BRB No. 04-0529 BLA

ARTHUR O. HELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 03/10/2005
	)	
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly and Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand Awarding Benefits (1997-BLA-0578) of Administrative Law Judge Richard A. Morgan (the administrative law judge) 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). Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718.[1] This case is before the Board for a second time.[2]

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[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 20 C.F.R. Parts 718, 722, 725 and 726

Initially, claimant filed this duplicate claim on March 14, 1996. Director's Exhibit 1. After noting that the parties agreed that claimant established thirty-two years of coal mine employment, and that a material change in conditions was established based on new evidence showing a totally disabling respiratory impairment, the administrative law judge found that the existence of pneumoconiosis arising out of coal mine employment was established and that claimant's total respiratory disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. Decision and Order Awarding Benefits February 24, 1998. On appeal, the Board affirmed the award of benefits. *Held v. Consolidation Coal Co.*, BRB No. 98-0876 BLA (Sept. 28, 1999) (unpub.).

Following employer's appeal, the United States Court of Appeals for the Fourth Circuit vacated the administrative law judge's findings of pneumoconiosis and therefore vacated the award of benefits and remanded the case for reconsideration in light of its holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), requiring the administrative law judge to weigh together all relevant evidence before finding the existence of pneumoconiosis established.[3] The Fourth Circuit also held that the administrative law judge erred in according undue weight to the medical report of Dr. Tsai, based on his status as claimant's treating physician. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002).

In his Decision and Order on Remand, issued on March 3, 2004, the administrative law judge, weighing the x-ray and medical opinion evidence together, found that it established the existence of coal workers' pneumoconiosis and that the opinion of Dr. Tsai was entitled to greater weight, not because of his status as the miner's "treating physician" but, because of his extensive familiarity with claimant's condition given his long and consistent treatment of claimant's pulmonary condition. Accordingly, benefits were awarded.

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his first claim for benefits on March 18, 1982. That claim was denied on August 26, 1986, by Administrative Law Judge Gerald M. Tierney due to claimant's failure to establish any required element of entitlement. Director's Exhibit 32. Claimant took no further action on that claim.

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

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis and disability causation established. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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 rational, supported by substantial evidence, and in accordance with applicable law. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first contends that the administrative law judge erred in making a separate finding regarding the x-ray evidence at Section 718.202(a)(1) when the Fourth Circuit instructed the administrative law judge to consider the x-ray evidence in conjunction with the medical opinion evidence pursuant to *Compton*. Moreover, employer contends that the administrative law judge erred in finding that the x-ray evidence did not establish either the pneumoconiosis or absence of pneumoconiosis on remand, when he had found the same x-ray evidence to be negative for the existence of pneumoconiosis in his prior decision and the vast majority of the x-rays were read negative for the existence of pneumoconiosis, as well as the x-rays read by better qualified physicians.

In remanding the case for the administrative law judge to weigh the x-ray evidence and medical opinion evidence together before determining whether it established the existence of pneumoconiosis, the Fourth Circuit, while noting that "there was not a perfect consensus as to the x-ray evidence, noted the vast majority of readers over time had found the x-ray results to be negative[,] and "those physicians who gave negative readings had, as a group, far more impressive credentials than those who rendered positive readings." *Held*, 314 F.3d at 187, 22 BLR at 2-570. The Fourth Circuit concluded that "[i]f the administrative law judge had properly balanced the x-ray evidence against the medical opinion evidence, which was itself mixed, its conclusion may well have been different." *Held*, 314 F.3d at 187, 22 BLR at 2-570.

In light of the Fourth Circuit's remand instructions, the administrative law judge must consider the x-ray evidence. Further, because, as the Fourth Circuit stated, both the x-ray and medical opinion evidence is conflicting regarding the existence of pneumoconiosis, the administrative law judge must fully consider the x-ray evidence, resolve the conflicts in the x-ray evidence, and explain his basis for resolving those conflicts. 20 C.F.R. §718.202(a)(1); *Held*; Administrative Procedure Act, 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).

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis without providing any explanation of the weight he accorded various medical reports or discussing how he resolved the conflicts in those reports. We agree.

After listing the findings of various physicians and their qualifications, Decision and Order on Remand at 6-7, the administrative law judge summarily concluded that "[w]hen balancing the [x]-ray evidence against the medical opinion evidence, I again find that a preponderance of all the evidence does establish the existence of coal workers' pneumoconiosis and total disability caused by pneumoconiosis." Decision and Order on Remand at 8. The administrative law judge's summary conclusion, however, fails to discuss why he credited the opinions of the physicians diagnosing the existence of pneumoconiosis and fails to discuss how he resolved the conflict between the medical opinions of Drs. Jaworski, Garson, Connelly and Cho, diagnosing the existence of coal workers' pneumoconiosis, and the opinions of Drs. Fino, Renn, Kress and Anderson, who did not. Employer's Exhibits 3, 13, 14, 16; Claimant's Exhibits 2, 3, 5; Director's Exhibits 16, 28, 32. Because the administrative law judge has failed to do this, his finding of pneumoconiosis cannot be affirmed. 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); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, the administrative law judge's finding of pneumoconiosis is vacated and the case is remanded for reconsideration.

Employer also contends that the administrative law judge disregarded the remand instructions of the Fourth Circuit when he again accorded determinative weight to the opinion Dr. Tsai based on his status as claimant's treating physician. Employer's contention has merit.

On appeal, the Fourth Circuit held that the administrative law judge's treatment of Dr. Tsai's opinion was inconsistent with its law when he accorded determinative weight to it solely due to Dr. Tsai's status as claimant's treating physician, citing *Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (an administrative law judge may not discredit a

physician's opinion solely because the physician did not examine claimant). *Held*, 314 F.3d at 187-188, 22 BLR at 2-571; *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993)("[n]either this circuit nor the Benefits Review Board has ever fashioned either a requirement or presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians.").

The administrative law judge, in this case however, has provided essentially the same rationale for crediting Dr. Tsai's opinion as that previously vacated by the Fourth Circuit, *i.e.*, the administrative law judge stated that he credited Dr. Tsai's opinion, although he did not have the best qualifications, because: his opinion was worthy of "special consideration" as a treating physician; his opinion was based on the "ten annual full pulmonary evaluations he conducted," and his opinion based on his "ten years of meeting with the claimant and evaluating his pulmonary condition provides comprehensive insight into the Claimant's breathing difficulties." Decision and Order on Remand at 8; Employer's Exhibit 5; Claimant's Exhibit 1; Director's Exhibit 29. The administrative law judge has failed, therefore, to follow the remand instructions of the Fourth Circuit regarding the weighing of Dr. Tsai's opinion, and this case must be remanded for him to comply with those instructions. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-129 (4th Cir. 1993).

Employer further challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis at Section 718.204(c),[4] contending that the administrative law judge erred by failing to provide a rationale for his finding. Employer's contention has merit. The Decision and Order on Remand contains no findings regarding the weight accorded to the medical reports relevant to the issue of causation, but summarily finds that the "preponderance of all the evidence" establishes this element. Decision and Order on Remand at 8. As the administrative law judge has failed to state the basis of his finding regarding this issue, we vacate the administrative law judge's causation determination and remand the case for reconsideration of this issue. *Sparks*, 213 F.3d 186, 22 BLR 2-251; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Wojtowicz*, 12 BLR 1-162. Moreover, the administrative law judge's failure to sufficiently discuss the medical opinion evidence as to the existence of pneumoconiosis at Section 718.202 and his failure to follow the Fourth Circuit's remand instructions in considering the opinion of Dr. Tsai necessarily affects his consideration of disability causation. On remand, the administrative law judge must consider whether disability causation is established pursuant to Section 718.204(c)(1), *i.e.*, whether pneumoconiosis, as defined by the Act, is

[4] The provisions pertaining to causation, previously set out at 20 C.F.R. §718.204(b) (2000), are now found at 20 C.F.R. §718.204(c).

a substantially contributing cause of claimant's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003).

Finally, employer further requests that this case be assigned to another administrative law judge on remand for adjudication due to Judge Morgan's failure to comply with the Fourth Circuit's remand instructions and Fourth Circuit law. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-23 (1999)(employer's request that the case be reassigned to another administrative law judge on remand was denied when record did not support employer's allegations of intransigence and bias on part of administrative law judge). *Millburn*, 138 F.3d 524, 21 BLR 2-323 (Fourth Circuit directed the Board to remand to a new administrative law judge; where same administrative law judge had evaluated the evidence three times); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992) (case remanded to a new administrative law judge where employer clearly showed that the administrative law judge was biased against employer). Employer's request for reassignment to another administrative law judge is, therefore, denied.

Accordingly, the Decision and Order On Remand Awarding Benefits of the administrative law judge is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge