BRB No. 06-0941 BLA

W.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LESLIE RESOURCES, INCORPORATED c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
and	)	
	)	
AMERICAN ZURICH	)	
	)	DATE ISSUED: 08/29/2007
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2004-BLA-5610) of Administrative Law Judge Larry S. Merck on a claim filed on September 27, 2002 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). The administrative law judge

credited claimant with thirty-three years of coal mine employment, based on the parties' stipulation, and adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge erred in failing to accord proper weight to the medical opinion of Dr. Mandviwala, claimant's treating physician. In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief 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 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).

The evidence relevant to Section 718.202(a)(4) consists of the medical opinions of Drs. Mandviwala, Baker, Dahhan, and Rosenberg. Dr. Mandviwala began treating claimant for pulmonary disease and hypertension beginning on September 4, 2002 and has seen claimant every three or four months. Dr. Mandviwala diagnosed chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure. Director's Exhibit 25; Claimant's Exhibits 1, 4. Dr. Baker examined claimant on November 20, 2002 and diagnosed coal workers' pneumoconiosis, COPD, and hypoxemia. Dr. Baker attributed these conditions to smoking and coal dust exposure. Director's Exhibit 8. Dr. Dahhan examined claimant on February 27, 2003, and diagnosed COPD, hypertension, and hyperventilation. He opined that these conditions are not related to coal dust

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

[2] The parties do not challenge the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) or his finding that claimant proved that he is totally disabled under 20 C.F.R. §718.204(b)(2). These findings are, therefore, affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

exposure. Employer's Exhibit 7. Dr. Rosenberg reviewed claimant's medical records, and determined that claimant has COPD caused solely by cigarette smoking. Employer's Exhibits 1-4.

The administrative law judge reviewed the medical opinions and found that each was adequately reasoned and documented. Decision and Order at 13-16. The administrative law judge concluded that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) by a preponderance of the evidence, however, "because there are two well-reasoned and well-documented reports finding that [c]laimant does not have pneumoconiosis and two finding [c]laimant does." Decision and Order at 17.

Claimant asserts that the administrative law judge's finding under Section 718.202(a)(4) must be vacated, as the administrative law judge failed to apply "the treating physician presumption" set forth in 20 C.F.R. §718.104(d), when weighing the opinion of Dr. Mandviwala. Claimant's Brief at 8. Claimant further states that "[m]ore weight to Dr. Mandviwala's opinion should not be given automatically, but should be given because his opinions are well-reasoned and supported by objective testing and he meets the treating physician criteria of 20 C.F.R. §718.104(d)." *Id.* Claimant also argues that the administrative law judge should have taken into consideration the fact that Dr. Mandviwala has treated claimant for his respiratory condition every three to four months since September 2002 while, in contrast, Dr. Dahhan examined claimant only once and Dr. Rosenberg has not examined claimant. *Id.* Claimant asserts that, in light of Dr. Mandviwala's qualifications as a Board-certified pulmonologist and his status as claimant's treating physician, his opinion is entitled to controlling weight. Claimant's Brief at 9. In response, employer argues that the administrative law judge acted properly in declining to accord greater weight to Dr. Mandviwala's opinion based upon his status as a treating physician. Employer's Response Brief at 13-18.

Upon review of the arguments raised on appeal, the relevant evidence, and the administrative law judge's consideration of the evidence under Section 718.202(a)(4), we hold that claimant's allegations of error have merit, in part. Although Section 718.104 does not contain a "presumption" requiring the administrative law judge to accord greater weight to Dr. Mandviwala's opinion, the terms of Section 718.104(d) require an administrative law judge to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the regulation requires an administrative law judge to take into consideration the nature of the relationship between the miner and the treating physician, the duration of the relationship, the frequency of treatment, and the extent of the treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation also provides that the treatment relationship may constitute substantial evidence in support of an administrative law judge's decision to give that physician's opinion controlling weight in appropriate cases, but the weight

accorded must also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002)(the opinions of treating physicians get the deference they deserve based on their power to persuade).

In the present case, the administrative law judge found that Dr. Mandviwala's opinion was reasoned and documented, but he did not apply the criteria set forth in Section 718.104(d)(1)-(4) to determine whether Dr. Mandviwala's opinion is entitled to controlling weight on the issue of the existence of pneumoconiosis. As claimant maintains, a review of the record suggests that Dr. Mandviwala meets the criteria set forth in Section 718.104(d)(1)-(4), as he has treated claimant's pulmonary disease since September 2002, he has seen claimant every three or four months specifically for this purpose, and he has regularly obtained objective studies and performed physical examinations to assess claimant's pulmonary condition. Director's Exhibit 25; Claimant's Exhibits 1, 4. Because the Board cannot make findings of fact, however, we must vacate the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) and remand the case for him to reconsider the opinion of Dr. Mandviwala in light of the criteria in Section 718.104(d)(1)-(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). If the administrative law judge finds the existence of pneumoconiosis established at Section 718.202(a)(4), he must also reconsider his finding that the medical opinion evidence was insufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total disability at 20 C.F.R. §718.204(c), and determine whether Dr. Mandviwala's opinion should be accorded greater weight in light of the factors set forth at Section 718.104(d).

Accordingly, the administrative law judge's Decision and Order - Denial of 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

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge