BRB No. 03-0444 BLA

WILLIAM HUFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/29/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5249) of Administrative Law Judge Joseph E. Kane denying benefits on a duplicate claim[1] filed pursuant to the

[1]Claimant filed the first claim on April 16, 1987. Director's Exhibit 1. On November 26, 1990, Administrative Law Judge Gerald M. Tierney issued a Decision and Order denying benefits. *Id*. Judge Tierney's denial was based on claimant's failure to establish the existence of pneumoconiosis. *Id*. The Board affirmed Judge Tierney's Decision and Order. *Huff v. Blue Diamond Coal Co.*, BRB No. 91-0537 BLA (Sept. 15, 1992)(unpub.). Subsequently, the Board denied claimant's request for reconsideration. *Huff v. Blue Diamond Coal Co.*, BRB No. 91-0537 BLA (Apr. 7, 1993)(Order)(unpub.). Because

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 years of coal mine employment based on the parties' stipulation and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.[3] On the merits, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and total disability overall pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.[4]

The Board's scope of review is defined by statute. If the administrative law judge's

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claimant did not pursue this claim any further, the denial became final. Claimant filed the second claim on March 19, 1996. Director's Exhibit 1. On October 14, 1997, Administrative Law Judge Alfred Lindeman issued a Decision and Order denying benefits, *id*., which the Board affirmed, *Huff v. Arch on the North Fork*, BRB No. 98-0604 BLA (Feb. 11, 1999)(unpub.). Judge Lindeman's denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1. The denial became final because claimant did not pursue this claim any further. Claimant filed the most recent claim on July 25, 2001. Director's Exhibit 3.

[2]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). As the instant claim was filed after the effective date of the amended regulations, all citations to the regulations refer to the amended regulations.

[3]The administrative law judge stated, "[a]s the Director is not challenging the presence of pneumoconiosis arising out of coal mine employment, [c]laimant has automatically established an element of entitlement previously adjudicated against him." Decision and Order at 8.

[4]Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§725.309 and 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[5] The administrative law judge considered the reports of Drs. Baker, Broudy, Hussain and Wicker.[6] In a report dated October 9, 1996, Dr. Broudy opined that claimant retains the respiratory capacity to perform the work of an underground coal miner. Director's Exhibit 1. Similarly, in a report dated April 10, 1996, Dr. Wicker opined that claimant's respiratory capacity was adequate to perform his previous occupation in the coal mining industry. *Id.* In a report dated August 25, 2001, Dr. Baker opined that claimant suffers from a Class 1 impairment. Director's Exhibit 15. Dr. Baker also opined that claimant was occupationally disabled from working in the coal mining industry or similar dusty occupations because of the development of pneumoconiosis. *Id.* Dr. Hussain, in a report dated September 7, 2001, opined that claimant suffers from a mild pulmonary impairment. Director's Exhibit 14. Dr. Hussain further opined that claimant retains the respiratory capacity to perform the work of a coal miner. *Id.* Based on his weighing of the opinions of Drs. Baker, Broudy, Hussain and Wicker,[7] the administrative law judge found the evidence insufficient to establish total

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[5]Claimant asserts that a single medical opinion supportive of a finding of total disability is "sufficient for invoking the presumption of total disability." Claimant's Brief at 3. However, claimant has not identified any presumption of total disability that is applicable in this case.

[6]Although the administrative law judge stated that he reviewed all of the evidence of record, he did not specifically identify and weigh the evidence submitted with the first claim in his weighing of the evidence on the merits. The administrative law judge stated that "[m]ost of the previous evidence is medical evidence from the late 1980s." Decision and Order at 4. The administrative law judge therefore concluded, "[c]onsidering that the instant controversy asks only whether [c]laimant is totally disabled, I grant little probative weight to evidence nearly two decades old. It simply is not reflective of [c]laimant's current physical condition." *Id.* Claimant does not contest the administrative law judge's failure to weigh this evidence. Since none of the previously submitted medical opinion evidence supports a finding of total disability, we hold that any error by the administrative law judge in failing to weigh this evidence on the merits is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7]We reject claimant's assertion that the administrative law judge's consideration of the

disability.[8]

Claimant contends that the administrative law judge erred in discounting Dr. Baker's opinion. We disagree. The administrative law judge permissibly discounted Dr. Baker's opinion because he found it not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). After considering Dr. Baker's opinion, the administrative law judge rationally found that Dr. Baker failed to explain how the pulmonary function studies indicated a Class 1 respiratory impairment. The administrative law judge specifically stated:

> [Dr. Baker] concludes that [c]laimant possesses a "Class 1" impairment, and he cites [c]laimant's FEV1 and vital capacity measures of above 80% as his bases for such a conclusion. The rationale alone is inadequate. Nowhere does Dr. Baker attempt to explain how objective medical testing that reveals pulmonary capability near or at normal capacity is supportive of an impairment diagnosis, and he offers no further rationale.

Decision and Order at 10. Further, the administrative law judge rationally found that Dr. Baker's opinion, that pneumoconiosis alone rendered claimant totally disabled because claimant should receive no further coal dust exposure, is not a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Clark*, 12 BLR at 1-155, *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion.

Claimant next asserts that the administrative law judge should have accorded dispositive weight to the opinion of Dr. Baker based on Dr. Baker's status as the miner's

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1996 opinions of Drs. Broudy and Wicker violated the limitation on evidence imposed by 20 C.F.R. §725.414. As argued by the Director, Office of Workers' Compensation Programs, the pertinent regulation provides that "[a]ny evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." 20 C.F.R. §725.309(d)(1).

[8]Contrary to claimant's assertion, the administrative law judge did not find the medical opinion evidence in equipoise. Rather, the administrative law judge accorded moderate probative weight to Dr. Wicker's opinion and mild probative weight to Broudy's opinion, while he accorded less probative weight to Dr. Hussain's opinion and little to no probative weight to Dr. Baker's opinion. Decision and Order at 10-11.

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. 20 C.F.R. §718.104(d)(5). 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 not presumptively correct nor are they afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 510-513, BLR (6th Cir. 2002); *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. In the instant case, the administrative law judge did not specifically consider Dr. Baker's opinion in light of the criteria provided in 20 C.F.R. §718.104(d). Nonetheless, since the administrative law judge permissibly discredited Dr. Baker's opinion because it is not reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294, we hold that any error by the administrative law judge in this regard is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we reject claimant's assertion that the administrative law judge should have accorded dispositive weight to the opinion of Dr. Baker based on Dr. Baker's status as the miner's treating physician.

In addition, the administrative law judge permissibly discounted Dr. Hussain's opinion because it is not reasoned. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. The administrative law judge rationally determined that Dr. Hussain's opinion is insufficient to establish total disability as he failed to provide a rationale for his finding of a mild impairment. *Clark*, 12 BLR at 1-155; *Tackett*, 12 BLR at 1-14. Moreover, Dr. Hussain also opined that claimant could perform his usual coal mine employment. Director's Exhibit 14. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Hussain's opinion.

We also reject claimant's assertion that the administrative law judge was required to consider the exertional requirements of claimant's usual coal mine employment in conjunction with the reports of Drs. Baker and Hussain. Dr. Hussain did not provide specific limitations that could be compared to claimant's work requirements. *Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984);

Laird v. Alabama By-Products Corp., 6 BLR 1-1146 (1984). Moreover, although Dr. Baker opined that claimant suffers from a Class 1 impairment, the administrative law judge rationally found that Dr. Baker failed to explain how the pulmonary function studies indicated a Class 1 respiratory impairment. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. Additionally, we hold that it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are relevant only in determining the miner's ability to perform comparable and gainful work, not to establishing total disability from performing claimant's usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *Fields*, 10 BLR at 1-22.

Finally, we reject claimant's assertion that the administrative law judge erred in failing to conclude that claimant's condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Since it is supported by substantial evidence, we affirm 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).

Because claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *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 affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge