

BRB No. 01-0641 BLA

CLARENCE WHITT)
)
 Claimant-Petitioner)
)
 v.)
)
 EASTERN COAL CORPORATION)
)
 and) DATE ISSUED:
)
 THE PITTSSTON 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (00-BLA-0772) of Administrative Law Judge Joseph E. Kane denying benefits on modification of 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).² The administrative law judge credited claimant with twenty-four and one-half years of coal mine employment pursuant to the parties' stipulation, 2000 Hearing Transcript at 9. Decision and Order at 3. Applying the regulations at 20 C.F.R. Part 718, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis and, therefore, a change in

¹Claimant is Clarence Whitt, the miner, who filed his claim for benefits on September 7, 1988. Director's Exhibit 1. This claim was denied on June 24, 1992 by the Benefits Review Board, and claimant requested modification on May 17, 1993. Director's Exhibits 47, 48. Claimant's request for modification was denied by Administrative Law Judge Frederick D. Neusner on August 4, 1995. Director's Exhibit 82. Claimant appealed the denial to the Board, and the Board remanded the case to the Office of Administrative Law Judges for further consideration. Director's Exhibit 93. On remand, Judge Neusner denied claimant's request for modification. Director's Exhibit 95. Claimant again appealed the denial to the Board, the Board affirmed the denial, claimant appealed to the United States Court of Appeals for the Sixth Circuit, and the Sixth Circuit court affirmed the denial on July 30, 1998. Director's Exhibits 105, 111. Subsequently, claimant requested modification on September 17, 1998. Director's Exhibit 112.

²The 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.

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). 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*, 160 F. Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments regarding the impact of the challenged regulations made by employer in its response brief and the Director, Office of Workers' Compensation Programs, in his letter to the Board.

conditions pursuant to 20 C.F.R. §718.202(a) (2000). Decision and Order at 12-13. The administrative law judge further found that the newly submitted evidence was insufficient to establish total respiratory disability and, therefore, was insufficient to establish a change in conditions pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence regarding the existence of pneumoconiosis and total respiratory disability. Claimant's Brief at 6-7. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief on the merits of this appeal.³

³We affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000) and his findings pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3) (2000) and 20 C.F.R. §718.204(c)(1)-(c)(3) (2000) inasmuch as they are unchallenged on appeal. *See* 20 C.F.R. §§718.202(a)(1)-(a)(3), 718.204(b)(2)(i)-(b)(2)(iii); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(4) (2000), claimant contends that the administrative law judge erred in failing to give greater weight to the opinions of Drs. Camomot and Shafer based on their status as claimant's treating physicians.⁴ Of the newly submitted medical opinions, Drs. Camomot, Shafer, and Younes⁵ found the existence of pneumoconiosis, whereas Drs. Broudy, Branscomb, and Fino did not. The administrative law judge acknowledged that Drs. Camomot and Shafer, "treated the claimant over many years." Decision and Order at 12. However, the administrative law judge found the opinions of Drs. Camomot and Shafer to be undocumented and unreasoned. *Id.* In doing so, the administrative law judge stated that neither Drs. Camomot or Shafer "provided specific dates of objective studies to support their conclusions" and neither provided some reasoning to support their findings other than stating that claimant never smoked. Decision and Order at 13.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held in *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995), that under certain circumstances an administrative law judge is not required to give greater weight to the opinion of a treating physician. *See Griffith, supra*; *see generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In this case, contrary to claimant's contention, the administrative law judge reasonably found the opinions of Drs. Camomot and Shafer to be entitled to less weight because he determined their opinions were undocumented and unreasoned. Decision and Order at 12-13; *see Griffith, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *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). Accordingly, we affirm the

⁴Additionally, claimant asserts that the administrative law judge erred in crediting the reports of the non-examining physicians. Claimant's Brief at 6. Contrary to claimant's assertion, an administrative law judge is not required to give less weight to a reviewing physician's opinion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *see generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

⁵The administrative law judge permissibly found Dr. Younes' opinion to be undocumented and unreasoned because this physician did not provide a basis for his finding, other than noting claimant has a history of coal workers' pneumoconiosis. Decision and Order at 13; *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).

administrative law judge's finding that claimant failed to establish a change in conditions pursuant to Section 718.202(a)(4) (2000) based on the newly submitted medical opinion evidence. *See* 20 C.F.R. §718.202(a)(4); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

Regarding the issue of total respiratory disability, the record contains the newly submitted medical reports of Drs. Camomot and Shafer, who found claimant has a totally disabling respiratory impairment, and the opinions of Drs. Broudy, Branscomb, and Fino, who found that claimant has no respiratory impairment. The administrative law judge properly found the reports of Drs. Camomot and Shafer to be undocumented and unreasoned, noting that neither physician "addressed the non-qualifying results of the pulmonary function studies and blood gas studies" and neither physician explained their rationale for their disability findings.⁶ Decision and Order at 13; *see Lucostic, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983).

Claimant contends that the opinions of Drs. Broudy, Branscomb, and Fino are invalid with respect to the issue of total disability because these physicians were not aware of the exertional requirements of claimant's usual coal mine employment. Claimant's Brief at 7. The Sixth Circuit court discussed in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), that a physician who has opined that claimant has some degree of respiratory impairment, *i.e.*, mild to moderate, should have knowledge of the exertional requirements of claimant's coal mine work before rationally determining whether claimant is or is not totally disabled from performing his usual coal mine employment. However, because Drs. Broudy, Branscomb, and Fino all found that claimant has no respiratory impairment, Director's Exhibit 140; Employer's Exhibit 2, 3, it was unnecessary for them to demonstrate awareness of the physical requirements of claimant's usual coal mine employment before opining that claimant is not totally disabled from performing his usual coal mine work. *See Cornett, supra*; *see generally Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986). Accordingly, we reject claimant's assertion and affirm the

⁶Additionally, the administrative law judge stated that the qualifications of Drs. Camomot and Shafer in pulmonary medicine are unknown. The qualifications of Drs. Camomot and Shafer are not in the record. The record reflects that Drs. Broudy and Fino are both Board-certified in internal medicine and pulmonary disease and are B-readers, and Dr. Branscomb is Board-certified in internal medicine and was previously a B-reader. Director's Exhibit 140; Employer's Exhibit 10.

administrative law judge's finding that claimant failed to demonstrate total respiratory disability and a change in condition based upon the new medical opinion evidence. *See* 20 C.F.R. §718.204(b)(iv); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Worrell, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge