BRB No. 98-1032 BLA

BURBON GIBSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 4/28/99
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	
	)	
Employers-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S. C.), Pikeville, Kentucky, for employers.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employers appeal the Decision and Order Awarding Benefits (98-BLA-0089) of Administrative Law Judge Thomas F. Phalen, Jr., 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] After accepting the parties' stipulation

[1]This claim was filed on November 4, 1996. Director's Exhibit 1.

of at least eighteen years of coal mine employment, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's findings under Sections 718.202(a)(4), 718.203(b), 718.204(c)(4) and 718.204(b).[2] Claimant did not file a response brief, and the Director, Office of Workers' Compensation Programs, has declined to participate on this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates Inc.,* 380 U.S. 359 (1965).

At Section 718.202(a)(4), employer correctly asserts that the administrative law judge failed to consider whether the opinions of Drs. Powell and Baker, finding the existence of pneumoconiosis, are reasoned as they relied on x-ray evidence reread as negative by physicians with superior qualifications. Director's Exhibits 12-14, 16-27, 41. While an administrative law judge may not discredit, as unreasoned, a medical report diagnosing pneumoconiosis based on a positive x-ray which is outweighed by *other* negative x-rays, in this case the positive x-rays relied upon were reread by better qualified readers as negative. The administrative law judge must therefore determine whether the underlying documentation of the medical reports of Drs. Baker and Powell provides a basis for their opinions before relying on their medical reports to establish the existence of pneumoconiosis pursuant to subsection (a)(4). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Additionally, employer argues that the administrative law judge accorded less weight to Dr. Fino's opinion that claimant did not suffer from pneumoconiosis

[2]We affirm the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1)-(3), and 718.204(c)(1)-(3), and his finding of at least eighteen years of coal mine employment as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

because he never examined or treated claimant. Decision and Order Awarding Benefits at 11. The administrative law judge, citing *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), concluded that "[m]ore weight may be accorded to the conclusion of a treating physician because he is more likely to be familiar with the miner's condition. *Id.* In *Tussey,* the United States Court of Appeals for the Sixth Circuit concluded that "[i]t is clearly established that opinions of treating physicians are entitled to greater weight than those of non-treating physicians." However, in this case, employer correctly argues that there are no treating physicians of record. Drs. Baker, Powell and Broudy only examined claimant for his black lung claim and Dr. Fino only reviewed the medical evidence for purposes of this claim. Consequently, the administrative law judge's determination to accord less weight to Dr. Fino's opinion is not rational or supported by the evidence of record. Whether or not Dr. Fino examined claimant is only one factor to be considered by the administrative law judge in weighing the medical opinion evidence of record. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). The administrative law judge must examine the validity of the reasoning of each medical opinion in light of the studies conducted, and the objective indications upon which the medical opinion or conclusion is based. *Clark v. Karsts-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19(1987); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Amax Coal Co. v. Beasley,* 97 F.2d 324, 16 BLR 2-45 (7th Cir.1992). We, therefore, vacate the administrative law judge's finding of the existence of pneumoconiosis, and remand for the administrative law judge to reweigh the medical opinion evidence at Section 718.202(a)(4).

Because the administrative law judge relied on his evaluation of the evidence under Section 718.202(a)(4) in finding total disability at Section 718.204(c)(4), Decision and Order Awarding Benefits at 13, and in finding total disability due to pneumoconiosis at Section 718.204(b), Decision and Order Awarding Benefits at 14, we also vacate these findings. If, on remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis, he must then reweigh the evidence at Section 718.204(c)(4). Moreover, if on remand, the administrative law judge finds total disability at subsection (c)(4), he must further weigh the evidence probative of total disability against the contrary probative evidence, like and unlike, to determine whether total disability is established at Section 718.204(c) as a whole. *Tussey, supra; Clark*, *supra*; *Fields, supra*; *Shedlock v. Bethlehem Mines Corp.,* 9 BLR 1-195 (1986), *aff'd on recon.,* 9 BLR 1-236 (1987)(*en banc*). If the administrative law judge again finds total disability established at Section 718.204(c), he must then determine whether claimant's totally disabling respiratory impairment was due at least in part to pneumoconiosis pursuant to Section 718.204(b). *Adams v. Director, OWCP,* 886 F.2d 818. 13 BLR 2-52 (6th Cir. 1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON Acting
Administrative Appeals Judge