

BRB No. 05-0108 BLA

JOHN M. PETROSKY)
)
 Claimant-Petitioner)
)
 v.)
)
 KRISTI COAL COMPANY,) DATE ISSUED: 09/12/2005
 INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Anthony J. Cicconi and Bernard R. Cochran (Shaffer & Shaffer PLLC), Charleston, West Virginia, for claimant.

Robert Weinberger (West Virginia Workers' Compensation Fund), Charleston, West Virginia, for employer/carrier.

Helen H. Cox (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6550) of Administrative Law Judge Richard A. Morgan (the administrative law judge) denying benefits on a subsequent 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 The administrative law judge credited claimant with at least ten years of coal mine employment and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.² The

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 his first claim for benefits on August 14, 1986. Director's Exhibit 1. This claim was denied by the district director on September 3, 1986 because claimant failed to establish the existence of pneumoconiosis and total disability. *Id.* Because claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim for benefits on August 26, 1992. *Id.* On December 15, 1993, Administrative Law Judge Robert S. Amery issued a Decision and Order denying benefits because claimant failed to establish a material change in conditions, the existence of pneumoconiosis and total disability due to pneumoconiosis. *Id.* In its December 22, 1994 Decision and Order, the Board affirmed Judge Amery's denial of benefits because claimant failed to establish total disability due to pneumoconiosis on the merits. *Petrosky v. Donex Mining, Inc.*, BRB No. 94-0652 BLA (Dec. 22, 1994)(unpub.). Although the Board reversed Judge Amery's finding that the evidence was insufficient to establish a material change in conditions, the Board held that Judge Amery's error at 20 C.F.R. §725.309 (2000) was harmless in light of its disposition of the case on the merits. *Id.* Claimant appealed the case to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. Director's Exhibit 1. Based on a joint motion of dismissal filed by the parties, the Fourth Circuit dismissed the case on February 22, 1995. *Id.* Claimant filed his third claim for benefits on April 24, 2000. Director's Exhibit 2. This claim was denied by the district director on August 25, 2000 because claimant failed to establish that his pneumoconiosis arose out of coal mine employment and that he was totally disabled. *Id.* In a statement dated September 11, 2000, claimant acknowledged receipt of the district director's August 25, 2000 denial of benefits, and stated that he did not wish to appeal that decision. Rather, claimant stated that he only wanted to object to the district director's finding of eight years of coal mine employment. *Id.* Claimant filed his most recent claim for benefits on August 28, 2001. Director's Exhibit 4.

administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.³ With regard to the merits of the case, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found the evidence insufficient to establish 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 finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer/carrier (employer) responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand the case to the administrative law judge to provide an adequate explanation for his credibility assessment of Dr. Hussain's disability causation opinion. Alternatively, the Director asserts that the Board should remand the case to the district director so that Dr. Hussain may supplement his disability causation opinion, if the Board holds that the administrative law judge permissibly discredited Dr. Hussain's opinion.

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The record consists of the reports of Drs. Hussain, Younes, Zaldivar, and Ranavaya. Dr. Hussain

³Administrative Law Judge Richard A. Morgan (the administrative law judge) also found the evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Specifically, the administrative law judge stated, "I find that [c]laimant has established a 'material change in conditions' and a 'change in one of the applicable conditions of entitlement' under both the old and new provisions of §725.309." Decision and Order at 2 n.1. The administrative law judge noted that claimant's September 11, 2000 letter could arguably be considered a request for modification and, thus, claimant's August 28, 2001 claim for benefits would merge into claimant's April 24, 2000 claim for benefits. Nonetheless, the administrative law judge stated that "under the facts of this case, the new Amendments do not affect the outcome of this case." *Id.*

opined that claimant's severe pulmonary impairment is related to pneumoconiosis. Director's Exhibit 10. Dr. Younes opined that claimant suffers from a moderate obstructive ventilatory impairment caused by coal dust exposure and tobacco smoking. Director's Exhibit 2. In contrast, Dr. Zaldivar opined that claimant does not suffer from a pulmonary impairment resulting from coal workers' pneumoconiosis. Employer's Exhibit 1. Lastly, Dr. Ranavaya opined that claimant does not suffer from pneumoconiosis or a pulmonary impairment. Director's Exhibit 1.

The administrative law judge stated, "[h]aving carefully considered the entire record, I do not find any well-reasoned and/or well-documented medical opinion which establishes that pneumoconiosis is a substantially contributing cause of the miner's total disability."⁴ Decision and Order at 16. The administrative law judge discredited Dr. Younes's opinion because he found that it is poorly reasoned and documented. *Id.* at 8 n.7, 16. Further, the administrative law judge found that Dr. Zaldivar's opinion is flawed. *Id.* at 16 n.10. In addition, the administrative law judge discredited Dr. Hussain's opinion because it is poorly reasoned. Claimant challenges only the administrative law judge's decision to discredit Dr. Hussain's opinion.

Claimant asserts, and the Director agrees, that the administrative law judge erred in discrediting Dr. Hussain's disability causation opinion on the basis that it is poorly reasoned. Specifically, claimant argues that the administrative law judge applied an incorrect standard for determining whether Dr. Hussain's opinion is reasoned and documented because neither the regulations nor the courts require the degree of detailed analysis in rendering a disability

⁴Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

causation opinion that the administrative law judge required of Dr. Hussain.⁵ The Director argues that the administrative law judge failed to provide an adequate explanation for finding that Dr. Hussain's opinion is poorly reasoned. At the request of the Director, Dr. Hussain performed a pulmonary examination on claimant. Director's Exhibit 10. In a report dated November 21, 2001, Dr. Hussain noted claimant's smoking history and that claimant had had a stroke in 1992 and heart problems in 1993. *Id.* Dr. Hussain diagnosed pneumoconiosis related to coal dust exposure and opined that claimant suffers from a severe impairment. *Id.* On an attached form, Dr. Hussain checked a box marked "Severe Impairment," and wrote the word "Pneumoconiosis" to indicate the etiology of claimant's impairment. *Id.* In finding that Dr. Hussain's opinion is poorly reasoned, the administrative law judge stated:

In making this determination, I find that Dr. Hussain's analysis regarding the "causation" issue is cursory, poorly reasoned, and undermined by his failure to address numerous other possible factors. Dr. Hussain simply states that [c]laimant's severe impairment is due to pneumoconiosis without providing any further discussion or analysis. Since [c]laimant also has a cigarette smoking history and suffers from numerous other health problems, including strokes and heart attacks, I find that Dr. Hussain's opinion regarding the "disability causation" issue is inadequate. In view of the foregoing, I accord Dr. Hussain's opinion no weight regarding the "causation" issue, and find that [c]laimant did not establish total disability due to pneumoconiosis under §718.204(c).

Decision and Order at 16.

An administrative law judge, within his discretion as finder-of-fact, may discredit an opinion where he finds that the doctor failed to adequately explain his diagnosis. *Clark*, 12 BLR at 1-155. Although Dr. Hussain noted that claimant had a history of smoking, a stroke, and heart problems, he concluded that claimant's severe impairment was due to pneumoconiosis. As the administrative law judge found, Dr. Hussain did not explain why he concluded that claimant's severe impairment is due to pneumoconiosis, as opposed to other potentially contributing factors. Thus, we reject the assertions of claimant and the Director that the administrative law judge erred in discrediting Dr. Hussain's opinion because it is poorly reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291

⁵Claimant asserts that the administrative law judge irrationally found that Dr. Hussain's disability causation opinion is poorly reasoned because he found that Dr. Hussain's existence of pneumoconiosis opinion and total disability opinion are reasoned. Contrary to claimant's assertion, Dr. Hussain's disability causation opinion is separate and distinct from his opinions with respect to the issues of the existence of pneumoconiosis and total disability.

(1984).

Claimant also asserts that the administrative law judge should have accorded dispositive weight to Dr. Hussain's opinion based on his status as claimant's treating physician. Contrary to claimant's contention, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002) (although the opinions of treating and examining physicians deserve special consideration, there is no rule that a treating or examining physician must be accorded greater weight than the opinions of other physicians). Section 718.104(d) requires the officer adjudicating the claim 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 pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the regulations direct that the weight accorded shall 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). Since the administrative law judge properly discredited Dr. Hussain's disability causation opinion because it is poorly reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294, we reject claimant's assertion that the administrative law judge should have accorded dispositive weight to Dr. Hussain's opinion based on his status as claimant's treating physician.

The Director asserts that the Board should remand the case to the district director so that Dr. Hussain may supplement his disability causation opinion, if the Board holds that the administrative law judge properly discredited Dr. Hussain's opinion at 20 C.F.R. §718.204(c). Director's Brief at 6-7 n.6. Specifically, the Director argues that he has a statutory duty to provide claimant with an opportunity to substantiate his claim by means of a complete pulmonary evaluation. *Id.* According to the Director, his obligation is to provide an opinion that addresses all of the elements of entitlement and it is not discharged if the record contains an opinion that is not credible because it is not sufficiently reasoned and documented. *Id.* As discussed *supra*, Dr. Hussain performed the pulmonary evaluation on claimant for the Department of Labor. Because the administrative law judge properly discredited Dr. Hussain's disability causation opinion at 20 C.F.R. §718.204(c) on the basis that it is poorly reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294, Dr. Hussain's pulmonary evaluation does not satisfy the Director's obligation to provide claimant with a credible pulmonary evaluation that addresses all of the elements of entitlement, *Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). Thus, we remand the case to the district director so that the Director can fulfill his statutory

obligation to provide claimant with a complete and credible pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b). *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the district director to allow for a complete pulmonary evaluation, at no expense to claimant, and for reconsideration of the merits of this claim in light of our Decision and Order and all the evidence of record.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINIA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge