BRB No. 99-0646 BLA

ANDREW RIDNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEMARCO, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-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.

Sidney B. Douglass (Douglass Law Office), Harlan, Kentucky, for claimant.

Richard Davis (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-BLA-0636) 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). The administrative law judge found that the parties stipulated to a coal mine employment history of at least thirty-two years and that a review of the record supports such a stipulation. Decision and Order at 4. The administrative law judge proceeded to find that claimant failed to establish the existence of pneumoconiosis pursuant

to 20 C.F.R. §718.202(a)(1)-(3), but that the presence of the disease was established pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 13-16. The administrative law judge further found that claimant was entitled to the presumption, found at 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, and that the presumption was unrebutted. Decision and Order at 16-17. Finally, the administrative law judge found that while claimant could not establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1), (3), claimant did establish such an impairment pursuant to 20 C.F.R. §718.204(c)(2), (4), and that the totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 18-19. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), and further erred in finding the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to Section 718.204(c), (b). Claimant responds urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.[1]

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).

Employer asserts that the administrative law judge erred in relying upon the opinion of

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, as well as the findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3) and failed to demonstrate total disability pursuant to Section 718.204(c)(1), (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm, as unchallenged, the administrative law judge's determination that claimant established entitlement to the presumption at Section 718.203(b) and that the presumption was not rebutted. *See Skrack*, *supra*.

Dr. Myers, Director's Exhibit 43, as support for a finding of pneumoconiosis pursuant to Section 718.202(a)(4) inasmuch as the physician erred in relying on x-ray evidence as support for his conclusions. Employer further asserts that the administrative law judge erred in relying on the opinions of Dr. Smith, Director's Exhibit 43, as support for a finding of pneumoconiosis inasmuch as the physician's opinion was equivocal and erred in according greatest weight to Dr. Smith's opinions merely because he was claimant's treating physician. Employer also contends that the administrative law judge erred in crediting the opinions of Dr. Dalloul, who concluded that claimant suffered from pneumoconiosis, Claimant's Exhibits 1, 3, without explaining his reasons for crediting the opinions. Finally, with regard to Section 718.202(a)(4), employer contends that the administrative law judge erred in not crediting the well-reasoned opinions of Drs. Fino and Dahhan, both of whom concluded that claimant did not suffer from pneumoconiosis, Director's Exhibits 15, 43; Employer's Exhibit 1.

In finding that claimant established the existence of pneumoconiosis of Section 718.202(a)(4), the administrative law judge found that the opinions of Drs. Smith and Dalloul were entitled to greater weight as their opinions were supported by the underlying documentation of record and both physicians had treated claimant over a period of time. The administrative law judge also concluded that Dr. Myers's opinion diagnosing silicosis resulting from coal mine employment was well-documented and well-reasoned and thus constituted a credible medical opinion, but that Dr. Baker's opinion which also diagnosed pneumoconiosis, Director's Exhibit 35, was entitled to little weight as Dr. Baker did not demonstrate much familiarity with claimant's condition and thus did not present a well-reasoned or well-documented opinion. Decision and Order at 14. Finally, the administrative law judge concluded that the opinions of Drs. Dahhan and Fino were entitled to less weight as Dr. Fino's opinion was not based on an examination of claimant and Dr. Dahhan's opinions were not supported by underlying documentation and were not explained.

We reject employer's assertions and affirm the administrative law judge's determination that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge, in a permissible exercise of his discretion, accorded greatest weight to the opinions of both Drs. Dalloul and Smith as claimant's treating physicians. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). Contrary to employer's assertion that the administrative law judge's crediting of the treating physicians was a mechanical exercise, the administrative law judge found Dr. Smith's conclusions to be the best supported by the underlying documentation of record based on the fact that he was familiar with claimant's condition and the progression of that condition over the years. Decision and Order at 15. The administrative law judge law judge assigned greater weight to Dr. Dalloul's opinions based upon the fact that they were well-supported, were corroborated by

Dr. Smith's opinions, and were based on the fact that Dr. Dalloul examined and treated claimant over a period of time. Decision and Order at 15. Accordingly, we conclude that the administrative law judge has provided an affirmable basis for concluding that the opinions of claimant's treating physicians were entitled to greater weight than the other opinions.

Furthermore, since the administrative law judge considered the equivocal statement in Dr. Smith's opinions that claimant's chronic obstructive pulmonary disease was probably related to coal dust exposure, Director's Exhibit 43, yet did not find the opinion less credible, we reject employer's argument that the opinions of Dr. Smith must be discredited because of the physician's equivocal statement. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). In the instant case, the administrative law judge permissibly concluded that Dr. Smith's opinions supported a finding of the existence of pneumoconiosis, notwithstanding the equivocal statement, based on the physician's familiarity with claimant's physical condition. *See Justice, supra*.

Further, we reject employer's assertion that the administrative law judge was required to accord greater weight to the opinions of Drs. Dahhan and Fino. Such an assertion is tantamount to a request to reweigh the evidence of record, a function outside the Board's scope of review.[2] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, we affirm the administrative law judge's determination that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4).[3]

[2] In any event, the administrative law judge has provided an affirmable basis for the rejection of these opinions inasmuch as Dr. Fino did not examine claimant and was thus not as familiar with claimant's physical condition, and inasmuch as Dr. Dahhan, even though he did examine claimant twice, failed to demonstrate the familiarity with claimant's condition demonstrated by the treating physicians, *see Griffith*, *supra*; *Tussey*, *supra*.

[3] Inasmuch as the administrative law judge has provided an affirmable basis for his

finding that claimant has established the existence of pneumoconiosis at Section 718.202(a)(4), we need not address employer's allegation of error regarding the administrative law judge's consideration of Dr. Myers's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Employer next contends that the administrative law judge erred in finding the presence of a total disabling respiratory impairment established at Section 718.204(c) inasmuch as the administrative law judge failed to consider relevant evidence, specifically a non-qualifying[4] exercise blood gas study and failed to weigh fully the entirety of relevant evidence pursuant to Section 718.204(c)(1)-(4).

In finding that claimant established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c), the administrative law judge initially found that claimant could not demonstrate the presence of such an impairment pursuant to Section 718.204(c)(1) and (3) as there was no qualifying pulmonary function study evidence and no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 17. The administrative law judge concluded, however, that the qualifying blood gas study evidence at Section 718.204(c)(2) and the medical opinion evidence at Section 718.204(c)(4) supported a finding of total disability at Section 718.204(c).

In considering the relevant evidence at Section 718.204(c)(2), the administrative law judge failed to address the non-qualifying exercise portion of the October 24, 1996 blood gas study, Director's Exhibit 47.[5] Such evidence is relevant to an assessment of total disability and must be addressed by the administrative law judge. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Accordingly, we vacate the administrative

[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. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

[5] Although the administrative law judge concluded that the "at rest" portion of this study produced non-qualifying values, he accorded it little weight as it only "exceeded the qualifying values by 0.5." Decision and Order at 17. The administrative law judge at no point addressed the exercise portion of this study which was non-qualifying.

law judge's determination that the evidence of record has demonstrated the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2).

Further, the administrative law judge erred in finding that claimant had established total disability at Section 718.204(c) without properly weighing the evidence. The administrative law judge must assign the contrary probative evidence of record, if any, appropriate weight and determine whether such evidence outweighs the evidence supportive of a finding of total respiratory disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). In the instant case, the administrative law judge merely concluded that the evidence indicative of non-disability failed to outweigh the evidence of disability without providing reasons for his conclusion. Such a determination is not consistent with the Administrative Procedure Act (the APA), 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 U.S.C. §932(a), which requires that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented...." 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 U.S.C. §932(a). Accordingly, if reached, the administrative law judge must consider and weigh all of the relevant evidence of record, including the contrary probative evidence, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c). *See Fields, supra*; *Rafferty, supra*; *Shedlock, supra*.

Employer further contends that the administrative law judge erred in concluding that claimant established that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b). Employer asserts that the administrative law judge erroneously credited the unsupported opinions of Drs. Myers and Dalloul, both of whom concluded that claimant was totally disabled from coal mine employment due to pneumoconiosis, because they were unsupported by underlying documentation, Director's Exhibits 43; Claimant's Exhibits 1, 3, and that the administrative law judge erred in discrediting the opinions of Dr. Dahhan and Fino solely because they fail to diagnose the presence of pneumoconiosis. Employer asserts the opinions of Drs. Dahhan and Fino are supported by the record and that as the administrative law judge, himself, concluded that the objective evidence of record does not support a finding of pneumoconiosis, the discrediting of their opinions is irrational.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that, in order to satisfy his burden at 20 C.F.R. §718.204(b), claimant must establish that his totally disabling respiratory impairment is due, at least in part, to pneumoconiosis, *see Adams v. Director, OWCP*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987). In order to carry his burden at Section 718.204(b), claimant must initially

establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c). *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Inasmuch as we have vacated the administrative law judge's determination that total disability was established pursuant to Section 718.204(c), we must also vacate the administrative law judge's finding at Section 718.204(b). *See Gee*, *supra*.

While we vacate the administrative law judge's finding at Section 718.204(b), however, we conclude that the administrative law judge has proffered affirmable bases for concluding that claimant has carried his burden at that section, and hold that, if reached on remand, the administrative law judge may rely on such analysis to conclude that claimant has established that his totally disabling respiratory impairment, if established, is due to pneumoconiosis. *See Adams*, *supra*.

Contrary to employer's assertions, the administrative law judge has permissibly concluded that the opinions of Dr. Myers and Dalloul were entitled to the greatest weight at Section 718.204(b) as the opinions were the best-reasoned of record, *i.e.*, they were supported by extensive underlying medical data. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, contrary to employer's assertion, the administrative law judge permissibly concluded that the opinions of Drs. Dahhan and Fino were entitled to less weight at Section 718.204(b) based on the their failure to diagnose the existence of pneumoconiosis. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Since the administrative law judge specifically determined that claimant established the existence of "legal" pneumoconiosis pursuant to Section 718.202(a)(4), *see* 20 C.F.R. 718.201, he permissibly accorded less weight to those opinions which lacked a complete picture of the miner's health, *see Stark*, *supra*; *Hutchens*, *supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge