BRB No. 04-0305 BLA

BARRY KENT SULLIVAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROAD FORK DEVELOPMENT COMPANY	)	DATE ISSUED: 12/28/2004
	)	
and	)	
	)	
A.T. MASSEY	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0992) of Administrative Law Judge Thomas F. Phalen, Jr. 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] This claim is before the Board for the third time. In the original Decision and Order, the administrative law judge credited claimant with eleven years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1) (2000) and 718.203(b) (2000). Although the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), he found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §§718.204(c)(4) (2000) and 718.204(c) (2000) overall.[2] Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. In response to employer's appeal, the Board affirmed the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) (2000). However, the Board remanded the case to the administrative law judge to weigh together all of the evidence at 20 C.F.R. §718.202(a)(1)-(4) (2000) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The Board also vacated the administrative law judge's finding at 20 C.F.R. §718.203(b) (2000) and remanded the case for further consideration. Although the Board affirmed the administrative law judge's findings at 20 C.F.R. §718.204(c)(1)-(3) (2000), the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.204(c)(4) (2000) and 718.204(b) (2000), and remanded the case for further consideration of these issues, if reached. *Sullivan v. Road Fork Dev. Co.*, BRB No. 00-0426 BLA (Jan. 11, 2001)(unpub.).

On remand, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3). However, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)[3] and

---

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

[3]The administrative law judge stated, "[i]n the 1999 Decision and Order I found that the x-ray evidence established the presence of pneumoconiosis." 2002 Decision and Order at 11.

(a)(4), 718.202(a) overall and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(b) overall and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge again awarded benefits. In disposing of employer's second appeal, the Board affirmed the administrative law judge's finding at 20 C.F.R. §718.202(a)(3), but vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2), (a)(4), 718.203(b) and 718.204, and remanded the case for further consideration of the evidence. *Sullivan v. Road Fork Dev. Co.*, BRB No. 02-0411 BLA (Mar. 31, 2003)(unpub.).

On remand for the second time, the administrative law judge credited claimant with eleven years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). However, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §§718.202(a)(2)-(4) and 718.202(a) overall. Further, the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[4] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in applying the decision of the United States Court of Appeals for the Fourth in *Compton* in weighing together the evidence at 20 C.F.R. §718.202(a)(1)-(4) since, claimant asserts, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Claimant also challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). In addition, claimant challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits on remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[5]

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);

[4]The administrative law judge noted that the Board affirmed his prior findings that the evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii).

[5]Since the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Dr. Baker opined that claimant suffers from a Class III impairment. Director's Exhibit 32. Dr. Baker also opined that the presence of pneumoconiosis suggests a 100% disability since it usually requires removal from exposure to the dust causing the condition. *Id*. Dr. Hussain opined that claimant is totally disabled from a pulmonary impairment. Claimant's Exhibit 2. In contrast, Drs. Caffrey, Castle, Dahhan, Lockey and Ranavaya opined that claimant is not totally disabled from a pulmonary or respiratory impairment. Director's Exhibits 13, 28, 30; Employer's Exhibits 7, 9, 11, 13. Specifically, Dr. Caffrey opined that "it does not appear that working 13 to 14 years in the coal mines caused [claimant] any objective pulmonary disability." Director's Exhibit 30. Further, Drs. Castle and Dahhan opined that claimant retains the respiratory capacity to perform his last coal mine work. Claimant's Exhibit 28; Employer's Exhibits 7, 13. In a report dated March 28, 1999, Dr. Lockey stated, "[b]ecause of the uncertainty of [claimant's] diagnosis, I cannot state, within a reasonable degree of medical probability, that the current pulmonary impairment is a result of coal dust exposure." Employer's Exhibit 2. Dr. Lockey also stated, "I do feel, however, that until further diagnostic tests are undertaken, [claimant] should not have further exposure to coal and/or rock dust, or any other type of pulmonary irritant." *Id*. However, in a subsequent deposition dated October 14, 1999, Dr. Lockey opined that claimant is not totally disabled from a functional respiratory standpoint. Employer's Exhibit 11. Lastly, Dr. Ranavaya opined that claimant suffers from a mild pulmonary defect that would not prevent him from performing his last coal mine employment. Director's Exhibit 13. Based on his consideration of the conflicting medical opinions, the administrative law judge found that Dr. Castle's opinion outweighed the contrary opinions of Drs. Baker and Hussain.[6]

Initially, claimant asserts that the administrative law judge erred in discrediting Dr. Baker's opinion because it was based on a non-qualifying pulmonary function study. Contrary to claimant's assertion, the administrative law judge discredited Dr. Baker's opinion that claimant suffers from a moderate impairment because it is contradicted by the opinions of Drs. Castle, Dahhan, Lockey and Ranavaya, that claimant suffers from a mild impairment. Dr. Baker diagnosed a moderate restrictive ventilatory defect based on a December 16, 1998

[6]The administrative law judge determined that the opinions of Drs. Caffrey, Castle, Dahhan, Lockey and Ranavaya are reasoned and documented. 2002 Decision and Order at 18-20. The administrative law judge also determined that the opinions of Drs. Castle, Dahhan, Lockey and Ranavaya are entitled to enhanced weight based on their credentials as Board-certified pulmonologists. *Id*. Moreover, the administrative law judge found that Dr. Castle's opinion was "most probative" on the issue of total disability because he had a better understanding of the exertional requirements of claimant's usual coal mine employment. *Id*. at 20.

pulmonary function study.[7] Director's Exhibit 32. In contrast, Dr. Dahhan opined that claimant suffers from a mild impairment that is not sufficient to render him totally disabled. Employer's Exhibit 7. Similarly, Dr. Ranavaya opined that claimant suffers from a mild pulmonary defect that would not prevent him from performing his last coal mine employment. Director's Exhibit 13. Drs. Caffrey, Castle and Lockey opined that claimant does not suffer from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 30; Employer's Exhibits 11, 13. Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Baker's opinion because it was based on a non-qualifying pulmonary function study.

Dr. Baker also suggested that claimant is 100% occupationally disabled because the presence of pneumoconiosis usually requires removal from exposure to the dust causing the condition. Director's Exhibit 32. However, because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), the administrative law judge properly found that "[Dr. Baker's] opinion that [c]laimant is 100% occupationally disabled does not support a finding of total respiratory disability," 2003 Decision and Order at 18.

Next, claimant 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. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003) (the opinions of treating physicians are not presumptively correct nor are they afforded automatic deference); *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); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). In the instant case, the administrative law judge acknowledged Dr. Hussain's

[7]Dr. Baker additionally opined that claimant suffers from a Class III impairment. Director's Exhibit 32. Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class III impairment is insufficient to support a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*).

status as claimant's treating physician.[8] 2003 Decision and Order at 9. An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indication upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Based upon his consideration of Dr. Hussain's opinion, the administrative law judge rationally determined that Dr. Hussain failed to adequately explain how the underlying objective evidence supported his opinion. *Tackett*, 12 BLR at 1-14; *Oggero*, 7 BLR at 1-865. The administrative law judge specifically stated:

> Dr. Hussain set forth clinical observations and findings. However, his reasoning is not supported by adequate data. There is simply no objective evidence to identify the presence of a severe respiratory or pulmonary impairment to go along with his observations of [c]laimant's immediate symptoms. Even though Dr. Hussain was privy to the superior and relevant medical evidence through his position as [c]laimant's treating physician, the reasoning in his opinions does not demonstrate that he effectively relied upon the objective evidence available to him to support his conclusions.

2003 Decision and Order at 17. Thus, since the administrative law judge permissibly discredited Dr. Hussain's opinion because Dr. Hussain failed to adequately explain how the underlying objective evidence supported his opinion, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Tackett*, 12 BLR at 1-14; *Oggero*, 7 BLR at 1-865, we reject claimant's assertion that the administrative law judge erred in failing to accord dispositive weight to Dr. Hussain's opinion based on his status as claimant's treating physician. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is

[8]The administrative law judge correctly stated that "[i]n determining the weight to be accorded to a treating physician's opinion, the amended regulations at §718.104(d) (2002) are not directly applicable because this evidence was developed prior to January 19, 2001, but it is instructive." 2003 Decision and Order at 9.

insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[9]

Since claimant failed to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[10] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is

[9]Claimant asserts that the administrative law judge erred in finding that Dr. Castle's opinion outweighed Dr. Hussain's contrary opinion based on Dr. Castle's superior qualifications as a Board-certified pulmonologist since, claimant argues, Dr. Hussain has the same credentials. Since the administrative law judge permissibly discredited Dr. Hussain's opinion because Dr. Hussain failed to adequately explain how the underlying objective evidence supported his opinion, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985), we hold that any error by the administrative law judge in this regard is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[10]In view of our disposition of this case at 20 C.F.R. §718.204(b), we decline to address claimant's contentions at 20 C.F.R. §718.202(a)(4). Moreover, since the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) is not changed by the application of either the case law of the United States Courts of Appeals for the Fourth or Sixth Circuits, we decline to address claimant's contention that the administrative law judge erred in applying the case law of the Fourth Circuit in this case.

affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge