BRB No. 00-1043 BLA

HAROLD McCAIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Gregory E. Hull (Millikin & Fitton Law Firm), Hamilton, Ohio, for claimant.

Jennifer U. Toth and Mary Forrest-Doyle (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-BLA-1450) of Administrative Law Judge Robert L. Hillyard denying benefits 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] In the initial Decision and Order, the

[1]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

administrative law judge, after crediting claimant with four years of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Although the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), the administrative law judge found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge denied benefits. By Decision and Order dated October 29, 1999, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2) and (a)(3) (2000) and 718.204(c) (2000) as unchallenged on appeal. *McCain v. Director, OWCP*, BRB No. 98-1268 BLA (Oct. 29, 1999) (unpublished). The Board also affirmed the administrative law judge's length of coal mine employment finding. *Id.* The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and

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Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

718.204(b) (2000) and remanded the case to the administrative law judge for further consideration. *Id.*

On remand, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge also found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Claimant also argues that the administrative law judge erred in finding that the evidence was insufficient to establish that his total disability was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits. In a reply brief, claimant reiterates his previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Claimant specifically argues that the administrative law judge erred in finding that Dr. Rubio's opinion is insufficient to establish the existence of pneumoconiosis.

In a letter dated November 9, 1995, Dr. Rubio explained that his diagnosis of pneumoconiosis was based upon pulmonary function studies demonstrating a "significant restrictive component." Director's Exhibit 25. In a followup letter dated January 4, 1996, Dr. Rubio reiterated that his finding of pneumoconiosis was based upon "pulmonary function test criteria." Claimant's Exhibit 1. Dr. Rubio explained that "restrictive patterns are more commonly seen with pneumoconiosis than with obstructive pulmonary disease." *Id.* In a letter dated December 15, 1997, Dr. Rubio noted that there was "no doubt that [claimant] has a restrictive component with severe decrease in the diffusion capacity which would be more [sic] with a fibrotic illness rather than an obstructive illness." *Id.*

The administrative law judge noted that Dr. Rubio's finding of a restrictive impairment was inconsistent with his interpretation of three earlier pulmonary function studies.[2] Decision and Order on Remand at 4. In weighing a medical opinion, an

[2]The record contains the results of a September 8, 1993 pulmonary function study. Claimant's Exhibit 1. Although the report listing the results of claimant's September 8, 1993

administrative law judge must "examine the validity of the reasoning of [the] medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). In the instant case, the administrative law judge permissibly questioned Dr. Rubio's diagnosis of pneumoconiosis because the basis for his diagnosis, the fact that there was evidence of a restrictive impairment, is not supported by Dr. Rubio's own interpretation of claimant's pulmonary function studies. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge also acted within his discretion in finding that Dr. Rubio's opinion was too equivocal to support a finding of pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order on Remand at 4. The Board previously affirmed the administrative law judge's finding of four years of coal mine employment. *See McCain*, *supra*. In his most recent opinion, Dr. Rubio, after indicating his belief that claimant had actually worked nine years in the coal mines, opined that even if claimant's coal dust exposure was for four years, claimant "still *could have* suffered during that time sufficient to result in the current impairment...." Unmarked Exhibit (emphasis added).

The administrative law judge also discredited Dr. Rubio's opinion because it was unclear whether he had an accurate understanding of the extent of claimant's smoking history. Although Dr. Rubio referenced the fact that claimant had a smoking history, Dr. Rubio provided no indication that he was aware of the extent of that history. An administrative law judge may properly discredit the opinion of a physician which is based upon an inaccurate or incomplete picture of the miner's health. *See generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7

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pulmonary function study identifies Dr. Rubio as claimant's physician, Dr. Russell actually provided the interpretation of the results. *See* Claimant's Exhibit 1. Dr. Russell interpreted the results as revealing "severe obstructive pulmonary disease which may be related primarily to the long history of cigarette smoking." *Id.* Although Dr. Russell stated that a mild restriction could not be ruled out, he noted that this was suggested only by the vital capacity results. *Id.*

Dr. Rubio interpreted the results of claimant's subsequent December 28, 1993 and October 6, 1994 pulmonary function studies. Claimant's Exhibit 1. Dr. Rubio interpreted each of these studies as revealing a severe obstructive ventilatory defect. *Id.* Dr. Rubio failed to note any evidence of a restrictive impairment. *Id.*

BLR 1-106 (1984). We, therefore, hold that the administrative law judge properly found that Dr. Rubio's opinion was insufficient to support a finding of pneumoconiosis.[3]

Claimant argues that the opinions of Drs. Burton and Fritzhand are not sufficiently reasoned. The administrative law judge failed to adequately consider whether the opinions of Drs. Burton and Fritzhand were sufficiently reasoned. However, inasmuch as the opinions of Drs. Burton and Fritzhand do not assist claimant in establishing the existence of pneumoconiosis, *see* Director's Exhibits 11, 35, the administrative law judge's error, if any, in his consideration of their opinions is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4).

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[3]Claimant contends that Dr. Rubio's opinion is entitled to greater weight based upon his status as the miner's treating physician. The United States Court of Appeals for the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, because the administrative law judge properly found that Dr. Rubio's opinion was not sufficiently reasoned, the administrative law judge was not required to accord greater weight to his opinion based upon his status as claimant's treating physician. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

Moreover, contrary to claimant's assertion, an administrative law judge is not required to defer to a physician with superior qualifications. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See 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*). Consequently, we need not address claimant's challenge to the administrative law judge's finding at 20 C.F.R. §718.204(b) (2000). *Larioni, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge