

BRB No. 06-0980 BLA

H.H.)
)
 Claimant-Petitioner)
)
 v.)
)
 GUM BRANCH COAL COMPANY,)
 INCORPORATED)
)
 and) DATE ISSUED: 08/21/2007
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

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

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6445) of Administrative Law Judge Larry S. Merck 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). The administrative law judge credited claimant with five years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), he found that the evidence did not establish the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.¹

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant generally contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs.

¹ Because the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) and that the evidence established total disability at 20 C.F.R. §718.204(b) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Hussain, Martin, Dahhan, and Fino. Dr. Hussain diagnosed pneumoconiosis and chronic obstructive pulmonary disease.² Director's Exhibit 9. Dr. Martin diagnosed advanced pneumoconiosis and/or silicosis, miner's asthma, and chronic bronchitis.³ Director's Exhibit 11; Claimant's Exhibit 3. By contrast, Dr. Dahhan opined that claimant does not have occupational pneumoconiosis, or any disease or condition that was significantly contributed to or significantly aggravated by coal dust exposure. Employer's Exhibits 1, 4, 9. Similarly, Dr. Fino opined that claimant does not have coal workers' pneumoconiosis, or any disease or condition that was significantly contributed to or significantly aggravated by coal dust exposure. Employer's Exhibits 3, 5, 8, 10-A.

The administrative law judge permissibly found that Dr. Hussain's opinion that claimant has "clinical" pneumoconiosis was unreasoned because Dr. Hussain did not give any other reasons for the diagnosis beyond a positive chest x-ray.⁴ Decision and Order at 9; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge found that the three remaining opinions of Drs. Martin,⁵

² The administrative law judge stated that Dr. Hussain's diagnosis of chronic obstructive pulmonary (COPD) disease did not constitute a finding of "legal" pneumoconiosis because "Dr. Hussain failed to opine [that] [c]laimant's COPD is related to coal dust exposure." Decision and Order at 10. The administrative law judge stated that "[Dr. Hussain] related the condition to tobacco abuse. (DX 9)." *Id.*

³ During a deposition, Dr. Martin also diagnosed complicated pneumoconiosis. Claimant's Exhibit 3. The administrative law judge reasonably found that Dr. Martin's diagnosis of complicated pneumoconiosis was neither well-reasoned nor well-documented because it was not supported by the underlying documentation of record. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983).

⁴ The administrative law judge stated, "[a]cknowledging that Dr. Hussain performed other physical and objective testing, he listed that he expressly relied on the [c]laimant's positive x-ray for his clinical determination of pneumoconiosis." Decision and Order at 9. The administrative law judge also stated that "[Dr. Hussain] failed to state how results from his other objective testing might have impacted his diagnosis of pneumoconiosis." *Id.*

⁵ The administrative law judge noted that Dr. Martin's opinion was supported by his deposition testimony and claimant's treatment notes, which included the results of objective tests. Decision and Order at 10 n.7.

Dahhan, and Fino were each well-reasoned and well-documented.⁶ The administrative law judge, however, found that Dr. Martin's opinion was outweighed by the contrary opinions of Drs. Dahhan and Fino. Decision and Order at 13.

Claimant asserts that the administrative law judge failed to properly consider whether to accord greater weight to Dr. Martin's opinion based on his status as claimant's treating physician. The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. 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). Although 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 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.⁷ 20 C.F.R. §718.104(d)(5).

Although the administrative law judge noted that Dr. Martin was claimant's treating physician, he did not specifically consider Dr. Martin's opinion in light of the criteria provided in 20 C.F.R. §718.104(d) to determine whether Dr. Martin's opinion is entitled to greater weight than the contrary opinions of Drs. Dahhan and Fino, based on Dr. Martin's status as claimant's treating physician. The administrative law judge noted that Dr. Martin has been claimant's family physician since 1971,⁸ and that Dr. Martin

⁶ In considering Dr. Martin's report, the administrative law judge stated that "with respect to complicated pneumoconiosis, his report is unreasoned, and with respect to advanced pneumoconiosis, his report is reasoned." Decision and Order at 15 n.12.

⁷ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 277 F.3d at 513, 22 BLR at 2-647.

⁸ Dr. Martin is Board-certified in family practice. Claimant's Exhibit 3. While the administrative law judge accurately noted that Drs. Dahhan and Fino are Board-certified in internal medicine and pulmonary disease, Employer's Exhibits 7, 8, he did not find

prescribed bronchial dilators, intermittent antibiotics, and continuous oxygen for claimant's breathing problems. Decision and Order at 10. In addition to indicating that Dr. Martin has treated claimant for over thirty years, however, the record also reveals that Dr. Martin treated claimant monthly for his breathing problems. Claimant's Exhibit 3; Hearing Transcript at 20, 23. In weighing the medical opinion evidence, the administrative law judge did not explain why the opinions of Drs. Dahhan and Fino outweighed the opinion of Dr. Martin. Rather, the administrative law judge found without further explanation that "[t]he well-reasoned and well-documented opinions of Drs. Dahhan and Fino and the negative x-ray interpretations outweigh Dr. Martin's reasoned and documented opinion and the unreasoned report of Dr. Hussain." Decision and Order at 13. The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, because the administrative law judge did not consider whether to accord greater weight to Dr. Martin's opinion based on his status as claimant's treating physician, we vacate the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case to the administrative law judge to consider the medical opinion evidence in accordance with the criteria set forth in 20 C.F.R. §718.104(d).

Finally, in view of our decision to vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of the evidence thereunder, if reached.

that their opinions were entitled to dispositive weight, based on their qualifications. Decision and Order at 11-12.

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 administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge