BRB No. 98-0832 BLA

RAYMOND F. PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BISHOP COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 8/19/99
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Fourth Decision and Order Upon Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Raymond F. Phillips, Hickory, North Carolina, *pro se.*

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH, BROWN and MCGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Fourth Decision and Order Upon Remand (82-BLA-5796) of Administrative Law Judge Daniel A. Sarno, Jr. denying 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). This case is before the Board for the fifth time. In the Board's 1995 Decision and Order, *Phillips v. Bishop Coal Co.*, BRB No. 95-1066 BLA (Nov. 30, 1995)(unpub.)(McGranery, J. dissenting), we affirmed the administrative law judge's denial of benefits, holding that the administrative law judge properly found that claimant failed to establish invocation of the interim presumption found at 20 C.F.R. §727.203(a), or entitlement to benefits pursuant to 20 C.F.R. Part 410, Subpart D. In so holding, the Board affirmed the administrative law judge's weighing of medical reports at 20 C.F.R. §727.203(a)(4), holding that the administrative law judge acted

within his discretion as trier-of-fact in according determinative weight to the opinions of Drs. Abernathy, Rasmussen and Zaldivar, all of whom determined that claimant did not suffer with a totally disabling respiratory or pulmonary impairment. The Board further held that the administrative law judge acted rationally in discounting the opinion of Dr. Taylor, as his assessment of disability was a list of physical restrictions which the administrative law judge rationally found to be claimant's subjective recitation of symptoms.

Claimant filed a motion for reconsideration, which was granted, and, in *Phillips v. Bishop Coal Co.,* BRB No. 95-1066 BLA (Decision and Order on Reconsideration *En Banc*)(Dec. 8, 1997)(unpub.), the Board vacated the administrative law judge's weighing of the medical opinions and remanded for further consideration under Section 727.203(a)(4) and 20 C.F.R. Part 410, Subpart D. Specifically, the Board held, pursuant to the then-recent holding of the United States Court of Appeals for the Fourth Circuit in *Scott v. Mason Coal Co.,* 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), that the administrative law judge must explain his determination that physical limitations contained in Dr. Taylor's medical opinion were a recitation of symptoms reported by the claimant rather than a medical determination made by the physician. The Board also held that, on remand, the administrative law judge must determine whether the medical opinion by Dr. Zaldivar, which was relied up on in part by the administrative law judge, was properly placed into the evidentiary record.

On remand, the administrative law judge concluded that the physical limitations contained in Dr. Taylor's opinion were a medical determination proffered by the physician, but found the medical opinion entitled to little weight because the physician provided no explanation for his conclusions. The administrative law judge also found that Dr. Zaldivar's opinion was excluded from the record, as the report had been offered into evidence but subsequently withdrawn. The administrative law judge then considered the other relevant evidence of record, and again found that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 727.203(a)(4) or Part 410 Subpart D, relying on the medical opinions of Drs. Abernathy and Rasmussen as best reasoned and explained. Claimant currently without counsel appeals and employer responds, requesting affirmance of the decision below.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

After consideration of the administrative law judge's Fourth Decision and Order Upon Remand, the evidence of record, and the arguments made by the parties, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Initially, we note that, as instructed on remand, the administrative law judge properly considered the medical opinion of Dr. Taylor in light of the holding of the United States Court of Appeals for the Fourth Circuit in *Scott,* and concluded that Dr. Taylor's listing of physical restrictions was a medical assessment rather than the claimant's recitation of his own symptoms. The administrative law judge's finding is rational, and in accordance with the holding of the court in *Scott*, inasmuch as the administrative law judge reasonably concluded that the physical limitations contained in Dr. Taylor's report must be taken as the physician's medical opinion because there is no explicit evidence to the contrary contained in the physician's report. *See* Director's Exhibit 17; *Scott*, 60 F.3d at 1141, 19 BLR at 2-263. Furthermore, the administrative law judge acted within his discretion as trier of fact in finding Dr. Taylor's opinion to be entitled to little weight as unreasoned and unsupported by objective evidence, because the physician provided no indication that he performed any objective tests and did not explain how he reached his conclusions regarding claimant's physical limitations.[1] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*);

[1]Claimant contends that the administrative law judge erred by failing to compare the physical limitations contained in Dr. Taylor's report with the exertional requirements of his usual coal mine employment to determine whether Dr. Taylor's opinion is sufficient to establish a totally disabling respiratory or pulmonary impairment. Inasmuch as the administrative law judge found that, even if sufficient to establish total disability, Dr. Taylor's report is not entitled to sufficient weight as it is unreasoned and undocumented, we reject claimant's contention that the administrative law judge committed reversible error in this regard. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Tackett v. Director, OWCP, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp*, 6 BLR 1-1291 (1984).

Furthermore, in response to the Board's instructions in the 1997 Decision and Order on Reconsideration, the administrative law judge determined that the medical opinion of Dr. Zaldivar, labeled Employer's Exhibit 8, was not entered into evidence at the hearing, but was proposed and then withdrawn by employer's counsel. The administrative law judge's finding in this regard is supported by substantial evidence, since the transcript of the hearing indicates that there was some discussion about whether Dr. Zaldivar's opinion was properly served on the parties in accordance with the "twenty day rule" found at 20 C.F.R. §725.456, and, in response to the concerns of claimant's then-counsel[2], employer's counsel voluntarily withdrew the report from the evidentiary record. The administrative law judge stated that he was placing the physical report in the file, noted that it had been withdrawn, and would that he not consider it in rendering his opinion on the case. Hearing Transcript at 12 - 14.

Inasmuch as the administrative law judge's findings in this regard are rational and supported by the evidentiary record, they are affirmed. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

[2]Although claimant presently is pursuing this claim without the assistance of counsel, claimant was represented by counsel at the formal hearing in this case, which occurred on June 27, 1984.

We also affirm the administrative law judge's weighing of medical opinions pursuant to Section 727.203(a)(4) in this case. The administrative law judge properly considered all of the medical opinions of record, namely the opinions of Drs. Abernathy, Rasmussen Paranthaman, Motos, Agrival and Hatfield, and rationally relied upon Dr. Abernathy's opinion, in conjunction with the opinion of Dr. Rasmussen, as the most credible, finding it to be supported by objective evidence and the best reasoned and explained. Claimant contends that the administrative law judge erred in relying upon Dr. Abernathy's opinion, because the physician opined that claimant was capable of returning to his usual coal mine employment without demonstrating familiarity with the exertional requirements of claimant's usual job as a stationary equipment operator. However, contrary to claimant's allegations, the record reflects that Dr. Abernathy was aware of the exertional requirements of claimant's usual coal mine employment Dr. Abernathy's stated in his medical opinion that claimant had been employed in the mines for 37 years, that he worked at the tipple performing different jobs as a slate picker, car dropper, railroad car loader, diaster table operator and clean up man, that claimant's last job was that of a stationary equipment operator, where claimant loaded coal into cars, took care of filters, kept the floors washed and repaired breakdowns. Director's Exhibit 39.[3] We also reject claimant's contention that the administrative law judge was bound to credit the opinion of Dr. Motos based on his status as claimant's treating physician. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has recently held in *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998), and *Milburn Colliery Company v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), that an administrative law judge may not mechanically credit the opinions of examining and treating physicians to the exclusion of other competent medical opinions solely because the doctor personally

[3]We also note that claimant alleges that Dr. Rasmussen's report should not have been relied up to defeat invocation of the presumption at Section 727.203(a)(4) because he opined that claimant was capable of performing his usual employment as a stationary equipment operator without demonstrating knowledge of the physical demands of the position. Although the record does not contain evidence that Dr. Rasmussen had specific knowledge of the exertional requirements of claimant's last coal mining position, inasmuch as Dr. Rasmussen concluded in his most recent report in 1982 that his 1977 estimate that claimant suffered a 30% loss of capacity was "somewhat excessive", Employer's Exhibit 1, and found in that 1977 report that claimant could perform steady work at moderate levels, Director's Exhibit 40, the administrative law judge rationally relied on Dr. Rasmussen's opinion as supportive of Dr. Abernathy's conclusion that claimant was not suffering from a totally disabling respiratory or pulmonary impairment. *See generally Casella v. Kaiser Steel Corp.,* 9 BLR 1-131 (1986).

examined the miner. *See Hicks*, 138 F.3d at 533, 21 BLR at 335. Moreover, unlike Dr. Motos and the other physicians with contrary opinions Dr. Abernathy explicitly indicated that his medical opinion was based upon past medical history, family history, physical examination, pulmonary function studies, blood gas studies, electrocardiogram and x-rays. Further, Dr. Abernathy fully explained how these objective tests led him to the conclusion that claimant did not have a severe pulmonary disorder, noting that the oxygen exchange is fairly normal and improves with exercise, indicating that there is no significant alveolocapillary block, that a spirogram was an effort dependent test and may not have reflected maximum effort, and that forced expiratory volume was fairly normal. Director's Exhibit 39. Consequently, the administrative law judge acted within his discretion in finding that Dr. Abernathy's opinion was entitled to the greatest weight because it is best supported by objective evidence, best reasoned and best explained. *See Clark, supra; Lucostic v. United States Steel Corp.*,8 BLR 1-46 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Accordingly, we affirm the administrative law judge's determination that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 727.203(a)(4), and consequently, affirm the administrative law judge's finding that claimant failed to establish entitlement to benefits pursuant to 20 C.F.R. Part 727.[4]

Finally, we reject claimant's contention that the administrative law judge refused to evaluate this claim under 20 C.F.R. Part 410, Subpart D. The administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis by x-ray at Section 410.414(a)(1), based upon the prior weighing of x-rays at 20 C.F.R. §727.203(a)(1), which had been previously affirmed by the Board. The administrative law judge also found that all pulmonary function studies and blood gas studies of record were non-qualifying pursuant 20 C.F.R. §410.426(b) or the Appendix at Part 410, Subpart D. Furthermore, based upon his weighing of medical opinions pursuant to Section 727.203(a)(4), the administrative law judge rationally concluded that claimant failed to establish a totally disabling

[4]Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish invocation pursuant to 20 C.F.R. §727.203(a), we decline to address claimant's allegations of error regarding rebuttal pursuant to 20 C.F.R. §727.203(b). We note that the administrative law judge did not address Section 727.203(b) rebuttal in his Fourth Decision and Order Upon Remand.

respiratory or pulmonary impairment pursuant to 20 C.F.R. §§410.412, 410.414(b)(1) - (4), 410.422, 410.424, 410.426. Thus, the administrative law judge's finding that claimant failed to establish entitlement pursuant to Part 410, Subpart D is rational, supported by substantial evidence and is consequently affirmed.

Accordingly, the administrative law judge's Fourth Decision and Order Upon Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge