. However, the remaining question is whether and to what extent those maladies arise from coal mine dust exposure.

Decision and Order at 41-42.

Contrary to employer's argument, these are proper inquiries for the administrative law judge to make under Section 718.204(b) as it is claimant's burden to show that his pneumoconiosis, "legal" or "clinical," is a contributing cause of his total disability. *See Robinson, supra*. In this regard, the administrative law judge compared a claimant's burden of proof under the *Robinson* standard with a claimant's burden of proof under standards applicable in other federal circuits. Decision and Order at 35, 42, 43. The administrative law judge definitively held claimant to the standard enunciated by the United States Court of Appeals for the Fourth Circuit in *Robinson, see* Decision and Order at 34-36, 42, 43, and concluded,

> Paraphrasing the Court's language in *Robinson, supra*, I find Mr. Compton would not have been disabled to the same degree and by the same time in his life if he had never been a coal miner. I find the claimant has met his burden of proof in establishing the existence of total disability due to "legal" coal workers' pneumoconiosis.

Decision and Order at 43. We thus reject employer's arguments in this regard.

Employer next contends that it was irrational for the administrative law judge to determine that Dr. Naeye's opinion supports Dr. Rasmussen's opinion and that the opinions of Drs. Gaziano and Zaldivar tend to support Dr. Rasmussen's diagnoses. The administrative law judge accorded determinative weight to Dr. Rasmussen's opinion at Section 718.204(b). The administrative law judge then found,

> I also find that Dr. Naeye's opinion, concerning long-term smoking miners

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element of entitlement by a preponderance of the evidence.)

> who have industrial bronchitis and bronchiolitis, supports Dr. Rasmussen's opinion and makes it more likely than not that Mr. Compton's lung disease is in fact aggravated by or related to his exposure to coal mine dust. While the opinions of Dr[s]. Gaziano and Zaldivar, both highly qualified in the field of pulmonary medicine, are "unreasoned" and could not be relied upon alone to establish entitlement to benefits, they tend to support Dr. Rasmussen's diagnoses and I accept them as some corroboration of same.

Decision and Order at 42-43. Employer argues that it was irrational for the administrative law judge to credit the opinions of Drs. Gaziano and Zaldivar as he previously found them to be unreasoned. Employer also argues that, contrary to the administrative law judge's indication, Dr. Naeye's opinion does not support Dr. Rasmussen's opinion. Employer also argues that the phrase "more likely than not," as used by the administrative law judge, is not the appropriate standard for establishing legal pneumoconiosis or disability causation.

The administrative law judge initially found that claimant's clinical coal workers' pneumoconiosis, established by biopsy evidence, is too mild to *cause* his disability. Decision and Order at 41-42. He then found, based on Dr. Naeye's opinion, that claimant's focal emphysema is too insignificant to have *caused* total disability. The administrative law judge found "no question" that claimant's focal emphysema is significantly related to his coal mine employment, and credited claimant's evidence establishing that claimant's chronic bronchitis arose from a combination of coal dust exposure and smoking. Decision and Order at 42. The administrative law judge further determined that it was more likely than not that claimant's centrilobular emphysema is significantly related to his coal mine dust exposure. *Id.* The administrative law judge ultimately concluded that claimant established that he is totally disabled due to "legal" coal workers' pneumoconiosis. Decision and Order at 43.

Employer correctly argues that the administrative law judge's use of speculative terms in weighing this evidence was erroneous. Moreover, as employer also correctly contends, the administrative law judge appears to credit medical opinions which he previously found to be unreasoned. Inasmuch as we, herein, find error in the administrative law judge's reliance on Dr. Rasmussen's opinion to find disability causation at Section 718.204(b), *see* discussion, *supra*, we further remand the case for the administrative law judge to reconsider the opinions of Drs. Gaziano, Zaldivar and Naeye and to redetermine their credibility.

Employer next contends that the administrative law judge erred in discrediting employer's experts. Employer argues that the administrative law judge offered a "blanket criticism" of this evidence. Employer also asserts that the administrative law judge did not give a reason for discrediting the opinions of Drs. Fino, Castle and Tuteur, and the reasons given for discrediting the opinions of Drs. Crisalli, Naeye, Bush and Kleinerman are not valid.

The record shows that the administrative law judge was not persuaded by Dr. Fino's opinion and found it outweighed by other evidence of record, including the reports of Drs. Rasmussen, Gaziano and Zaldivar who attribute claimant's total disability to a combination of coal mine dust exposure and smoking. Inasmuch as the administrative law judge's weighing of Dr. Fino's opinion was based, in part, on his crediting of Dr. Rasmussen's opinion, we further remand the case for the administrative law judge to reconsider Dr. Fino's opinion. Further, with regard to the pre-1998 opinions of Drs. Castle and Tuteur, the administrative law judge noted their findings that claimant did not have pneumoconiosis. He also noted that Dr. Castle had never examined the miner. The administrative law judge found that the biopsy and surgical evidence shows that these opinions of Drs. Castle and Tuteur were wrong at the time. Decision and Order at 39. The administrative law judge could properly accord these opinions less weight for these reasons. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000); *see also Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

With regard to Dr. Crisalli's opinion, the administrative law judge noted the physician's testimony that he could not agree that claimant's coal mine dust exposure contributed to his emphysema and that he relied primarily on the opinions of Drs. Naeye and Kleinerman for his diagnosis. Decision and Order at 40. The administrative law judge indicated, "Because I do not find the opinions of Drs. Naeye and Kleinerman sufficient to rebut Dr. Rasmussen's diagnoses, and since Dr. Crisalli relies on those two opinions for his diagnosis, I give his opinion less weight. Further, Dr. Crisalli's apparent vacillation between finding total disability and no total disability, noted above, leads me to give his opinion less weight." *Id.*

Contrary to the administrative law judge's indication, Dr. Crisalli did not vacillate but merely immediately corrected a misstatement. Specifically, Dr. Crisalli testified that claimant did not have a totally disabling respiratory impairment and then, in response to a follow-up question, retracted that statement and opined that claimant did. Employer's Exhibit 7 at 52-53. However, the administrative law judge's stated rationale for according less weight to Dr. Crisalli's opinion, namely that Dr. Crisalli's opinion was not persuasive given his reliance on the opinions of Drs. Naeye and Kleinerman, is affected by our remand of the case for reconsideration of Dr. Naeye's opinion. Accordingly, we further remand the case for reconsideration of Dr. Crisalli's opinion.

Dr. Bush opined that claimant's pneumoconiosis is "too limited in degree and extent to be a significant contributing factor to respiratory impairment." Employer's Exhibit 5. He attributed claimant's respiratory impairment to centrilobular emphysema, "typical of that resulting from heavy cigarette smoking..." *Id.* The administrative law judge properly accorded less weight to this opinion based on his finding that, "Although Dr. Bush, who did not examine the miner, appeared to be aware of the miner's smoking history, he did not

exhibit or specifically report his own personal knowledge of the same and therefore I give his opinion slightly lesser weight." *Grizzle, supra*; *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1983); Decision and Order at 41.

Dr. Kleinerman opined that claimant was not and is not totally disabled, and he attributed claimant's mild degree of obstructive and restrictive lung dysfunction to smoking. Employer's Exhibit 1. Employer challenges, as invalid, the administrative law judge's indication that since Dr. Kleinerman did not find total disability, he did not provide a cause for disability. Employer's contention has merit. Further, the administrative law judge's finding that the opinions of Drs. Naeye and Kleinerman are insufficient "to rebut" the diagnoses made by Dr. Rasmussen, Decision and Order at 40, is affected by our remand of the case. On remand, the administrative law judge must reconsider the credibility of Dr. Kleinerman's report.

Employer further acknowledges that the administrative law judge twice weighed the physicians' qualifications and argues that the administrative law judge erred in that he "never again addressed or *considered* the qualifications, and never explained how qualifications factor into his credibility determination." Employer's Brief at 23 (emphasis provided). Contrary to employer' suggestion, the administrative law judge is not compelled to accord determinative weight to the physicians' comparative qualifications. *Lane v. Union Carbide Corp.,* 105 F.3d 166, 21BLR 2-34 (4th Cir, 1997).

Based on the foregoing discussion, we vacate the administrative law judge's finding at Section 718.204(b) and remand the case for reconsideration.

Employer next correctly notes that the administrative law judge took judicial notice of two documents proffered by claimant but did not formally accept them in to evidence or indicate what weight, if any, he accorded to them. *See* Decision and Order at 3, 25, 26. Employer argues, however, that the administrative law judge's apparent error "would appear to be harmless in the Judge's current decision. However, if the claim is to be remanded, the Judge's decision to take judicial notice of the two documents cannot be allowed to stand." Employer's Brief at 24-25. Employer argues that these documents do not constitute material facts of which an administrative law judge could properly take judicial notice. In light of our remand of the case at Section 718.204(b), we instruct the administrative law judge to indicate whether or not these documents are properly admitted into the record as evidence, and, if so, what weight, if any, he accords to them.

Finally, employer challenges the administrative law judge's finding regarding the date from which benefits commence. The administrative law judge found,

Benefits are payable beginning with the month of the onset of total

> disability due to pneumoconiosis. 20 C.F.R. §725.503. Physicians, i.e., Drs. Rasmussen, Fino, Sobieski, and Tuteur had found Mr. Compton totally disabled as early as July 1990 albeit from different causes. He had a "qualifying" resting PFS as early as September 1987. However, the resting and exercise PFS did not begin to become uniformly "qualifying" until August 1991. It is established that Mr. Compton became totally disabled due to CWP between 1990 and 1991. Since I am unable to fix a specific date during that period, I find he is entitled to benefits as of June 5, 1990. Thus, benefits will begin on the first day of the month in which he filed the claim. 20 C.F.R. §725.503(b).

Decision and Order at 43. Employer recites to Dr. Daniel's 1991opinion that claimant's pulmonary impairment was mild and notes Dr. Castle's agreement with Dr. Daniel's opinion. Director's Exhibit 28, Employer's Exhibit 33. Employer argues that the administrative law judge ignored this evidence.

In light of our remand of this case on its merits, we additionally vacate the administrative law judge's finding with regard to the issue of the date from which benefits commence. If claimant is found to be entitled to benefits on remand, then he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). The administrative law judge must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins, supra*.

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 consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority opinion insofar as it vacates the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §718.204(b). With regard to Dr. Rasmussen's opinion, I recognize that the administrative law judge erroneously indicated that Dr. Rasmussen examined claimant many times and conducted many objective tests over the years. Decision and Order at 37. I would not, however, remand the case for reconsideration of Dr. Rasmussen's opinion as the administrative law judge did not accord Dr. Rasmussen's opinion greater weight on this basis, but rather, provided valid reasons for crediting Dr. Rasmussen's opinion. Specifically, the administrative law judge properly credited Dr. Rasmussen's opinion because it was well-reasoned and documented because the physician substantiated his position that exposure to coal mine dust can cause disabling chronic obstructive pulmonary disease, *see* 20 C.F.R. §§718.201; 718.204(b), and because the doctor had superior credential and extensive writing experience, *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Dixon v. North Camp Coal Co.,* 8 BLR 1-344 (1985); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987).

Further, the administrative law judge's discussion of the physicians' opinions which he determined to be corroborative of Dr. Rasmussen's opinion, is entirely reasonable. He strongly qualified the limited extent to which he found that their findings corroborated Dr. Rasmussen's findings. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

For the foregoing reasons, I would affirm the administrative law judge's finding at Section 718.204(b) and I would affirm the Decision and Order awarding benefits.

REGINA C. McGRANERY
Administrative Appeals Judge