BRB No. 00-0860 BLA

MILLARD W. DYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAT CONTRACTORS	)	
	)	DATE ISSUED:
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (Judith E. Kramer, 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (1999-BLA-00526) of Administrative Law Judge Lawrence P. Donnelly awarding 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] The administrative law judge found that claimant[2] established at least fourteen years of qualifying coal mine employment and total disability due to pneumoconiosis which arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203 (b) and 718.204(b), (c)(4) (2000). Accordingly, benefits were awarded.

In the instant appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Sections 718.202(a)(4) (2000) and 718.204(b), (c)(4) (2000). Claimant has not filed a response brief on appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, declining to submit a brief on appeal.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted

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[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.

[2]Claimant is Millard W. Dye, the miner, who filed a claim for benefits on August 26, 1997. Director's Exhibit 1.

[3]We affirm the administrative law judge's findings regarding the length of the miner's coal mine employment and pursuant to 20 C.F.R.§§718.202(a)(1)-(3), 718.203(b) and 718.204(c)(1)-(3) (2000), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which claimant, employer and the Director have responded. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure to prove any of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry, supra*.

Employer initially contends that the administrative law judge erred in finding Dr. Koenig's opinion to be well-documented because the evidence he relied upon does not support a finding of the existence of pneumoconiosis. Employer's Brief at 7. We agree. Dr. Koenig examined claimant on September 17, 1997, indicated that he reviewed an x-ray and CT scan, although he does not provide the dates of these items, and diagnosed: 1) coal workers' pneumoconiosis based on an x-ray and CT scan which showed bilateral upper lobe nodules/small; low DLCO, total lung capacity beneath 95 % confidence limits; dyspnea that preceded recent hospitalization, and the surgeon's observations during an operation of changes consistent with coal workers' pneumoconiosis; 2) bronchitis/obstructive lung disease due to coal dust, based on the chronic cough, sometimes of black sputum, and the increased RV, indicative of air trapping, in a non-smoker; and 3) interstitial infiltrates which are most prominent in the left lower lobe and are most likely post inflammatory. Director's Exhibit 8.

After discussing all of the medical opinion evidence, the administrative law judge found that:

Weighing these opinions, I give greatest weight to the opinion of Dr. Koenig,

> who is the Claimant's treating physician along with other physicians at the University of Virginia. Dr. Koenig prescribed the Claimant's inhalers. His report is based on a thorough examination of the Claimant, and is documented and well-reasoned. He considered all the findings, including the observations made by Dr. Hannan during surgery, an x-ray, and a CT scan. Dr. Koenig concluded that the Claimant had coal workers' pneumoconiosis, although he also concluded that the most prominent interstitial changes on the x-rays/CT scan were most likely due to the recent hospitalizations. Moreover, Dr. Koenig related the Claimant's bronchitis/obstructive lung disease to coal dust, bringing it within the statutory definition of pneumoconiosis at §718.201, a finding no other physician contested. While Dr. Fino concluded that the Claimant did not have any respiratory or pulmonary impairment, and implicitly any obstruction, Dr. Koenig's studies did reveal an impairment as acknowledged by Drs. Michos and Naeye. As such, the preponderance of the medical opinion and CT scan evidence establishes that the Claimant has pneumoconiosis.

Decision and Order at 10.

While the administrative law judge correctly states that Dr. Koenig diagnosed pneumoconiosis, the x-ray and CT scan obtained by Dr. Koenig during his September 17, 1997 exam do not contain a diagnosis of pneumoconiosis. The record contains an x-ray read by Dr. Gesner on September 17, 1997 which indicates no acute cardiopulmonary processes. Director's Exhibit 13. The record also contains a CT scan report dated September 17, 1997 in which Dr. Udoff opines that there are "interstitial changes present in the right upper lobe, right lower lobe, and left upper and lower lobes, greatest in the left lower lobe" and that the changes are more "streak like in nature and not the typical rounded nodular pattern of coworker's pneumoconiosis and most likely residual to previous inflammatory processes and due to scarring." Director's Exhibit 14. The record indicates that Dr. Koenig relied upon Dr. Hannon's opinion that claimant's lungs have the appearance of the lungs of other patients who had been diagnosed with pneumoconiosis although Dr. Hannon stated in his report that he is not an expert in the treatment and diagnosis of pneumoconiosis and that he would defer to Dr. Koenig. EX 7. Based on the administrative law judge's discussion regarding the existence of pneumoconiosis, his finding that Dr. Koenig's opinion is documented and well-reasoned is not clear. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Hutchens v. Director,* OWCP, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Further, it appears that the administrative law judge mischaracterized the evidence by stating that the preponderance of the medical opinion and CT scan evidence establishes that

claimant has pneumoconiosis when the record does not contain a CT scan report which diagnoses pneumoconiosis and only two of the seven physicians offering medical opinions, Drs. Koenig and Hannan, opined that claimant has pneumoconiosis. Decision and Order at 10; Director's Exhibits 8, 9, 14, 18, 29, 36; Employer's Exhibits 1, 3, 7- 9, 13; Claimant's Exhibit 9; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Inasmuch as the evidence of record does not support the administrative law judge's findings regarding Dr. Koenig's opinion and the nature of the evidence regarding the existence of pneumoconiosis, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), as well as his finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000) and remand the case to the administrative law judge for further discussion of the evidence of record regarding the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.204(b) (2000).

Employer next contends that the administrative law judge erred in finding that the evidence of record supports a finding that claimant established total respiratory disability pursuant to Section 718.204(c)(4) (2000). Dr. Koenig opined that claimant's VO2 max showed moderate impairment and his DLCO indicated mild impairment and that "considering the strenuousness of his work, this impairment will prevent performance of his coal mine job." Director's Exhibit 8. Dr. Michos agreed with Dr. Koenig's finding that claimant has mild to moderate impairment and opined that "this may prevent the miner from performing his last CME." Director's Exhibit 9. Dr. Naeye opined that "the results of claimant's pulmonary function studies reveal that he is likely too incapacitated to resume the very strenuous physical work which he was engaged in..." Employer's Exhibit 3. Dr. Fino opined that claimant has no evidence of a ventilatory impairment and that he retains the physiologic capacity from a respiratory standpoint to perform all of the requirements of his last job. Director's Exhibit 36.

The administrative law judge noted Dr. Koenig's finding that claimant is unable to resume his coal mine employment and stated that the opinions of Drs. Naeye and Michos supported Dr. Koenig's opinion. Decision and Order at 11. The administrative law judge then noted that Dr. Fino is the only physician to conclude that claimant could resume his former employment. *Id.* The administrative law judge then found that:

> Considering the unquestionable validity of the pulmonary function study obtained by Dr. Koenig, the invalidity of the pulmonary function study obtained by Dr. Fino, the VO2 max findings, the claimant's subjective complaints, and the results of the other tests, I find that Dr. Koenig's opinion is the more documented and well-reasoned.

Decision and Order at 11. Although the administrative law judge considered the validity of

the pulmonary function studies of record, he did not explain his finding in light of the non-qualifying results from both the pulmonary function studies and the arterial blood gas studies.[4] Decision and Order at 10-11. Inasmuch as the non-qualifying results, regardless of their validity, are more supportive of Dr. Fino's opinion, that the miner does not have a totally disabling respiratory impairment, it is not clear from the administrative law judge's discussion of this evidence how these tests support a finding that Dr. Koenig's is better documented and reasoned. *See Clark, supra*; *Fields, supra*; *Lucostic, supra*; *Peskie, supra*; *Hutchens, supra*; *Fuller, supra*. Consequently, we vacate the administrative law judge's finding that claimant established total respiratory disability pursuant to Section 718.204(c)(4) (2000) and remand the case to the administrative law judge for further discussion of the relevant evidence on that issue.

Also, when weighing all of the evidence, both like and unlike, pursuant to Section 718.204(c) (2000), the administrative law judge only discussed Dr. Koenig's opinion and the evidence supportive of his opinion. Decision and Order at 11. The administrative law judge does not discuss the medical opinion evidence in relation to the objective evidence, which he had previously found insufficient to support a finding of total disability. Decision and Order at 10-11. Inasmuch as the administrative law judge failed to assign the objective evidence probative weight and to weigh it against the evidence supportive of a finding of total respiratory disability, we vacate the administrative law judge's finding that claimant established total respiratory disability pursuant to Section 718.204(c) (2000) and remand the case for the administrative law judge to weigh the like and unlike evidence and determine whether claimant established total respiratory by a totality of the evidence. *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Clark, supra; Fields, supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987).

[4]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge