

BRB No. 99-1273 BLA

NELLIE M. HONAKER)	
(Widow of FRED G. HONAKER, Sr.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
RANGER FUEL CORPORATION)	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 on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, 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 on Remand (91-BLA-2871) of Administrative Law Judge Stuart A. Levin awarding benefits on a miner's 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 miner's claim is before the Board

¹ Claimant, Nellie Honaker, is the widow of the miner, Fred G. Honaker, who died on October 3, 1990. Director's Exhibit 5. Subsequent to the miner's death, claimant, on November 27, 1990, filed a survivor's claim. Director's Exhibit 1. In a Decision and Order issued August 11, 1993, Judge Levin denied benefits on the survivor's claim inasmuch as he concluded that the evidence of record failed to establish that the miner's pneumoconiosis contributed in any way to his death. Claimant failed to challenge the denial of survivor's benefits, and in its Decision and Order issued on May 31, 1995, the Board held that the

for a third time. Initially, the administrative law judge determined that the instant claim constituted a duplicate claim, that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), and, further, that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge found that the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309 and awarded benefits on the miner's claim. Subsequent to an appeal by employer, the Board vacated the award of miner's benefits. *Honaker v. Ranger Fuel Corporation*, BRB No. 93-2538 BLA (May 31, 1995)(unpub.). The Board affirmed the administrative law judge's findings regarding the length of the miner's coal mine employment and the findings rendered pursuant to Sections 718.202(a)(2), 718.203, 718.204(c)(1)-(3) and 725.309, but vacated the administrative law judge's findings that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b) and remanded the claim for further consideration. *Id.*

On remand, the administrative law judge again concluded that the evidence of record established that the miner established a totally disabling respiratory impairment due to pneumoconiosis pursuant to Section 718.204(b) and (c). Accordingly, benefits were again awarded. Subsequent to an appeal by employer, the Board again vacated the award of benefits. *Honaker v. Ranger Fuel Corp.*, BRB No. 98-0372 BLA (Dec. 1, 1998)(unpub.). Specifically, the Board affirmed, as unchallenged, the administrative law judge's finding that the evidence established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c), *Honaker*, slip op. at 2 n.2, but vacated the administrative law judge's finding that the evidence of record established a totally disabling respiratory impairment due to pneumoconiosis at Section 718.204(b), *Honaker*, slip op. at 3. The Board held that, in reaching his determination at Section 718.204(b), the administrative law judge relied upon evidence which could not be located in the record. Accordingly, the Board concluded that the administrative law judge's finding was violative of the Administrative Procedure Act (APA), which provides 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). *Honaker*, slip op. at 3. The Board thus remanded the claim for further consideration of the relevant evidence at Section 718.204(b). *Id.* On remand, the administrative law judge concluded that the evidence he had

denial of benefits on the survivor's claim was final. *Honaker v. Ranger Fuel Corporation*, BRB No. 93-2358 BLA (May 31, 1995)(unpub.). Accordingly, the survivor's claim is not before the Board at this time.

² The miner filed a claim for benefits on November 8, 1979, which was denied on June 19, 1981, Director's Exhibit 20. The miner took no further action until the filing of the instant claim on February 26, 1984. Director's Exhibit 1.

previously relied upon was part of the record and that the Board erred in its holding that such evidence was not part of the record. Accordingly, the administrative law judge incorporated, by reference, his previous findings of facts and conclusions of law and awarded benefits. On appeal, employer contends that the administrative law judge erred in relying upon the opinion of Dr. Daniel as support for a finding of total disability due to pneumoconiosis at Section 718.204(b). Employer further asserts that the administrative law judge erred in his analysis of the remaining relevant evidence at Section 718.204(b). Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When this case was most recently before the Board, it held that with regard to the Decision and Order on Remand dated April 23, 1997:

While the record contains reports from Dr. Daniel of the miner's hospital visits, our review of the record has not revealed the reports of the miner's hospital visits on November 27, 1985 and December 23, 1985 or any evidence that the reports were assigned exhibit numbers and admitted into the record....Because the administrative law judge based his findings pursuant to Section 718.204(b) on medical evidence which can not be located in the record, we vacate the administrative law judge's finding pursuant to Section 718.204(b) and remand the case to the administrative law judge for further discussion of the evidence of record relevant to the causation of the miner's totally disabling respiratory impairment pursuant to Section 718.204(b).

Honaker, slip op. at 3. On remand, the administrative law judge concluded that the Board's reference to the December 23, 1985, hospital report was erroneous inasmuch as the report in question was dated December 23, 1986, and was properly referred to as such in his previous Decision and Order. Decision and Order on Remand at 1. The administrative law judge further acknowledged that the hospital discharge summary to which he referred to in his previous Decision and Order was actually dated November 29, 1985, and not November 27,

³ In view of this determination, our review of the administrative law judge's findings encompass the Decision and Order on Remand (dated April 23, 1997) as well as the instant Decision and Order.

1985 as he previously indicated. Decision and Order on Remand at 1. Nevertheless, the administrative law judge found that the discharge report, like the hospital report, was part of the record he had addressed previously. Decision and Order on Remand at 2. Employer, in its response brief, has conceded that the hospital records in question, both the hospital report of December 23, 1986, and the discharge report of November 29, 1985, were part of the record. See Employer's Brief at 3. To the extent that the administrative law judge specifically addressed the medical opinions in question and based upon the fact that employer has failed to challenge the findings that such reports were part of the record, see *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), we now conclude that these opinions are part of the record, see Director's Exhibit 7, and, as such, may be considered by the administrative law judge under the APA. Accordingly, our review of the administrative law judge's findings will be of the most recent Decision and Order on Remand, dated August 17, 1999, and the previous Decision and Order on Remand, dated April 23, 1997.

Employer asserts that the medical opinions of Dr. Daniel do not support a finding that the miner's total disability was due to pneumoconiosis inasmuch as the physician's opinions were silent on the issue. Employer asserts that none of Dr. Daniel's opinions link claimant's coal worker's pneumoconiosis to a total and permanent disability or any disability at all.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that, in order to carry his burden at Section 718.204(b), claimant must demonstrate that pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *Robinson v. Pickands Mather Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). To be a contributing cause, claimant's coal mining must be a necessary condition of his disability. *Robinson, supra*. In finding that Dr. Daniel's opinions were supportive of claimant's burden at Section 718.204(b), the administrative law judge found that while the physician ruled out pneumoconiosis as the cause of the miner's death, Dr. Daniel nevertheless concluded that pneumoconiosis was a contributing cause of the miner's impairment during his lifetime. Decision and Order on Remand (of April 23, 1997). Contrary to the administrative law judge's finding, as employer contends, a review of Dr. Daniel's various opinions of record, see Director's Exhibits 3, 5; Employer's Exhibits 7, 10, fails to demonstrate the "nexus" between the miner's pneumoconiosis and his totally disabling respiratory impairment. While the physician diagnosed the presence of coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and dyspnea, the opinions seemingly fail to diagnose the presence of a totally disabling respiratory impairment or the link between such an impairment and the miner's pneumoconiosis. An administrative law judge's evidentiary analysis which fails to coincide with the evidence of record constitutes error and remand is necessary for further consideration of the relevant evidence. 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 must vacate the administrative law judge's determination that claimant has carried his burden at Section 718.204(b), see *Robinson, supra*, and we remand the claim for further consideration of the opinions of Dr. Daniel.

In the interest of administrative efficiency and to avoid repetition of error on remand, we next consider employer's other contentions regarding the administrative law judge's consideration of the evidence at Section 718.204(b). Employer contends that, in his analysis of the medical opinion evidence at Section 718.204(b), the administrative law judge improperly accorded less weight to the opinions of Dr. Crisalli, who concluded that claimant's pulmonary impairment was due to cardiac problems and obesity. Director's Exhibit 38. In considering Dr. Crisalli's opinions, the administrative law judge found, correctly, that during the miner's lifetime Dr. Crisalli concluded that the miner did not suffer from pneumoconiosis. Decision and Order on Remand (of April 23, 1997); Director's Exhibit 38. The administrative law judge further found that, subsequent to the miner's death, Dr. Crisalli submitted a medical opinion in which the physician indicated his awareness that the miner suffered from simple coal workers' pneumoconiosis, but that such pneumoconiosis played no role in the miner's death. In that subsequent report, as the administrative law judge found, Dr. Crisalli acknowledged that even if the miner were determined to have had pneumoconiosis in 1988, it was of such a minimal degree as to cause no restrictive impairment. It was Dr. Crisalli's conclusion that any impairment suffered by the miner was a result of obesity. The administrative law judge found that Dr. Crisalli's opinion was not well-documented as it was based on "vague, speculative assumptions." Decision and Order on Remand (of April 23, 1997), at 4-5.

To the extent that the administrative law judge concluded that Dr. Crisalli's opinion was entitled to little weight as did not constitute a well-reasoned opinion, we affirm the administrative law judge's finding as such a determination is soundly within the discretion of the administrative law judge. *See generally McMATH v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We are, however, mindful of precedent which establishes that medical opinions which find that claimant does not suffer from any pulmonary or respiratory impairment even though they erroneously found that claimant did not have pneumoconiosis may still constitute credible evidence under Section 718.204(b). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see generally Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). Accordingly, we hold that on remand, if reached, the administrative law judge must address the opinions of Dr. Crisalli in a manner consistent with the concerns expressed, *supra*.

Lastly, employer asserts that the administrative law judge erred in according little weight to the opinions of the pathologists regarding the extent of the miner's disability. Specifically, employer contends that the opinions of the various pathologists of record, Drs. Kleinerman, Hutchens, Caffrey, Hansbarger, Bush and Naeye, Director's Exhibit 15; Employer's Exhibits 6, 8, 9 13, 16, "provide[] a definitive picture of the quantum of disease present at death," and thus would demonstrate the role of pneumoconiosis in any disability suffered by the miner at the time of his death. Employer's Brief at 14. Employer further asserts that it was error to discredit this evidence in favor of the opinions of Dr. Daniel.

A review of the relevant evidence demonstrates that, as employer asserts, the opinions of Drs. Kleinerman, Hutchens and Bush all specifically conclude that pneumoconiosis played no role in the miner's pulmonary impairment. See Employer's Exhibits 6, 9, 15. In concluding that the opinions of these pathologists were entitled to less weight the administrative law judge found that because the physicians did not examine the miner during his lifetime, the opinions were entitled to less weight than the opinion of Dr. Daniel, who was the miner's treating physician.

While the opinion of a treating physician may be accorded greater weight than that of a non-examining physician, see *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); see generally *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the fact that a particular physician is a treating physician is merely one factor which must be addressed by the administrative law judge in assessing the credibility of medical opinions, see *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); see also *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Inasmuch as we have already concluded that Dr. Daniel's opinions are flawed to the extent that his opinions may not be supportive of a finding of total disability due to pneumoconiosis at Section 718.204(b), see discussion, *supra*, we must vacate the administrative law judge's reliance on Dr. Daniel's opinion as more credible than the opinions of the pathologists, see *Tedesco, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated 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