BRB No. 00-0875 BLA

BERKLEY CONNER Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-1090) of

Administrative Law Judge James W. Kerr, Jr. awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] The instant case is before the Board for the third time. In the initial Decision and Order, the administrative law judge credited claimant with twenty-four years of coal mine employment and found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000).[2] The administrative law judge, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, the administrative law judge denied benefits. By Decision and Order dated May 27, 1998, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) (2000) and 718.204(c)(1) and (c)(3) (2000) as unchallenged on appeal. *Conner v. Eastern Associated Coal* Corp., BRB No. 97-1543 BLA (May 27, 1998) (unpublished). The Board also affirmed the administrative law judge's finding that the arterial blood gas study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) (2000). *Id.* The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and 718.204(c)(4) (2000) and remanded the case for further consideration.

On remand, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b)(2000). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c)(4) (2000) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. The administrative law judge subsequently denied employer's motion for reconsideration. By Decision and Order dated January 19, 2000, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and 718.204(c)(4) (2000) and remanded the case for further consideration.[3] *Conner v. Eastern Associated Coal Corp.*,

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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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000).

[3]The Board also affirmed the administrative law judge's finding that claimant's usual

BRB No. 99-0429 BLA (Jan. 19, 2000) (unpublished).

On remand, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge also found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). The administrative law judge further found that the evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and 718.204(b) and (c) (2000). Claimant responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

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coal mine employment was that of a supply man. *Conner v. Eastern Associated Coal Corp.*, BRB No. 99-0429 BLA (Jan. 19, 2000) (unpublished).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which employer and the Director have responded.[4] Based on the briefs submitted by employer and the Director,[5] and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

[5]Employer and the Director, Office of Workers' Compensation Programs, assert that the amended regulations do not affect the outcome of this case.

Employer contends that the administrative law judge committed numerous errors in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis. Employer initially contends that the administrative law judge erred in resolving the conflict in the medical evidence solely on the basis of the number of physicians supporting the respective parties. We agree. In the instant case, the administrative law judge concluded that claimant had pneumoconiosis solely because more doctors opined that claimant had pneumoconiosis (Drs. Rasmussen and Tuteur) than opined that he did not (Dr. Zaldivar). Decision and Order on Remand at 6 [6]; Director's Exhibit 12; Claimant's Exhibit 4; Employer's Exhibits 1, 3. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that resolving a conflict in the medical opinion evidence on such a basis is error. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998). We also agree with employer that the administrative law judge failed to adequately address whether Dr. Rasmussen's diagnosis of

[6] Unless otherwise noted, all references to the administrative law judge's "Decision and Order on Remand" refer to the administrative law judge's 2000 Decision and Order on Remand.

pneumoconiosis was sufficiently reasoned.[7] *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

To the extent that Dr. Rasmussen's opinion is merely his restatement of an x-ray opinion, it is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

Dr. Rasmussen subsequently reviewed the medical evidence of record. In a report dated September 10, 1996, Dr. Rasmussen noted that because disagreement among B readers in the interpretation of x-rays is a very common occurrence, the x-ray is "a poor tool for determining the presence or absence of pneumoconiosis." Claimant's Exhibit 4. Dr. Rasmussen opined that "the pattern of [claimant's] impairment clearly indicate[d] the presence of an interstitial type lung disease of which coalworkers' pneumoconiosis is an example." *Id.* Dr. Rasmussen reiterated that claimant suffered from pneumoconiosis. *Id.*

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[7]In a report dated September 18, 1995, Dr. Rasmussen diagnosed coal workers' pneumoconiosis based upon claimant's twenty-five years of coal mine employment and Dr. Patel's positive interpretation of claimant's September 18, 1995 x-ray. Director's Exhibits 12, 17, 18. Dr. Rasmussen also diagnosed chronic bronchitis. Director's Exhibit 12. Dr. Rasmussen attributed claimant's coal workers' pneumoconiosis to his coal mine dust exposure. *Id.* Dr. Rasmussen attributed claimant's chronic bronchitis to his coal mine dust exposure and cigarette smoking. *Id.*

Employer also argues that the administrative law judge erred in finding that Dr. Tuteur's opinion was supportive of a finding of pneumoconiosis. The administrative law judge erred in not addressing whether Dr. Tuteur's diagnosis of "likely" coal workers' pneumoconiosis and his diagnosis of "possible" clinically-significant, physiologically significant, and/or radiographically-significant coal workers' pneumoconiosis were "equivocal."[8] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v.*

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[8]While Dr. Tuteur opined that it was "likely" that claimant suffered from "a mild simple coal workers' pneumoconiosis which is just radiographically visible," Employer's Exhibit 1, Dr. Tuteur made additional comments regarding claimant's x-rays. For example, Dr. Tuteur noted that rib fractures were seen on claimant's x-rays. Dr. Tuteur noted that at the time of the rib fractures, a pneumothorax occurred and was treated with chest tube drainage. *Id.* Dr. Tuteur explained that this was not infrequently "associated with a pleural fibrotic process which may mimic the radiographic changes of coal workers' pneumoconiosis." *Id.* Dr. Tuteur also noted that a CT scan of the thorax would evaluate the process in a much more rigorous and robust manner than x-rays. *Id.* Dr. Tuteur ultimately concluded that, based on the totality of all the available medical data, it was "possible" that claimant suffered from "clinically-significant, physiologically significant, and/or radiographically-significant coal workers' pneumoconiosis." *Id.* Dr. Tuteur, however, cautioned that the data were "insufficiently robust to confirm this possibility with reasonable medical certainty." *Id.* Dr. Tuteur explained, *inter alia*, that a high resolution CT scan was needed to more carefully assess the presence or absence of interstitial parenchymal abnormalities and to differentiate those from the potential pleural abnormalities that occurred

Director, OWCP, 11 BLR 1-16 (1987); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

Employer also argues that the administrative law judge erred in his consideration of Dr. Zaldivar's opinion. Employer contends that the administrative law judge erred in presuming Dr. Zaldivar to be biased. The administrative law judge noted that Dr. Zaldivar was "well-known to be extremely conservative in diagnosing pneumoconiosis." Decision and Order on Remand at 6. Unless a physician is properly held to be biased, based upon evidence in the record, an administrative law judge may not accord less weight to his opinion on this basis. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Inasmuch as there is no evidence in the record to support the administrative law judge's finding that Dr. Zaldivar has a "conservative" approach to diagnosing the existence of pneumoconiosis, the administrative law judge erred to the extent that he discredited Dr. Zaldivar's opinion on this basis.

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as a consequence of rib fractures, hematomas, pneumothoraces, and their treatment. *Id.*

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and remand the case to the administrative law judge for further consideration.[9]

Subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease.[10] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Consequently, should the administrative law judge, on remand, find the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh it together with all of the other relevant evidence to determine whether claimant suffers from pneumoconiosis.

Employer also contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000).[11] In his consideration of whether the medical opinion

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[9]The Fourth Circuit has held that an administrative law judge should not mechanically credit, to the exclusion of all other evidence, the opinion of an examining or treating physician solely because the doctor personally examined the claimant. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998). The Fourth Circuit has held that "experts' respective qualifications are important indicators of the reliability of their opinions." *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *accord Akers*, 131 F.3d at 441, 21 BLR at 2-275. While Drs. Tuteur and Zaldivar are Board-certified in Internal Medicine and Pulmonary Disease, Employer's Exhibits 1, 3, Dr. Rasmussen is Board-certified in only Internal Medicine. *See* 1997 Decision and Order at 9 n.10.

[10]The Fourth Circuit has also rejected the idea that Section 718.202(a) only requires that all evidence relevant to a determination of clinical pneumoconiosis be considered together and that all evidence relevant to a determination of legal pneumoconiosis be considered together. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

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

evidence was sufficient to establish total disability, the administrative law judge stated:

> Dr. Rasmussen found that Claimant is totally disabled from resuming his former coal mine employment of supply motorman which requires the loading and unloading of heavy mine equipment. Dr. Rasmussen noted that, as a supply motorman, Claimant was required to load and unload supplies including rock dust, headers, roof bundles, timbers, and other heavy materials. DX-12 p. 6. Dr. Tuteur opined that "the presence or absence of disability cannot be assessed." Thus, Dr. Tuteur's equivocal medical opinion does not constitute substantial evidence to support a finding. Dr. Zaldivar stated that Claimant is capable of performing his usual coal mining work. EX-1 p.3. Thus, this Court finds that Claimant is totally disabled because Dr. Rasmussen, a physician exercising reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques, concluded that Claimant's pulmonary condition prevents him from engaging in his former coal mine employment.

Decision and Order on Remand at 7 (case citations omitted).

Employer initially contends that the administrative law judge erred in not following the Board's remand instructions regarding Dr. Tuteur's opinion. In its most recent Decision and Order, the Board held that:

> Although Dr. Tuteur's opinion was equivocal on the issue of whether claimant was totally disabled, we agree with employer that Dr. Tuteur was not equivocal in his opinion that the data relied upon by Dr. Rasmussen is insufficient to verify that claimant is disabled with any degree of medical certainty. Contrary to our holding in our earlier decision, Dr. Tuteur's specific opinion regarding Dr. Rasmussen's total disability assessment may be considered by the administrative law judge in determining the weight to accord the medical opinion evidence.

Conner v. Eastern Associated Coal Corp., BRB No. 99-0429 BLA (Jan. 19, 2000) (unpublished), slip op. at 4.

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§718.204(c).

The administrative law judge erred in not following the Board's directive to address Dr. Tuteur's opinion regarding Dr. Rasmussen's assessment of claimant's pulmonary impairment.

Employer also contends that the administrative law judge erred in failing to provide a basis for crediting Dr. Rasmussen's opinion that claimant suffered from a totally disabling respiratory impairment over Dr. Zaldivar's contrary opinion. We agree. The administrative law judge's analysis does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000) is vacated.

If, on remand, the administrative law judge finds the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must then weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (*en banc*).

Employer also contends that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). In his consideration of whether the evidence was sufficient to establish that claimant's total disability was due to his pneumoconiosis, the administrative law judge stated that:

> Dr. Rasmussen concluded Claimant suffers from pneumoconiosis which arose from his coal mine employment and which is the major cause of his disabling respiratory insufficiency. The Court notes that Dr. Zaldivar's finding that Claimant does not have pneumoconiosis accordingly did not address the issue of the genesis of said disease. Dr. Tuteur did not directly address whether Claimant's pneumoconiosis arose from his coal mine employment. Based on Dr. Rasmussen's opinion, this Court finds that Claimant has established that his pneumoconiosis was a "contributing cause" to his total disability."

Decision and Order on Remand at 7.

We agree with employer that Dr. Tuteur's failure to address whether claimant's pneumoconiosis arose out of his coal mine employment is not relevant to the issue of the causation of claimant's total disability. Moreover, the administrative law judge, in his consideration of whether the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis, erred in not addressing Dr. Tuteur's comments regarding Dr. Rasmussen's findings.[12] We, therefore, vacate the administrative law judge's finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis. Should the administrative law judge, on remand, find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b), he must reconsider whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[13] Employer finally requests that the

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[12]Dr. Tuteur opined that claimant's pulmonary function studies revealed a "mild, apparently combined, obstructive and unconfirmed restrictive ventilatory defect." Employer's Exhibit 1. Dr. Tuteur noted that the obstructive component was consistent with the effects of tobacco smoke. *Id.* Dr. Tuteur noted that if a restrictive defect and an impairment of gas exchange were confirmed, "one would have findings indicative of physiologically-significant coal workers' pneumoconiosis of a magnitude insufficient to limit exercise tolerance." *Id.* Dr. Tuteur, however, questioned Dr. Rasmussen's finding of a restrictive defect. Dr. Tuteur stated that:

> It should be noted that Dr. Rasmussen repeatedly identifies a "restrictive" abnormality. First, this is unconfirmed, for such a diagnosis requires a reduced lung capacity. The so-called alveolar volume measurement performed in conjunction with a diffusing capacity is not considered confirmation. Second, Dr. Rasmussen's exercise tolerance study is not only internally inconsistent (normal VO2 max associated decline in arterial oxygen tension), but also is internally inconsistent with the exercise tolerance history that he elicited. Finally, radiographic interpretation in the face of the history of chest trauma is best confirmed by CT scan of the thorax.

Employer's Exhibit 1.

[13]Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment.

case be remanded to a different administrative law judge. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

20 C.F.R. §718.204(c)(1) is not among the regulations challenged in a lawsuit pending before the United States District Court for the District of Columbia. *See National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction).

REGINA C. McGRANERY
Administrative Appeals Judge