BRB No. 02-0279 BLA

THEODORE M. LATUSEK, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Sue Anne Howard, Wheeling, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand-Awarding Benefits (1995-BLA-2096) of Administrative Law Judge Daniel L. Leland rendered 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] This case is before the Board for the third time.

Initially, the administrative law judge found that employer stipulated that claimant has twenty-four years of coal mine employment, pneumoconiosis arising out of coal mine employment, and a totally disabling respiratory or pulmonary impairment. The administrative law judge further found that claimant's totally disabling idiopathic pulmonary fibrosis (IPF) arose out of his coal mine employment. In so finding, the administrative law judge credited the opinions of Drs. Jennings and Rose, in part because they cited three research articles in support of their opinions linking claimant's IPF to coal mine employment. Consequently, the administrative law judge found that claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board affirmed both the administrative law judge's finding that claimant established total disability due to pneumoconiosis, and the award of benefits. *Latusek v. Consolidation Coal Co*., BRB No. 97-1454 BLA (Jul. 17, 1998)(unpub.). Subsequently, employer appealed to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises. A majority of the Fourth Circuit court held that the administrative law judge failed to consider that employer's medical experts criticized the research articles cited by Drs. Jennings and Rose, and failed to explain why the opinions of employer's experts were discredited. *Consolidation Coal Co. v. Latusek*, No. 98-2336, 1999 WL 592051 (4th Cir., Aug. 6, 1999). Consequently, the court vacated the administrative law judge's Decision and Order and remanded the case for further consideration.

On remand, the administrative law judge again found that claimant's total disability was due to pneumoconiosis. The administrative law judge found that the opinions of Drs. Jennings and Rose were well-reasoned because they relied on objective medical evidence, not merely the research articles, to link claimant's IPF to coal dust exposure. The administrative law judge additionally found that Dr. Jennings' and Dr. Rose's opinions merited greater weight because they had superior expertise regarding IPF. The administrative law judge discounted the opinions by two of employer's experts, Drs. Spagnolo and Naeye, because the physicians did not adequately address the link between IPF and coal dust exposure. The administrative law judge discounted the opinions of Drs. Kleinerman, Fino, Morgan, and Renn as unreasoned. Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board held that the administrative law judge properly discounted the opinions of Drs. Spagnolo and Naeye, but did not give a valid reason for finding the opinions by employer's remaining experts to be unreasoned. *Latusek v. Consolidation Coal Co*., BRB No. 00-0996 BLA at 4 (Sep. 17, 2001)(unpub.). The Board additionally held that the administrative law judge did not explain why the reasons provided by employer's experts for

ruling out coal dust exposure as a cause of claimant's IPF were less persuasive than those offered by claimant's physicians. [2001] *Latusek*, slip op. at 5. Finally, the Board held that the administrative law judge did not address the expert criticisms of the three research articles relied upon by Drs. Jennings and Rose to link IPF with coal dust exposure. *Id*. Accordingly, the Board vacated the administrative law judge's Decision and Order in part and instructed him to determine whether the criticisms of the research articles were credible and, if so, their impact on the reliability of the opinions of Drs. Jennings and Rose. *Id*.

On remand, the administrative law judge found Drs. Jennings and Rose better qualified than employer's experts to address the cause of claimant's IPF. The administrative law judge further found their opinions well-documented and reasoned, and better supported by the objective medical factors relied upon by Drs. Jennings and Rose to link claimant's totally disabling IPF to his coal mine employment. These factors included the atypical onset of IPF in claimant at an early age, claimant's heavy exposure to dust containing silica and silicates in his work as a long wall coordinator, histological evidence of coal workers' pneumoconiosis with silica and silicates deposition, and the presence of emphysema in a non-smoker. The administrative law judge additionally found that even if the three research articles cited by Drs. Jennings and Rose were flawed, their opinions were still credible because Drs. Jennings and Rose based their etiology conclusions primarily on the objective medical evidence and their own specialized expertise in IPF. The administrative law judge therefore accorded greater weight to the opinions of Drs. Jennings and Rose and less weight to the contrary opinions of Drs. Kleinerman, Fino, Morgan, and Renn. Accordingly, the administrative law judge found that claimant's total disability is due to pneumoconiosis, and awarded benefits.

On appeal, employer contends that the administrative law judge made several errors in his analysis of the medical opinion evidence. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this case.

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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-

112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer argues that the administrative law judge failed to address Dr. Jennings' and Dr. Rose's reliance on flawed research studies to link claimant's IPF to coal dust exposure. Contrary to employer's contention, the administrative law judge found that even if the three research studies were flawed, the opinions of Drs. Jennings and Rose were credible. Substantial evidence supports the administrative law judge's finding that Drs. Jennings and Rose also based their opinions regarding the etiology of claimant's IPF on claimant's unusually young age for developing IPF, his heavy dust exposure, biopsy evidence of coal workers' pneumoconiosis with silicates deposition, and the presence of emphysema in a non-smoker. Employer's Exhibit 12 at 18-19; Employer's Exhibit 15 at 28-29. Substantial evidence also supports the administrative law judge's finding that Drs. Jennings and Rose relied in part on the three research articles, but did not make them the primary basis of their opinion that claimant's IPF is related to his coal dust exposure. Employer's Exhibit 12 at 17-19; Employer's Exhibit 15 at 27. The analysis of the documentation and reasoning of the medical opinions is for the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). The Board will not reweigh the evidence or substitute its inferences for those of the administrative law judge. *Mays v. Piney Mountain Coal Co*., 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting). Because the administrative law judge acted within his discretion in finding the opinions of Drs. Jennings and Rose to be credible, we reject employer's allegation of error.

Employer contends that substantial evidence does not support the administrative law judge's decision to accord greater weight to the opinions of Drs. Jennings and Rose because he found them to be better qualified with regard to IPF than Drs. Kleinerman, Fino, Morgan, and Renn. Employer's contention lacks merit. Substantial evidence supports the administrative law judge's finding that Drs. Jennings and Rose, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, are employed by the National Jewish Center for Immunology and Respiratory Medicine (National Jewish), in Denver, Colorado, a center for the treatment of interstitial lung diseases. Employer's Exhibits 12, 15 (*curricula vitae* attached as deposition exhibits); Employer's Exhibit 15 at 7. Additionally, as the administrative law judge found, Dr. Jennings has published articles on IPF. Employer's Exhibit 15 (deposition exhibit). Finally, the record supports the administrative law judge's finding that Dr. Renn, one of employer's pulmonary experts who also treated claimant, testified that he referred claimant to National Jewish in part because of its experience in treating IPF. Director's Exhibit 33 at 14-15. Employer insists that its experts are also highly qualified and have treated patients with IPF. However, the analysis of the

physicians' comparative credentials is for the administrative law judge. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-154 (1989)(*en banc*). The administrative law judge found the qualifications of employer's experts to be "impressive," Decision and Order on Remand at 2, but nevertheless found, within his discretion, that Drs. Jennings and Rose possessed superior qualifications with respect to IPF. Because the administrative law judge factored the qualifications of the physicians into his analysis of the medical opinions and gave rational reasons for his credibility determination, we reject employer's contention.

Employer argues that the administrative law judge did not provide a reason for finding that the experts' opinions ruling out coal dust exposure as a cause of claimant's IPF were less persuasive than those of Drs. Jennings and Rose. Contrary to employer's contention, the administrative law judge explained that he found Drs. Jennings and Rose to be "more qualified in regard to IPF than Drs. Kleinerman, Fino, Morgan, and Renn," who he permissibly found had "less expertise in the field of IPF. . . ." Decision and Order on Remand at 4; *see Hicks, supra*; *Clark, supra*. The administrative law judge further explained that he found the opinions of Drs. Jennings and Rose to be better supported by the objective medical data they relied upon to link claimant's totally disabling IPF to his coal dust exposure. This finding was within the administrative law judge's discretion and is supported by substantial evidence. *See Hicks, supra*; *Akers, supra*; *Trumbo, supra*. The administrative law judge's findings that Drs. Jennings and Rose possessed superior qualifications and rendered opinions that were better supported constitute valid reasons for crediting their opinions over those of employer's experts. *See Hicks, supra*. Consequently, we reject employer's allegation of error.

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Employer again argues that the administrative law judge erred in according less weight to the opinions of Drs. Spagnolo and Naeye. We reject employer's argument for the reasons given in our prior decision. [2001] *Latusek*, slip op. at 4 n.4.

Our dissenting colleague would vacate the administrative law judge's decision because one of the reasons he provided for discounting the opinions of employer's experts she considers to be invalid. We, however, do not decide the validity of the disputed reason because we affirm the administrative law judge's determination to accord greater weight to the opinions of the IPF doctors: as better supported by the objective medical data of record and as authored by doctors with superior expertise in the relevant field, *i.e.*, IPF medicine. Accordingly, any error the administrative law judge may have made in discounting the opinions of employer's experts is harmless. The administrative law judge's finding that claimant carried his burden of persuasion

to establish that his total disability is due to pneumoconiosis is supported by substantial evidence and in accordance with law. Hence, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and therefore affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's affirmance of the administrative law judge's finding that the medical opinion evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). An administrative law judge must give valid reasons both for crediting certain medical opinions and for discrediting others. Milburn Colliery Co. v. Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). The administrative law judge in this case failed to provide a valid reason for discrediting the opinions of Drs. Kleinerman, Fino, Morgan,

and Renn. He found it "irrational that these physicians are able to draw a conclusion as to what is not the cause of claimant's IPF when they cannot even give an opinion as to the cause of this disease." Decision and Order on Remand at 3. The administrative law judge thus found that qualified experts discussing a disease that the medical profession labels "idiopathic" because its cause is unknown could not reasonably rule out a specific cause of IPF. The administrative law judge's finding is irrational, and is the same invalid reason he gave previously for discrediting the opinions of employer's experts. [2001] Latusek, slip op. at 4. The administrative law judge not only ignored that it is claimant's burden to establish that his IPF arose out of coal mine employment, he also rejected expert opinions "simply because [they] d[id] not comply with the administrative law judge's own medical conclusion." Hall v. Consolidation Coal Co., 6 BLR 1-1306, 1-1309 (1984). This was improper. Thus, I do not agree with the majority that the administrative law judge properly weighed all the evidence.

Because I conclude that the administrative law judge has not complied with the Fourth Circuit court's or the Board's instructions to provide adequate reasons for discounting significant expert medical testimony, I would vacate the administrative law judge's finding and remand this case for further consideration.

NANCY S. DOLDER, Chief
Administrative Appeals Judge