BRB No. 97-1624 BLA

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| DANNY R. REED | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| SAGO COAL COMPANY | ) | |
| | ) | DATE ISSUED: |
| and | ) | |
| | ) | |
| WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | DECISION AND ORDER |
| Party-in-Interest | | |

Appeal of the Decision and Order Awarding Benefits of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

K. Keian Weld (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Carrier appeals the Decision and Order Awarding Benefits (96-BLA-0172) of Administrative Law Judge Samuel J. Smith with respect to a claim filed by a living miner 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). After a hearing held at claimant's

request, Administrative Law Judge Jeffrey Tureck issued a Decision and Order on January 10, 1995, in which he considered the claim, filed on December 7, 1992, under the regulations set forth in 20 C.F.R. Part 718. Judge Tureck determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but failed to prove that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were denied. Judge Tureck also denied claimant's request for reconsideration in an Order issued on January 30, 1995. Claimant filed a petition for modification on June 9, 1995, and submitted new evidence. A hearing was conducted before Administrative Law Judge Samuel J. Smith (the administrative law judge) on June 13, 1996.

In his Decision and Order Awarding Benefits, the administrative law judge determined that modification of the prior denial pursuant to 20 C.F.R. §725.310 was required, inasmuch as a mistake of fact had been made in the prior denial of benefits concerning the exertional requirements of claimant's usual coal mine work. Upon consideration of the merits of the claim, the administrative law judge found that claimant established that he is totally disabled due to pneumoconiosis under Section 718.204(b) and (c). Accordingly, benefits were awarded. Carrier argues on appeal that the administrative law judge erred in finding that the prior denial of benefits contained a mistake in a determination of fact. Carrier also maintains that the administrative law judge did not properly weigh the medical evidence of record relevant to Section 718.204(b) and (c).[1] Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

With respect to Section 725.310, in conjunction with his request for modification, claimant proffered affidavits signed by two men who had worked with him at Sago Coal

[1]In its Petition for Review, carrier requested that the Board hold that the Black Lung Disability Trust Fund is liable for the payment of benefits on the ground that carrier was erroneously held responsible for the district director's failure to provide claimant with adequate x-ray evidence. Inasmuch as carrier has not briefed this issue, we decline to address it. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Company, the last employer for whom he worked at least one year as a miner. Both men indicated that although claimant was a foreman, "the work we performed necessitated his involvement in heavy lifting and very heavy labor." Director's Exhibit 46. At the hearing on his request for modification, claimant again testified that his usual coal mine job was that of a foreman and that this job required extensive crawling in low coal, walking, lifting, and carrying. Hearing Transcript (6/13/96) at 16-22. The administrative law judge credited the newly submitted evidence and claimant's hearing testimony and found that this evidence was sufficient to establish that the prior administrative law judge made a mistake of fact in determining that claimant's usual coal mine job required only moderate physical labor. Decision and Order Awarding Benefits at 8.

In reaching this conclusion, the administrative law judge noted that Judge Tureck may not have been familiar with mining in low coal. *Id.*. The administrative law judge further found that Judge Tureck did not interpret Dr. Ranavaya's medical report correctly, as Judge Tureck erroneously attributed to claimant, the doctor's statement that claimant's work required only mild to moderate exertion.[2] *Id.* at 10; Director's Exhibit 43 at 6-7; Employer's Exhibit 4. The administrative law judge concluded that based upon a review of the entire record, claimant has given consistent testimony regarding the exertional requirements of his last coal mine work. Decision and Order Awarding Benefits at 11. The administrative law judge declined to credit Dr. Ranavaya's characterization of claimant's usual coal mine employment on the ground that the doctor did not inquire into the nature of this employment in sufficient detail to render an accurate assessment. *Id.*. The administrative law judge determined, therefore, that the record as a whole established that the prior Decision and Order contained a mistake of fact with respect to the exertional requirements of claimant's job as a mine foreman. *Id.*.

Carrier asserts that the administrative law judge's finding under Section 725.310 must be reversed, as the administrative law judge improperly based his ruling upon his belief that Judge Tureck was not familiar with the mining of low coal. Carrier also contends that the administrative law judge failed to discuss factors which affect the credibility of claimant's testimony, including claimant's inconsistent statements regarding the nature of his usual coal mine work, his use of alcohol, and his smoking history.

[2]Dr. Ranavaya noted that the job description that claimant related to him suggested that claimant did mild to moderate amounts of exertional labor during his usual coal mine job. Employer's Exhibit 4. Dr. Ranavaya also stated there was medical evidence of a mild pulmonary insufficiency which is not disabling and would not preclude claimant from performing his last job as a foreman/operator. *Id.*.

Carrier further maintains that the administrative law judge erred in crediting the affidavits of claimant's co-workers in light of the fact that both men used exactly the same words in describing claimant's duties and neither mentioned that claimant worked in low coal. Finally, carrier alleges that the administrative law judge's determination that Judge Tureck mischaracterized Dr. Ranavaya's medical report is incorrect.

We affirm the administrative law judge's mistake of fact determination, as the administrative law judge's finding that claimant's usual coal mine work required more than moderate exertion is rational and supported by substantial evidence. In his role as fact-finder, the administrative law judge is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). Contrary to carrier's assertions, therefore, the administrative law judge was not required to find that claimant's descriptions of his job as a foreman were inconsistent, inasmuch as claimant's statements do not appear to vary greatly. At both hearings, claimant testified that he was required to crawl and walk five to seven miles per day, lift and carry weights, including timbers, bags of rock dust, and oil cans weighing up to fifty pounds, shovel coal, and operate machinery which frequently necessitated additional shoveling, lifting, and carrying. Hearing Transcript (8/16/94) at 18-22; Hearing Transcript (6/13/96) at 16-26.

According to Dr. Vasudevan's report, claimant told him that he was a shot fire foreman, face drill operator, and roof bolter when he worked for Sago Coal Company. Director's Exhibit 16. Dr. Rasmussen indicated in his report that claimant said that his last coal mine job was as a section foreman and that as part of his duties, he set timbers, spread rock dust for lengths of four to five hundred feet from bags weighing up to fifty pounds, shoveled coal, unloaded supplies, and walked between five and seven miles per day. Director's Exhibit 35. Dr. Ranavaya recorded in his report that claimant informed him that his last job involved running various pieces of equipment, supervising a group of men, walking five miles per day, and helping his men with their duties whenever it was needed. Employer's Exhibit 4.

This review of claimant's descriptions of his coal mine work indicates that his statements do not vary to such an extent that the administrative law judge was remiss in declining to discredit them. Thus, the omission of one or two specific duties from claimant's individual descriptions of his job does not mandate that the administrative law judge discredit the entirety of claimant's remarks concerning the nature of his usual coal mine work. *See Mabe*, *supra*; *Kuchwara*, *supra*. Similarly, although it would have been permissible for the administrative law judge to consider claimant's statements regarding alcohol and tobacco consumption when assessing the credibility of his statements regarding his job as a foreman, the administrative law judge was not required to do so. *See generally Zyskoski v. Director, OWCP*, 12 BLR 1-159 (1989).

The administrative law judge also did not abuse his discretion in crediting the affidavits signed by claimant's co-workers. Carrier is incorrect in asserting that the

administrative law judge was required to question their credibility on the grounds that each affidavit contained the same language nor was he required to treat the absence of a specific reference to mining in low coal as evidence that claimant did not actually engage in such work when he was employed by Sago Coal Company. *See Zyskoski*, *supra*. This is particularly true in light of the fact that employer conceded that claimant's relevant employment involved mining low coal. Hearing Transcript (6/13/96) at 14.

Carrier's allegations of error concerning the administrative law judge's treatment of Dr. Ranavaya's opinion are also without merit. The administrative law judge acted within his discretion in determining that Dr. Ranavaya's summary of claimant's duties as a mine foreman, which did not include any reference to the extent to which these duties required lifting, carrying, or other physical labor, did not provide sufficient information upon which to base an assessment of the exertional requirements of claimant's job. *See Keen v. Laurel Creek Coal Co.*, 7 BLR 1-498 (1984); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). Moreover, the administrative law judge was correct in finding that Judge Tureck mistakenly determined that claimant told Dr. Ranavaya that his job involved only mild to moderate physical exertion. Decision and Order Awarding Benefits at 12. Claimant did not characterize the level of exertion that his duties required; he merely described his duties to Dr. Ranavaya. Employer's Exhibit 4. Dr. Ranavaya's statement that claimant's description of his job "suggests that he did mild to moderate amounts of exertional labor during the course of his usual coal mining job," supports the administrative law judge's determination that, in contrast to Judge Tureck's finding, claimant did not report to Dr. Ranavaya that his work required less than heavy physical labor. Decision and Order Awarding Benefits at 12; Employer's Exhibit 4.

Finally, although the administrative law judge mentioned the possibility that Judge Tureck's assessment of the evidence regarding claimant's usual coal mine work was affected by a lack of knowledge concerning low coal, the administrative law judge did not base his finding of a mistake in fact upon this observation. Decision and Order Awarding Benefits at 8, 10, 11. Inasmuch as the administrative law judge's determination that claimant's usual coal mine job required more than moderate physical exertion is supported by substantial evidence, we affirm it. We also affirm, therefore, the administrative law judge's finding that Judge Tureck's resolution of this issue contained a mistake in a determination of fact pursuant to Section 725.310.

Regarding the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b) and (c), carrier alleges that the administrative law judge erred in relying upon the opinion in which Dr. Rasmussen stated that pneumoconiosis is a significant contributing cause of claimant's totally disabling pulmonary impairment, as Dr. Rasmussen based his conclusions upon a smoking history that is twice as long as the history claimant reported to the other physicians of record and at the hearing. In addition, carrier contends that the administrative law judge erred in discrediting Dr. Vasudevan's opinion under Section 718.204(c)(4). Carrier also contends that the administrative law judge did not properly

weigh, under Section 718.204(b), the opinions in which Drs. Ranavaya, Vasudevan, Hippensteel, and Fino stated that pneumoconiosis plays no role in any disability suffered by claimant.[3]

In rendering his findings under Section 718.204(b) and (c)(4), the administrative law judge weighed the medical opinions of Drs. Vasudevan, Rasmussen, Ranavaya, Fino, and Hippensteel. Dr. Vasudevan examined claimant on January 20, 1993, and determined that claimant is suffering from asthma, hypertension, and chronic obstructive pulmonary disease. Director's Exhibit 16. Dr. Vasudevan concluded that claimant has a mild impairment due to the chronic obstructive pulmonary disease, which was caused by cigarette smoking. *Id.*. Dr. Rasmussen examined claimant on April 25, 1994, and found that claimant is suffering from pneumoconiosis and is disabled from performing heavy or very heavy manual labor. Director's Exhibits 35, 46. Dr. Rasmussen identified smoking and coal dust exposure as the sources of claimant's disabling impairment and stated that coal dust exposure must be considered a significant contributing factor in causing claimant's disability. *Id.*. Dr. Ranavaya examined claimant on March 4, 1994, and diagnosed pneumoconiosis and a mild pulmonary deficiency, caused by coal dust exposure and cigarette smoking, which is not disabling. Employer's Exhibit 4. Dr. Fino reviewed claimant's medical records and determined that there is evidence of simple coal workers' pneumoconiosis. Employer's Exhibit 6. Dr. Fino also concluded that claimant has a moderate respiratory impairment secondary to cigarette smoking. *Id.*. Dr. Hippensteel performed an evaluation of claimant's medical records and stated that it is "not likely" that claimant has pneumoconiosis. Employer's Exhibit 1. Dr. Hippensteel further stated that even assuming that claimant has simple pneumoconiosis, his mild pulmonary impairment is not disabling and is attributable solely to cigarette smoking. *Id.*.

[3]Carrier also reiterates its argument that the administrative law judge erred in discrediting Dr. Ranavaya's report under 20 C.F.R. §718.204(c)(4). As indicated above, however, carrier's contentions in this regard are without merit. *See* pp.4-5, *supra*.

With respect to Dr. Vasudevan's opinion, the administrative law judge found incorrectly that it was entitled to little weight under Section 718.204(c)(4) on the grounds that Dr. Vasudevan did not indicate on the Department of Labor Report of Physical Examination form that he was aware of the exertional requirements of claimant's last coal mine job and did not state the extent to which the mild impairment he diagnosed prevented claimant from performing this job. Decision and Order Awarding Benefits at 16-17; Director's Exhibit 16. In light of the fact that Dr. Vasudevan did not state that claimant was capable of performing his usual coal mine employment, the omission of a precise description of the exertional requirements of claimant's coal mine work did not render his report undocumented. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991).[4] Under Section 718.204(c)(4), the administrative law judge was required to compare Dr. Vasudevan's diagnosis of a mild impairment to the administrative law judge's finding that claimant's work required heavy physical exertion in order to determine whether claimant is totally disabled. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). Therefore, we vacate the administrative law judge's finding under Section 718.204(c)(4) and remand this case to the administrative law judge for reconsideration of whether Dr. Vasudevan's opinion supports a finding of total disability.

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia and West Virginia. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Regarding the administrative law judge's treatment of Dr. Rasmussen's opinion under Section 718.204(b) and (c)(4), Dr. Rasmussen's reliance upon an alleged overstatement of claimant's cigarette use does not require an inference that the doctor's conclusion that both smoking and pneumoconiosis are contributing factors to claimant's total disability is unreasoned. *See generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *see also Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, the administrative law judge did not err in crediting Dr. Rasmussen's opinion. Concerning the administrative law judge's weighing of the report of Dr. Ranavaya under Section 718.204(b), the administrative law judge acted rationally in finding that it corroborated Dr. Rasmussen's opinion. Decision and Order Awarding Benefits at 28; Employer's Exhibit 4. Like Dr. Rasmussen, Dr. Ranavaya indicated that claimant's pulmonary impairment, which he found to be nondisabling, was caused by smoking and by occupational dust exposure. Employer's Exhibit 4. Contrary to employer's assertion, the administrative law judge did not engage in a selective analysis of Dr. Ranavaya's opinion. The administrative law judge did not discredit Dr. Ranavaya's diagnosis of a pulmonary impairment; he merely determined that the doctor's conclusion that this impairment is not disabling was based upon an inaccurate understanding of claimant's usual coal mine work. Thus, the administrative law judge was not required to discredit Dr. Ranavaya's statements regarding the source of claimant's impairment merely because he discredited the portion of Dr. Ranavaya's report regarding whether claimant is totally disabled.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

With respect to the administrative law judge's evaluation of the medical opinions of Drs. Vasudevan and Fino under Section 718.204(b), the administrative law judge provided a valid rationale for discrediting each of these opinions. With respect to Dr. Vasudevan's opinion, the administrative law judge acted within his discretion as fact-finder in determining that it was insufficient to establish that pneumoconiosis is not a contributing cause of claimant's disability, as Dr. Vasudevan did not explain his statements regarding the etiology of the chronic obstructive pulmonary disease and mild airflow obstruction that he diagnosed. Decision and Order Awarding Benefits at 27; Director's Exhibit 16; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). Moreover, we are not required to vacate the administrative law judge's finding that Dr. Vasudevan's opinion was entitled to little weight under Section 718.204(b) on the ground that Dr. Vasudevan did not diagnose pneumoconiosis. An administrative law judge may assign less weight to a medical opinion where the administrative law judge finds that its

[5]Dr. Ranavaya opined that claimant's mild pulmonary insufficiency would not preclude claimant from performing his last coal mine job as foreman/equipment operator or a job requiring similar effort. Employer's Exhibit 4. Dr. Ranavaya also stated that claimant's mild pulmonary insufficiency was due to his coal dust exposure and his smoking and that it was impossible to determine to what extent each contributed to his pulmonary impairment. *Id.*.

underlying premise, that the miner does not suffer from pneumoconiosis, is inaccurate. Decision and Order Awarding Benefits at 27; Director's Exhibit 16; *see Dehue Coal Company v. Ballard*, 65 F.3d 1189, 19 BLR 2-306 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co. [Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

In the present case, carrier did not seek to modify Judge Tureck's finding that claimant suffered from pneumoconiosis nor did carrier challenge the administrative law judge's determination that the issue of whether claimant has pneumoconiosis was not before him. Decision and Order Awarding Benefits at 3, n.2, 13, 27. Carrier's only allegation of error concerning the administrative law judge's finding is that Dr. Vasudevan must have been aware that the x-ray taken during his examination of claimant was interpreted as positive for pneumoconiosis because he referred to the reading in his summary of the objective testing. This contention is without merit. The administrative law judge was not required to reach the conclusion urged by carrier, as Dr. Vasudevan did not include pneumoconiosis in the section of the Department of Labor Report of Physical Examination Form asking him to set forth his cardiopulmonary diagnoses. Director's Exhibit 16; *see Peskie*, *supra*; *Lucostic*, *supra*.

Regarding the opinion of Dr. Fino, the administrative law judge acted within his discretion in finding that Dr. Fino's attribution of claimant's respiratory impairment solely to cigarette smoking was based upon the erroneous assumption that pneumoconiosis cannot cause chronic obstructive pulmonary disease. Decision and Order Awarding Benefits at 28-29; Employer's Exhibit 6; *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Although Dr. Fino did not explicitly refer to this assumption, his attempt to refute the articles cited by Dr. Rasmussen in support of his diagnosis of a disabling obstructive impairment caused, in part, by coal dust exposure, suggests that it was Dr. Fino's belief, at the time that he reviewed the medical evidence of record in this case, that the inhalation of coal dust could not cause a significant obstructive impairment. The administrative law judge did not err, therefore, in declining to credit Dr. Fino's opinion under Section 718.204(b). *See Warth*, *supra*; *Stiltner*, *supra*.

With respect to Dr. Hippensteel's opinion, however, the administrative law judge's determination that Dr. Hippensteel relied upon the assumption prohibited by the United States Court of Appeals for the Fourth Circuit in *Warth* and *Stiltner* is not correct. Decision and Order Awarding Benefits at 28. The court indicated in *Stiltner* that when a physician states that it would be likely to see a restrictive component if the miner's impairment was related to coal dust exposure, rather than stating that a chronic obstructive pulmonary disease can never result from dust exposure in coal mine employment, his opinion may be credited by the administrative law judge. In the present case, Dr. Hippensteel indicated in his first report that coal workers' pneumoconiosis "causes fixed impairment that may affect diffusion and gas exchange as well as cause some restrictive and minor obstructive impairment." Employer's Exhibit 1. Dr.

Hippensteel further explained that his attribution of claimant's obstructive impairment solely to cigarette smoking was based upon the objective findings demonstrating that claimant is suffering from partially reversible obstructive changes without restriction. *Id.*. In his second report, Dr. Hippensteel stated that "[c]oal workers' pneumoconiosis[,] even if it causes obstructive disease[,] is expected to cause restriction." Employer's Exhibit 2. He also reiterated his conclusion that claimant's partially reversible lung disease is consistent with obstructive disease associated with cigarette smoking. *Id.*. Thus, Dr. Hippensteel's opinion is very similar to the opinion which the *Stiltner* court found acceptable.

In evaluating Dr. Hippensteel's diagnoses under the relevant Fourth Circuit case law, the administrative law judge did not seem to recognize the fact that *Stiltner* contained a more precise explanation of the central holding in *Warth* and that under the holding in *Warth*, he could credit Dr. Hippensteel's opinion. In addition, the administrative law judge did not accurately characterize Dr. Hippensteel's reports when he stated that the doctor did not "pause to consider" that claimant's obstructive disease could have been caused by coal dust exposure. Decision and Order Awarding Benefits at 28. Inasmuch as the administrative law judge's crediting of Dr. Hippensteel's report could alter his ultimate finding under Section 718.204(b), we must vacate the administrative law judge's determination under Section 718.204(b) and remand this case to the administrative law judge so that he can reconsider the opinion of Dr. Hippensteel in determining whether pneumoconiosis is at least a contributing cause of claimant's total disability. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *see also Tackett*, *supra*.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge