BRB No. 03-0758 BLA

CARL JUNIOR DAVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COUNTRY BOY MINING COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 08/12/2004
RELIANCE INSURANCE/ GUARANTY FUND MANAGEMENT SERVICES	)	
	)	
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 Naming Responsible Operator and Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Herbert B. Williams (Stokes, Rutherford, Williams, Sharp & Davies, PLLC), Knoxville, Tennessee, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Naming Responsible Operator and Denying Benefits (2001-BLA-0425) of Administrative Law Judge Pamela Lakes Wood on a claim[1]

[1] Claimant, Carl Junior Davis, filed his application for benefits on June 16, 1997.

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).[2] The administrative law judge initially credited claimant with "over" twenty-seven years of qualifying coal mine employment, Decision and Order at 6, and determined that, because Country Boy Mining Company was a successor operator pursuant to 20 C.F.R. §725.493 (2000), Country Boy was primarily liable as the responsible operator in this case.[3] With respect to the merits, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by the medical opinion evidence pursuant to Section 718.202(a)(4). Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to participate in this appeal.[4]

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

In challenging the administrative law judge's determination pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge engaged in a "head count" of the physicians' medical opinions because she accorded greater weight to the six opinions of Drs. Castle and Fino, physicians who diagnosed an absence of coal workers'

Director's Exhibit 1.

[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] By Order dated November 10, 2003, the Board dismissed Last Chance Coal Company and Old Republic Insurance Company as parties in the instant case because the administrative law judge dismissed Last Chance Coal Company as a named operator and no party appealed that determination.

[4] We affirm the administrative law judge's determinations regarding length of coal mine employment, and the failure to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) 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 6, 13, 15.

pneumoconiosis, over the two opinions of Drs. Forehand and Iosif, physicians who diagnosed the presence of pneumoconiosis. Claimant additionally contends that Section 718.104(d) compels an administrative law judge to accord greater weight to the opinion of a miner's treating physician, and that the administrative law judge thus erred by failing to accord greater weight to the opinion of Dr. Iosif based on his treating physician status, as evidenced by claimant's eleven visits during the two-year period Dr. Iosif treated claimant.

A review of the Decision and Order reveals, however, that the administrative law judge did not engage in a "head count" of the conflicting medical opinions. Instead, she engaged in a critical assessment of the medical opinion evidence by determining the probative value of each medical opinion without considering the number of reports each physician rendered. The administrative law judge found that Dr. Iosif's diagnoses of coal workers' pneumoconiosis, chronic asthma, and chronic obstructive pulmonary disease, and Dr. Forehand's opinion that, although there were no radiographic changes visible on the chest x-ray, claimant has coal workers' pneumoconiosis and chronic bronchitis based on history and pulmonary function study, were entitled to less weight because the physicians failed to explain how the clinical data supported their conclusions. This was rational. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985).

Additionally, the administrative law judge considered Dr. Iosif's status as a treating physician who had treated claimant for pulmonary problems every other month for more than six years and found that, while Dr. Iosif's opinion was worthy of additional weight, his opinion was not entitled to "controlling weight" because his pneumoconiosis diagnosis constituted "mere entries" in his reports without any discussion or rationale. Decision and Order at 19. Hence, contrary to claimant's argument, the administrative law judge reasonably declined to accord Dr. Iosif's opinion dispositive weight. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003)(noting that Section 718.104(d) does not call for automatic acceptance of a treating physician's opinion); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

Although the administrative law judge acknowledged that Dr. Forehand's opinion contained a more extensive medical history and clinical findings than Dr. Iosif supplied, the administrative law judge permissibly discounted Dr. Forehand's opinion because it lacked an adequate discussion or analysis for his conclusions. Because the determination of whether a physician's report is adequately documented and reasoned is a credibility matter for the

administrative law judge to determine, *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89; *Fields*, 10 BLR at 1-21, and an administrative law judge may discount a physician's opinion where she finds that the physician failed to adequately explain his diagnosis, *Clark*, 12 BLR at 1-155, we affirm the administrative law judge's determination to accord diminished weight to the opinions of Drs. Iosif and Forehand.

Claimant next asserts that the administrative law judge erred in finding that the opinions of Drs. Fino and Castle merited weight. Claimant contends that the administrative law judge erred by crediting Dr. Fino's opinion because, when he reviewed claimant's medical records, Dr. Fino relied on Dr. Iosif's diagnosis of asthma, a condition which, claimant states, did not respond to treatment and he stopped taking asthma medication. Likewise, claimant contends that the administrative law judge erred in crediting Dr. Castle's opinion because Dr. Castle not only relied on Dr. Iosif's diagnosis of asthma which was not cured, but he also relied on an inaccurate cigarette smoking history.[5]

The administrative law judge did not err in relying on the opinions of Drs. Fino and Castle. In assessing the opinion of Dr. Fino that claimant's respiratory disability was due to asthma unrelated to coal dust inhalation, and the opinion of Dr. Castle that claimant suffers from asthmatic bronchitis, the administrative law judge found that both Drs. Fino and Castle rendered detailed, well-reasoned explanations indicating how they reached their opinions and that their opinions were based upon the supporting medical data. Specifically, the administrative law judge permissibly found credible Dr. Fino's opinion that claimant did not suffer from an occupationally acquired pulmonary condition, which Dr. Fino based upon physical findings consistent with asthma, the lack of significant amounts of coal dust retained in claimant's lungs, the lack of radiographic changes of pneumoconiosis on x-ray, a minimal decrease in claimant's FEV_1 on pulmonary function study, and also upon Dr. Fino's analysis of supportive medical literature. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Even though the administrative law judge concluded that Dr. Castle

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5 A review of Dr. Castle's reports and deposition testimony indicate that he, in fact, had an accurate understanding of claimant's cigarette smoking history, indicating that claimant smoked one pack per day over a three-year or three and one-half-year period ceasing at the time claimant left the military, which was consistent with the other physicians' reports. Director's Exhibit 57; Employer's Exhibits 1-3. However, after reviewing additional medical records including the report of Dr. Iosif, Dr. Castle relied on Dr. Iosif's inaccurate notation that claimant smoked one pack per day for twenty-eight years and, based on this mistaken history, diagnosed "asthmatic bronchitis with the bronchitis being tobacco smoke induced." Employer's Exhibit 1 at 26. When revisiting his own record that claimant stopped smoking more than thirty years ago, Dr. Castle opined that tobacco smoke would not contribute to claimant's airways disease but rather bronchial asthma would be the etiology. Employer's Exhibit 1 at 27.

relied on an inaccurate cigarette smoking history, she reasonably found that this flaw was insufficient to undermine the probative value of Dr. Castle's opinion. *Cf. Gouge v. Director, OWCP*, 8 BLR 1-307, 1-309 (1985)(holding that an administrative law judge need not discredit a physician's opinion containing an inaccurate coal mine employment history, so long as the administrative law judge considers the discrepancy and addresses its significance).

After weighing all the medical opinions of record, the administrative law judge determined that because the opinions of Drs. Iosif and Forehand were insufficient to outweigh those of Drs. Fino and Castle, "the medical opinion evidence [was], at best, in equipoise" and therefore, that claimant failed to satisfy his burden of establishing the existence of either clinical or legal pneumoconiosis by a preponderance of the evidence. Decision and Order at 19. The administrative law judge's analysis was rational. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997)(observing that the administrative law judge, as trier-of-fact, assesses the weight and credibility of evidence). Consequently, we reject claimant's arguments and affirm the administrative law judge's weighing of the conflicting medical opinions.

Finally, citing *Doris Coal Co. v. Director, OWCP* [*Stiltner*], 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), claimant asserts that the administrative law judge abdicated her responsibility to consider claimant's thirty-five year coal dust exposure and determine the etiology of claimant's airways disease because, claimant asserts, the administrative law judge must make this assessment instead of relying on the physicians of record to render this determination. We disagree.

Section 718.202(a)(4) provides, in pertinent part, "A determination of the existence of pneumoconiosis may also be made if a *physician, exercising sound medical judgment*, notwithstanding a negative X-ray, finds that the miner suffers . . . from pneumoconiosis as defined in §718.201. Any such finding shall be based on objective medical evidence . . . . Such a finding shall be supported by a reasoned *medical* opinion." 20 C.F.R. §718.202(a)(4)(emphasis added). Furthermore, an administrative law judge may not substitute her own judgment for that of a qualified physician; she may not set her own expertise against that of a physician who presents competent evidence, and, absent countervailing clinical evidence or a valid legal basis for doing so, she cannot disregard the medical conclusions of a qualified physician. *Amax Coal Co. v. Director, OWCP* [*Rehmel*], 993 F.2d 600, 17 BLR 2-91 (7th Cir. 1993); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48-49 (7th Cir. 1992); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Thus, contrary to claimant's assertion, the regulations do not require the administrative law judge to consider claimant's coal dust exposure and make a medical determination as to the etiology of his pulmonary condition. Instead, the regulations provide that the administrative law judge may rely only on a reasoned medical opinion of a physician when determining whether claimant has established the existence of

pneumoconiosis under Section 718.202(a)(4). Moreover, claimant's reliance on *Stiltner* is misplaced, because that case dealt with the presumption that, once a miner is found entitled to benefits, he is also entitled to the cost of medical treatment and expenses incurred as a result of his pneumoconiosis pursuant to Section 725.701 (2000). *Stiltner*, 938 F.2d at 495, 15 BLR at 2-138-139. The *Stiltner* presumption is inapplicable to this case. Therefore, we reject claimant's allegation of error.

Consequently, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as this finding is rational, contains no reversible error, and is supported by substantial evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Because claimant has failed to satisfy his burden to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that claimant is not entitled to benefits.[6] *See* 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

[6] Claimant's failure to affirmatively establish the existence of pneumoconiosis, a requisite element of entitlement, obviates the need to address claimant's argument regarding total disability causation at Section 718.204(c)(2). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). We note, however, that to the extent claimant argues that Section 718.204(c)(2) contains a "presumption of pneumoconiosis" to which he is entitled based on pulmonary function studies, Claimant's Brief at 2, claimant's contention lacks merit. It is his burden to establish the existence of pneumoconiosis. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Accordingly, the Decision and Order Naming Responsible Operator and Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge