BRB No. 98-1393 BLA

JOSEPH E. ANGELILLI	)	
	)	
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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-BLA-0110) of Administrative Law Judge Daniel L. Leland 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). This case involves a duplicate claim filed on November March 10, 1997.[1] After noting that the parties stipulated that claimant established at least twenty-six

[1]Claimant first filed a claim for benefits on July 6, 1983. Director's Exhibit 27. In a Decision and Order dated April 27, 1989, Administrative Law Judge Ralph A. Romano credited claimant with thirty-three years of coal mine employment, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). *Id*. Judge Romano further found that the weight of the relevant evidence under 20 C.F.R. §718.204(c)(1)-(4) was sufficient to establish total disability. *Id*. On these bases, Judge Romano awarded benefits. *Id*. Employer appealed, and the Board reversed Judge Romano's decision awarding benefits, holding that Judge Romano erred in failing to determine whether claimant established that

years of coal mine employment, the administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 inasmuch as the parties stipulated that claimant established an element of entitlement which was adjudicated against him in his prior, 1990 claim, *i.e.*, total disability under 20 C.F.R. §718.204(c). Considering the claim on the merits, the administrative law judge then determined that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3), but that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant was entitled to the rebuttable presumption at 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of his coal mine employment, and found that rebuttal of the presumption was not established. Finally, the administrative law judge determined that claimant's total disability, to which the parties stipulated, was due to coal mine employment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's weighing of the medical opinions under Sections

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his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), and further holding that, moreover, there was no evidence of record which, even if credited, could support such a finding under Section 718.204(b). *See Angelilli v. Consolidation Coal Co.*, BRB No. 87-2274 BLA (Apr. 27, 1989)(unpublished). Claimant took no further action until filing a duplicate claim on December 19, 1990. Director's Exhibit 28. This claim was denied on May 30, 1991 by the district director, who found that the existence of pneumoconiosis arising out of coal mine employment was established, but that the new evidence did not establish total disability and total disability due to pneumoconiosis under Section 718.204(c), (b) and, therefore, did not establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Id*. Claimant took no further action in pursuit of benefits until filing the instant duplicate claim on March 10, 1997. Director's Exhibit 1.

718.202(a)(4) and 718.204(b), arguing that the administrative law judge erred in crediting Dr. Devabhaktuni's opinion and in discounting the opinions of Drs. Renn and Fino. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.[2]

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).

[2]The administrative law judge's findings that the parties stipulated to at least twenty-six years of coal mine employment and to total disability under 20 C.F.R. §718.204(c), as well as the administrative law judge's findings under 20 C.F.R. §§725.309, 718.202(a)(1)-(3) and 718.203(b), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 11-13.

In challenging the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4), employer first argues, citing the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), that the administrative law judge erred in weighing the medical opinion evidence separately rather than weighing it together with the x-ray evidence at Section 718.202(a)(1), the preponderance of which was negative. We disagree. We decline to apply the Third Circuit's decision in *Williams* in the instant case since this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has not adopted the *Williams* holding that all of the conflicting evidence under Section 718.202(a)(1)-(4) must be weighed together.[3] In order to maintain as much consistency in our decisions as possible, we will continue to hold that the methods by which claimant may establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) are alternate methods in cases arising within the Fourth Circuit. *See* 20 C.F.R. §718.202(a); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Employer further contends that the administrative law judge erred in crediting Dr. Devabhaktuni's medical opinion under Sections 718.202(a)(4) and 718.204(b). Employer also challenges the administrative law judge's stated reasons for crediting Dr. Devabhaktuni's opinion. Dr. Devabhaktuni examined claimant on January 22, 1991 and April 1, 1997, and testified at a deposition on September 3, 1997. Director's Exhibits 10, 28; Claimant's Exhibit 1. Dr. Devabhaktuni opined that claimant has chronic obstructive pulmonary disease due to an approximately thirty pack-year cigarette smoking, and also due in part to his approximately thirty-year history of coal dust exposure.[4] *Id*. Dr. Devabhaktuni concluded further that claimant has a severe obstructive impairment caused by coronary artery disease and his chronic obstructive pulmonary disease. *Id*.

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

[4]While Dr. Devabhaktuni did not diagnose clinical coal workers' pneumoconiosis, he stated in his April 1, 1997 report that the x-ray taken on that date showed opacities consistent with pneumoconiosis. Director's Exhibit 10.

Employer argues that the administrative law judge failed to consider deposition testimony from Dr. Devabhaktuni that shows that Dr. Devabhaktuni's opinion is equivocal and unreasoned. In this regard, employer contends that Dr. Devabhaktuni contradicted himself in testifying on the one hand that claimant had a severe obstructive impairment with small airways obstruction, and testifying on the other that coal dust exposure is unlikely to cause small airways disease. Employer's Brief at 15. Employer further contends that Dr. Devabhaktuni offered contradictory testimony in testifying that claimant exhibited more obstructive impairment in 1997 than he had six years earlier in 1991, but that one would not expect to see that degree of progression of obstruction associated with a coal mine dust induced lung disease without concomitant coal dust exposure.[5] *Id*. Employer also argues that Dr. Devabhaktuni's testimony, that there was nothing in the presentation of claimant's case that was not consistent with significant pulmonary abnormality due to cigarette smoking, refutes the doctor's opinion that coal dust exposure contributed to claimant's disease and impairment. While employer appears to have mischaracterized some of Dr. Devabhaktuni's actual testimony by overstating that the doctor explicitly testified that claimant has only small airways disease,[6] and that the doctor testified that it is an absolute fact that coal mine lung diseases do not progress,[7] employer's interpretation of the doctor's testimony could be found by a fact-finder to be rational. The Board is not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); however, there is merit to employer's contention that the administrative law judge erred in

[5]Claimant testified that he retired from coal mining in 1984. Hearing Transcript at 14.

[6]The testimony to which employer refers was given in response to a question about the significance of the ratio of the FEV-1 and FEF 25-75 values obtained in the pulmonary function study Dr. Devabhaktuni administered in April 1997 with respect to trying to ascertain the type of impairment claimant had. Claimant's Exhibit 1 at 19-20. Dr. Devabhaktuni stated that both of the values indicated a severe obstructive impairment, and that the FEF 25-75 value was somewhat suggestive of small airways obstruction. *Id*. at 19. Dr. Devabhaktuni further indicated, however, that when there is a severe impairment as such, he "tend[s] to just say it's a severe obstructive impairment rather than try[ing] to say whether it is large airways or small airways." *Id.* at 19-20. In answering the question of whether coal dust exposure causes small airways disease, Dr. Devabhaktuni replied, "[u]nlikely." *Id*. at 20.

[7]Dr. Devabhaktuni was asked whether the type of progression of obstruction evinced by a comparison of claimant's pulmonary function studies in 1991 and 1997 could be expected to be associated with a coal mine dust induced lung disease absent exposure, to which the doctor replied "[n]ot really -- coal workers' pneumoconiosis can worsen with time. But, this is an obstructive impairment." Claimant's Exhibit 1 at 25. Dr. Devabhaktuni was asked again, "[d]o you see this kind of progression or obstruction of lung disease that could be associated with coal dust exposure?" *Id*. at 26. He replied, "[m]ay not be the same degree...because the lung capacities decrease with every year of age. So that's a natural decrease due to aging." *Id*.

failing to consider Dr. Devabhaktuni's testimony and to determine whether Dr. Devabhaktuni's opinion was well-reasoned in view of the entirety of his opinion. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal* Co., 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Moreover, we agree with employer that the administrative law judge's finding that Dr. Devabhaktuni's opinion is entitled to greater weight than the opinions of Drs. Renn and Fino under Sections 718.202(a)(4) and 718.204(b) is not supported by the reasons he provided. Dr. Renn examined claimant on September 4, 1984 and August 18, 1997, reviewed the medical reports of record, and testified at a deposition on March 19, 1998. Director's Exhibit 22; Employer's Exhibit 4. Dr. Fino reviewed the medical reports of record, and was deposed on March 23, 1998. Employer's Exhibits 2, 5. Drs. Renn and Fino both opined that claimant does not have clinical pneumoconiosis and that claimant's chronic obstructive lung disease is due to his history of cigarette smoking,[8] and not to his nearly thirty-year history of coal dust exposure. Director's Exhibit 22; Employer's Exhibits 2, 4, 5. Drs. Renn and Fino also opined that claimant has a totally disabling pulmonary impairment, but found that this impairment is related to cigarette smoking, and is in not in any way related to coal dust exposure. *Id*.

The administrative law judge credited Dr. Devabhaktuni's opinion under Section 718.202(a)(4) on the bases that Dr. Devabhaktuni is Board-certified in pulmonary diseases and examined claimant twice. Decision and Order at 13; Director's Exhibits 10, 28; Claimant's Exhibit 1. These two factors do not provide a reasonable basis for distinguishing between the opinions of Drs. Devabhaktuni and Renn since, like Dr. Devabhaktuni, Dr. Renn is Board-certified in pulmonary diseases and also examined claimant on two occasions. Director's Exhibits 22, 27; Employer's Exhibit 4. The administrative law judge also credited Dr. Devabhaktuni's opinion upon finding that the doctor's two examinations were "among the most recent...of record and give a more complete picture of claimant's current health." Decision and Order at 13. Contrary to employer's contention, a fact-finder may credit a more recent opinion where the opinion indicates that a miner's condition has worsened, inasmuch as such an opinion is consistent with the principle that pneumoconiosis is a progressive disease. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *see generally Adkins v. Director, OWCP*, 958 F.3d 49, 16 BLR 2-61 (4th Cir. 1992). As employer contends, however, the administrative

[8]Dr. Renn noted in his August 18, 1997 report that claimant smoked one pack of cigarettes per day from 1943 until 1972, and that, subsequently, medical records of April 28, 1982 revealed that claimant was also smoking one pack per day at that time. Director's Exhibit 22. Dr. Renn also testified that the records he reviewed reflected that claimant gave varying smoking histories of between a twenty and forty pack year history. Employer's Exhibit 4 at 19. Dr. Fino noted a similar history in his February 13, 1998 consultant report and deposition. Employer's Exhibits 2, 5.

law judge failed to explain why he found that Dr. Devabhaktuni had a more complete picture of the miner's health than did Drs. Renn and Fino. Decision and Order at 13. Drs. Renn and Fino both reviewed all of the evidence of record, including the results of Dr. Devabhaktuni's examinations, whereas the record reflects that Dr. Devabhaktuni did not have the benefit of reviewing the results of Dr. Renn's examinations or the other medical evidence of record. Employer's Exhibits 2, 4, 5; Claimant's Exhibit 1.

Moreover, we agree with employer that the administrative law judge erred in rejecting Dr. Renn's opinion under Section 718.202(a)(4) as hostile to the Act because Dr. Renn stated that coal mine dust exposure cannot aggravate chronic obstructive pulmonary disease. Decision and Order at 13. As employer argues, although the administrative law judge was correct in noting that Dr. Renn indicated that coal dust exposure cannot "aggravate" chronic obstructive pulmonary disease, the administrative law judge erred in failing to consider Dr. Renn's other testimony explaining why claimant's chronic bronchitis was attributable to his history of cigarette smoking rather than coal dust exposure.[9] *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); Decision and Order at 13; Employer's Exhibit 4 at 16-18, 36-38, 40. Dr. Renn testified that claimant's 1984 and 1997 pulmonary function studies showed a disproportionate reduction of the volumes and flows of spirometry, and an increase in the total lung capacity over time, which he opined was a pattern that is consistent with tobacco smoke-induced lung disease and not with coal mine dust-induced lung disease. Employer's Exhibit 4 at 36-37. Dr. Renn also provided an explanation as to why a comparison between the diffusing capacities measured in 1984 and 1997, as well as an analysis of claimant's arterial blood gas studies administered in 1984 and 1997, likewise indicated that claimant exhibited pulmonary emphysema caused by tobacco smoking, and not coalworkers' pneumoconiosis. *Id*. at 38, 40.

Furthermore, as employer contends, the administrative law judge erred in rejecting Dr. Fino's opinion under Section 718.202(a)(4) because he incorrectly found that Dr. Fino did not explain whether claimant's asthma could be aggravated by coal dust exposure. In this regard, the administrative law judge failed to note Dr. Fino's testimony that claimant's thirty years of coal dust exposure have not contributed to or aggravated in any way claimant's asthma. Decision and Order at 12-13; Employer's Exhibit 5 at 38. There is also

[9]In *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit held that an opinion in which the physician relies upon the erroneous assumption that coal dust inhalation cannot cause an obstructive lung disorder is entitled to little, if any, weight. In *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the court held that the central holding in *Warth* does not apply when a physician states that a restrictive component would be seen if the impairment were related to coal dust exposure rather than stating that chronic obstructive pulmonary disease can never result from dust exposure in coal mine employment.

merit to employer's contention that the administrative law judge appears to have mechanically discounted Dr. Fino's opinion on grounds that Dr. Fino did not examine claimant. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Akers*, *supra*; Decision and Order at 12-13. Accordingly, we vacate the administrative law judge's findings with regard to the opinions of Drs. Devabhaktuni, Renn and Fino under Section 718.202(a)(4), and remand for the administrative law judge to reweigh these opinions thereunder.[10]

In addition, the administrative law judge erred in rejecting the opinions of Drs. Renn and Fino with regard to disability causation on the basis that Drs. Renn and Fino believed that claimant does not have pneumoconiosis. Decision and Order at 13; Employer's Exhibits 2, 4, 5. The Fourth Circuit has held that medical opinions which acknowledge the miner's respiratory or pulmonary impairment, such as those of Drs. Renn and Fino in the instant case, but nevertheless conclude that an ailment other than pneumoconiosis caused the miner's total disability, are relevant because they directly rebut the miner's evidence that pneumoconiosis contributed to disability. *See Hicks, supra*; *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). We, therefore, vacate the administrative law judge's findings with respect to the medical opinions of Drs. Devabhaktuni, Renn and Fino under Section 718.204(b), and remand the case for further consideration of these opinions thereunder, if reached.

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

[10]We affirm the administrative law judge's findings that the medical opinions of Drs. Leef, Previll, Franz and Neufeld are entitled to little weight under 20 C.F.R. §§718.202(a)(4) and 718.204(b) inasmuch as the administrative law judge's findings with respect to these opinions are unchallenged on appeal. *See Skrack , supra*; Decision and Order at 12-13; Director's Exhibit 27; Claimant's Exhibit 1.

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge