

BRB No. 03-0214 BLA

GEORGE T. DOUGLAS)	
)	
Claimant- Petitioner)	
)	
v.)	
)	
SOUTHERN OHIO COAL COMPANY)	DATE ISSUED: 12/04/2003
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate, & Cohen, L.C.), Morgantown, West Virginia, for claimant.

Douglas G. Lee (Steptoe & Johnson, PLLC), Charleston, West Virginia, for employer.

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denying Benefits (01-BLA-0995) of Administrative Law Judge Gerald M. Tierney on a duplicate claim¹ filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended,

¹ Claimant, George T. Douglas, filed his first application for benefits on August 15, 1977. That claim was denied by reason of abandonment. Director’s Exhibit 30. Claimant filed a second claim on September 2, 1993, which was likewise denied by reason of abandonment. Director’s Exhibit 31. On August 5, 1999, claimant filed a third claim, which is the subject of this appeal. Director’s Exhibit 1.

30 U.S.C. §901 *et seq.* (the Act).² Adjudicating this duplicate claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that prior claims filed in 1977 and 1993 were denied by reason of abandonment, and therefore, no determination had been made as to whether claimant established any of the elements of entitlement. After reviewing the entire record, the administrative law judge credited claimant with twenty-nine to thirty years of qualifying coal mine employment and found that claimant failed to establish total disability or that total disability was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find total disability and total disability due to pneumoconiosis established. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a limited response letter arguing that, because this is a duplicate claim, the administrative law judge erred in considering evidence submitted prior to the denial of claimant's earlier claim in determining whether a material change in conditions was established. The Director acknowledges, however, that if the Board affirms the administrative law judge's ultimate finding, that claimant failed to establish total disability, any error in this regard would be harmless. If, however, the Board determines that the administrative law judge erred in finding that claimant was not totally disabled, the Director contends that the administrative law judge must be instructed on remand to consider first whether the new evidence establishes total respiratory disability and, if he finds that it does, then consider whether all the evidence of record establishes the necessary elements of entitlement.³

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred in finding that claimant failed to establish a totally disabling respiratory impairment by finding that the opinion of Dr. Renn

² 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3-4.

outweighed the contrary evidence showing: the very heavy exertional requirements of claimant's usual coal mine employment; repeated hospital visits for ongoing pulmonary care; the reasoned opinions of Drs. Scattaregia and Rasmussen that claimant was totally disabled; and the opinion of Dr. Corder, claimant's treating physician, who found that claimant had severely impaired lung function. Specifically, claimant argues that the administrative law judge erred in relying on Dr. Renn's opinion that claimant was not totally disabled because it consisted of a one sentence statement and provided no reasoning or analysis in support of its conclusion. In support of his argument, claimant points to the administrative law judge's acknowledgment that while Dr. Renn was aware of Dr. Rasmussen's reports, as well as claimant's hospital records, Dr. Renn did not elaborate on how other evidence, such as the results of Dr. Rasmussen's exercise study and claimant's repeated hospitalizations, fit into his conclusion that claimant was not totally disabled

In considering the evidence relevant to total disability, the administrative law judge acknowledged that "it seems impossible that I could conclude that [c]laimant is not totally disabled[.]" in light of the very heavy exertional requirements of claimant's usual coal mine employment, his repeated hospital visits and his ongoing pulmonary care, and the reasoned opinions of Drs. Rasmussen, Scattaregia, and Corder, claimant's treating physician, that claimant was totally disabled, Decision and Order at 6. The administrative law judge stated that that was what he was compelled to do, however, because of Dr. Renn's opinion that claimant was not totally disabled and the most recent, non-qualifying pulmonary function study which was conducted in conjunction with his examination. The administrative law judge acknowledged, nevertheless, that Dr. Renn did not elaborate on how other evidence showing disability, *i.e.*, three doctors' opinions and claimant's repeated hospitalizations for respiratory distress, fit into his ultimate conclusion that claimant was not totally disabled. The administrative law judge further noted that this more recent evidence of nondisability was not accounted for by Drs. Rasmussen, Corder or Scattaregia. Accordingly, the administrative law judge concluded that claimant failed to establish total disability.

As claimant contends, however, Dr. Renn concluded that claimant was not totally disabled in a one sentence statement without offering any reasoning or elaboration to support his opinion, even though he was aware of the respiratory problems reflected in Dr. Rasmussen's opinion and claimant's hospital records. The administrative law judge failed to provide a rational explanation for crediting this opinion. This is error.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in weighing medical opinions the administrative law judge is called upon to consider their quality, *i.e.*, the qualifications of the experts, the opinion's reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudices. *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998).

Accordingly, we must vacate the administrative law judge's finding of total disability and remand the case for the administrative law judge to reconsider Dr. Renn's opinion for its reasoning and detail of analysis and in light of the other evidence on total disability.

Claimant also contends that the administrative law judge's reliance, in part, on the most recent, non-qualifying pulmonary function study to find that claimant was not totally disabled is misplaced citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Claimant further contends that both the Fourth Circuit and Third Circuit have held that non-qualifying pulmonary function studies do not raise an inference that claimant is not totally disabled citing, *citing Gober v. Matthews*, 574 F.2d 772, 778 (3d Cir. 1978); *Hubbard v. Califano*, 582 F.2d 319, 322 n.6 (4th Cir. 1978). We agree.

The administrative law judge appears to have credited Dr. Renn's non-qualifying pulmonary function study both because it was the most recent and because it reflected improvement. Decision and Order at 7. The Fourth Circuit does not recognize either rationale as a valid basis for crediting a non-qualifying pulmonary function study over a qualifying study. Thus, the administrative law judge erred in crediting the non-qualifying pulmonary function study over the qualifying studies and erred in crediting Dr. Renn's opinion of nondisability because it was based, in part on that pulmonary function study. *See Stanley v. Director*, OWCP, 989 F.2d 494, 1993 WL 78751 (4th Cir. 1993)(unpub.); *Adkins v. Director*, OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Claimant further argues that the administrative law judge erred in failing to find total disability established because he failed to properly credit the opinion of Dr. Corder, claimant's treating physician. Citing Section 718.104(d), claimant avers that the administrative law judge should have considered the factors enumerated therein in evaluating the opinion of Dr. Corder, claimant's treating physician.

The administrative law judge recognized that Dr. Corder had been the miner's treating physician since 1995, but held, nonetheless, that the credibility of his opinion was undermined by more recent medical evidence, *i.e.*, Dr. Renn's opinion of nondisability and claimant's non-qualifying pulmonary function study. Because we have held that the administrative law judge's did not provide valid reasons for crediting Dr. Renn's opinion and the most recent non-qualifying pulmonary function study and we have remanded the case for the administrative law judge to reconsider the issue of total disability, we must also vacate the administrative law judge's rejection of Dr. Corder's disability opinion. In reconsidering the evidence on the issue of total disability, the administrative law judge should consider the credibility of Dr. Corder's opinion in light of the factors set forth in Section 718.104(d). However, neither the Fourth Circuit nor the Benefits Review Board has ever fashioned a requirement or a presumption that treating or examining physicians' opinions be given greater weight than opinions of other expert physicians. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-188, BLR (4th Cir. 2002); *Grizzle v. Pickands Mather and Co.*, 994

F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993); *accord Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984).

Finally, claimant contends that the administrative law judge erred in finding that claimant failed to establish disability causation. Specifically, claimant contends that the administrative law judge erred in rejecting the evidence because it did not state that claimant's pneumoconiosis "substantially contributed" to his disability. Claimant contends, however that because Section 718.204(c) defines "substantially contributing" as having a material adverse effect on claimant's respiratory condition the administrative law judge should have considered whether the evidence established that claimant's pneumoconiosis had a material adverse effect on claimant's respiratory condition even if physicians did not use the words "substantially contributing" in their opinions and even if they also attributed claimant's condition to other factors. We agree. 20 C.F.R. §718.204(c)(1)(i). The administrative law judge's finding that claimant failed to establish disability causation is, therefore, vacated and the case is remanded for the administrative law judge to reconsider that issue. 20 C.F.R. §718.204(c). Additionally, because we are vacating the administrative law judge's Decision and Order denying benefits for reconsideration, we note that the administrative law judge must on remand first consider whether claimant has established a material change in condition based on a consideration of all the new evidence alone, before he considers whether claimant has established the necessary elements of entitlement on the record as a whole. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 510 U.S. 1090 (1997). Likewise, on remand, if reached the administrative law judge must determine whether the existence of pneumoconiosis has been established.⁴

⁴ Because claimant failed to establish any of the elements of entitlement in his previous claims and the administrative law judge only found that disability and disability causation were not established, he must also, if reached, determine whether claimant has established the existence of pneumoconiosis. 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from my colleagues decision to vacate the administrative law judge’s Decision and Order denying benefits and to remand this case. I would affirm the administrative law judge’s denial based on his finding that the evidence failed to establish total disability. The administrative law judge considered all the evidence in this case on the issue of total disability. He specifically noted that the opinions of all the doctors were reasoned as they were based on histories, examinations and testing. He further noted that Dr. Renn was aware of the results of Dr. Rasmussen’s exercise test of claimant, as well as claimant’s repeated hospitalizations for respiratory distress. Nonetheless, the administrative law judge determined that Dr. Renn’s opinion of nondisability along with the non-qualifying results of the most recent pulmonary function study were sufficient to overcome the evidence of disability. The administrative law judge specifically noted that he was not “mechanically” crediting the non-qualifying values of the most recent pulmonary function study because they were most recent. Rather, the administrative law judge found that because these test results showed that claimant was able to produce improved, non-qualifying pulmonary function study results and because Dr. Renn, a pulmonary specialist, concluded, based on his own findings and a review of other evidence, that claimant was not totally disabled, he could not automatically accept the earlier evidence of disability. This was reasonable. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993)(recent physician’s opinion can be more reliable than an earlier one if there is new or additional evidence developed that discredits an earlier opinion); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985)(administrative law judge is in better position to assess weight and

sufficiency of evidence); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Additionally, contrary to claimant's argument the administrative law judge was not required to accord the greatest weight to the opinion of claimant's treating physician, Dr. Corder, where he found it suspect in light of more reliable evidence. See 20 C.F.R. §718.104(d)(5); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-188, 22 BLR 564, 571 (4th Cir. 2002)(neither the Fourth Circuit nor the Board has ever fashioned a requirement or a presumption that treating or examining physician's opinions must be given greater weight than opinions of other expert physicians); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993); accord *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984).

Thus, I would affirm the administrative law judge's denial of benefits based on his reasonable finding that the evidence failed to establish total disability. Because I affirm the finding of no total disability, I would not address claimant's argument on disability causation or the argument of the Director, Office of Workers' Compensation Programs, on material change. In all other respects I would affirm the administrative law judge's findings. Likewise, because claimant has not established total disability, a requisite element of entitlement under 20 C.F.R. Part 718, *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), remand for a finding on the existence of pneumoconiosis is not necessary, in this case.

ROY P. SMITH
Administrative Appeals Judge