

BRB No. 04-0268 BLA

LARRY COAKLEY, Jr.)
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 Claimant-Petitioner)
)
 v.)
)
 PEABODY COAL COMPANY)
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 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 12/14/2004
)
 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 – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5011) of Administrative Law Judge Joseph E. Kane 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 involves a subsequent claim filed on July 30, 2001, which the administrative law judge properly considered pursuant to the applicable regulations at 20 C.F.R. Part 718.² After crediting claimant with twenty years of coal mine employment based upon the stipulation of the parties, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge then found the newly submitted evidence sufficient to establish total disability pursuant to 718.204(b). Considering the claim on the merits, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) and total disability 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 findings at Sections 718.202(a)(4) and 718.204(c). Employer has filed a response brief in support of the administrative law judge’s decision denying benefits. The Director, Office of Workers’ Compensation Programs, has filed a letter in which he states his agreement with claimant’s contention on appeal that the administrative law judge failed to consider the previously submitted opinions from Drs. Pope and Myers, necessitating remand for reconsideration of the evidence pursuant to Sections 718.202(a)(4) and 718.204(c).³

¹The 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.

²Claimant filed an initial claim for benefits on August 2, 1994. Director’s Exhibit 1. The district director found that claimant failed to establish any of the elements of entitlement under 20 C.F.R. Part 718 (2000) and, consequently, denied benefits on January 3, 1995. *Id.* Claimant filed a request for modification on January 17, 1996, which the district director denied as untimely on January 23, 1996. *Id.* Claimant filed a second claim on February 20, 1996. Director’s Exhibit 2. This claim was finally denied on July 8, 1996 by the district director, who found none of the elements of entitlement established. *Id.* Claimant took no further action in pursuit of benefits until filing the instant subsequent claim on July 30, 2001. Director’s Exhibit 4.

³We affirm, as unchallenged on appeal, the administrative law judge’s finding that claimant established twenty years of coal mine employment, and that the evidence of

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's finding that he failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge improperly discounted the opinions of Drs. Simpao and O'Bryan, each of whom examined claimant and diagnosed pneumoconiosis. Director's Exhibits 2, 16. Specifically, claimant asserts that it was error for the administrative law judge not to find the opinions of Drs. Simpao and O'Bryan to be reasoned and documented in view of the fact that each of the doctors based his diagnosis of pneumoconiosis not only upon a positive x-ray reading, but also upon a physical examination, objective studies, symptomatology, and smoking, medical and work histories. Claimant also contends that the opinions of Drs. Simpao and O'Bryan should have been accorded greater weight in light of the doctors' credentials, and because the two physicians actually examined claimant. Claimant further contends that the administrative law judge erroneously determined that Dr. Simpao did not have information regarding claimant's lung cancer in rendering his opinion, and improperly discounted Dr. O'Bryan's opinion on the ground that Dr. O'Bryan did not explain how he determined that one-third of claimant's breathing impairment is due to pneumoconiosis. Claimant's contentions lack merit.

A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *Clark*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). Dr. Simpao, who examined claimant on October 5, 2001, and previously, on April 5, 1996, diagnosed pneumoconiosis based upon a positive chest x-ray taken during each examination, and upon claimant's twenty year history of coal dust exposure. Director's Exhibits 2, 16. The administrative law judge properly discounted Dr. Simpao's opinion rendered in his 2001 report because, contrary to claimant's contention, Dr. Simpao did not have the benefit of the information regarding the miner's lung cancer, and thus did not adequately address all of the factors which could impact the

record is sufficient to establish total disability under Section 718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 15-17.

miner's respiratory status.⁴ *Clark*, 12 BLR at 1-155; Decision and Order at 13-14; Director's Exhibit 16. Additionally, the administrative law judge properly discounted Dr. Simpao's 1996 diagnosis of pneumoconiosis because Dr. Simpao, who is neither a B reader nor a Board-certified radiologist, relied upon his positive reading of an April 5, 1996 x-ray, which was reread as negative by Dr. Sargent, a B reader/Board-certified radiologist. *Winters v. Director, OWCP*, 6 BLR 1-877 (1984); Decision and Order at 18; Director's Exhibit 2.

Dr. O'Bryan examined claimant on May 13, 2002, and diagnosed clinical pneumoconiosis based upon his 1/1, positive interpretation of the x-ray taken during his examination. Claimant's Exhibit 1. Dr. O'Bryan also noted in his report the diagnosis of lung cancer reported by Dr. Harrison in an October 5, 2001 chest x-ray report, *see* Director's Exhibit 2. *Id.* Dr. O'Bryan attributed claimant's breathing impairment, in thirds, to claimant's twenty-nine pack year history of cigarette smoking, twenty year history of coal dust exposure, and chemotherapy for his lung cancer. *Id.* The administrative law judge properly discounted Dr. O'Bryan's opinion on the ground that Dr. O'Bryan diagnosed clinical pneumoconiosis solely on the basis of a positive x-ray and claimant's history of coal dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark*, 12 BLR at 1-155; Decision and Order at 14; Claimant's Exhibit 1. The administrative law judge also properly discounted Dr. O'Bryan's diagnosis of legal pneumoconiosis – *i.e.*, his opinion that claimant's breathing impairment is due, in part, to coal dust exposure – as not well-reasoned, because Dr. O'Bryan did not adequately explain how he could attribute claimant's impairment equally to the three causes he listed in his report. *Clark*, 12 BLR at 1-155; *Tackett*, 12 BLR at 1-14; Decision and Order at 14; Claimant's Exhibit 1. Contrary to claimant's contention, the administrative law judge did not err in failing to credit Dr. O'Bryan's opinion, as well as Dr. Simpao's opinion, on the basis that the doctors examined claimant. An examining physician's opinion is not automatically entitled to greater weight; rather, the opinion of a treating physician gets the deference it deserves based upon its power to persuade. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). Finally, contrary to claimant's contention, the administrative law judge did not err in failing to credit the opinions of Drs. Simpao and O'Bryan based on their qualifications.

⁴While a chest x-ray report dated October 5, 2001, which is included in Director's Exhibit 16, where Dr. Simpao's report is contained, states that "primary carcinoma is a consideration," the report is signed by Dr. Harrison. Director's Exhibit 16. In his report, Dr. Simpao specifically indicates that claimant does not have cancer. *Id.* Dr. Simpao does not reference Dr. Harrison's report in his opinion. *Id.* Thus, substantial evidence supports the administrative law judge's finding that Dr. Simpao did not have information regarding claimant's lung cancer.

The administrative law judge properly considered that Dr. Simpao is not a Board-certified pulmonary specialist, and duly noted that while Dr. O'Bryan is a pulmonary specialist, so are the two physicians whose contrary opinions the administrative law judge credited – Drs. Fino and Repsher. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-613 (6th Cir. 2003); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 14; Director's Exhibit 16; Claimant's Exhibit 1; Employer's Exhibits 2, 3, 5, 6. We affirm, therefore, the administrative law judge's discounting of the opinions of Drs. Simpao and O'Bryan under Section 718.202(a)(4).

Claimant also contends, and the Director agrees, that the administrative law judge erred in failing to consider the previously submitted medical opinions of Drs. Pope and Myers under Section 718.202(a)(4), necessitating remand. This contention is without merit. Claimant and the Director fail to recognize that, after considering the newly submitted evidence and determining that it established total disability under 20 C.F.R. §718.204(b), the administrative law judge duly considered whether the previously submitted medical opinion evidence, consisting of the opinions of Drs. Pope and Myers, established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Dr. Pope, who examined claimant on September 2, 1994, diagnosed clinical pneumoconiosis, 1/1, by x-ray, and further opined that claimant has chronic bronchitis related to both coal dust exposure and cigarette smoking. Director's Exhibit 1. Dr. Myers examined claimant on November 28, 1995, and diagnosed clinical pneumoconiosis, 1/1, by x-ray. *Id.* Dr. Myers also indicated that claimant has chronic obstructive pulmonary disease due to coal dust exposure for twenty years. *Id.* The administrative law judge properly discounted both physicians' diagnosis of clinical pneumoconiosis because Drs. Pope and Myers based their diagnoses upon their own positive x-ray readings of their x-rays, which were reread as negative by Drs. Sargent and Barrett, superiorly-qualified radiologists. *Winters*, 6 BLR at 1-881; Decision and Order at 18; Director's Exhibit 1. In addition, the administrative law judge properly discounted the opinions of Drs. Pope and Myers, indicating a diagnosis of legal pneumoconiosis pursuant to 20 C.F.R. §718.201, on the ground that the doctors relied upon a smoking history which was half that recorded by claimant's treating physicians,⁵ and because the doctors failed to adequately explain how they could determine the etiology of claimant's impairment in light of his heavy tobacco

⁵Drs. Pope and Myers noted in their 1994 and 1995 reports, respectively, that claimant's cigarette smoking habit of approximately twenty years occurred at the rate of one-half pack per day. Director's Exhibit 1. Dr. Gruenewald, claimant's treating physician during the course of his cancer treatment from 2001 to 2002, consistently noted, in several hospitalization reports and treatment records, that claimant's cigarette smoking, of up to thirty years, occurred at twice the rate – one pack per day. Employer's Exhibit 1.

use. *Clark*, 12 BLR at 1-155; *Tackett*, 12 BLR at 1-14; Decision and Order at 18-19; Director's Exhibit 1.

Finally, we reject claimant's contention that the administrative law judge erred in crediting the opinions of Drs. Repsher and Fino in determining that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4). Claimant argues that it is "obvious" that the opinions of Drs. Repsher and Fino are biased since four examining physicians – Drs. Simpao, O'Bryan, Pope and Myers – diagnosed claimant with pneumoconiosis. Claimant's Brief at 11. Claimant has failed to show bias on the part of the physicians, however. The administrative law judge properly credited the opinions of Drs. Repsher and Fino as well-reasoned and documented on the ground that the two doctors, both of whom, the administrative law judge noted, are pulmonary specialists, had the opportunity to review the entire medical record. *Clark*, 12 BLR at 1-155; Decision and Order at 14; Employer's Exhibits 2, 3, 5, 6. The administrative law judge also properly credited the opinions of Drs. Repsher and Fino on the ground that the reasoning and explanation in support of their conclusions was complete and thorough, and because their opinions are supported by the objective evidence of record. *Id.* We affirm, therefore, the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4).

We also affirm, as unchallenged on appeal, the administrative law judge's determination that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 11-12, 17-18. Because claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits. *See* 20 C.F.R. §718.202(a)(1)-(4); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We need not address, therefore, claimant's contentions with respect to the administrative law judge's findings on the issue of disability causation under 20 C.F.R. §718.204(c), as any errors the administrative law judge may have made thereunder were harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge