BRB No. 99-1104 BLA

JUNIOR RAY PATRICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
P & P TRUCKING	)	DATE ISSUED:
	)	
and	)	
	)	
FIDELITY AND CASUALTY COMPANY OF NEW YORK	)	
	)	
and	)	
	)	
STAR FIRE COALS, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
Employers/Carriers-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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Amy E. Wilmot (Arter & Hadden LLP), Washington, D.C., for employer, Star Fire Coals, Incorporated.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1637) of Administrative Law Judge Rudolf L. Jansen denying 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). The administrative law judge, based on the parties' stipulation, credited claimant with 17.05 years of coal mine employment[1] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R.

[1]The administrative law judge stated, "[c]laimant estimated that of the 17.05 years, he worked three years in underground mining." Decision and Order at 4. The administrative law judge also stated that "[c]laimant's last year of coal mine employment was as a truck driver hauling coal from the pit to the tipple for P & P." *Id*. The alj further stated, "since P & P is unable to pay, I find that Star Fire...is [properly] designated as the responsible operator." *Id*. at 6.

§718.204(c)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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).

[2]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Of the sixty-two x-ray interpretations of record,[3] thirty-three readings are negative for pneumoconiosis, Director's Exhibits 15, 16, 32-38, 41, 43, 44, 46-48, 50; Employer's Exhibits 1, 5, 6, 10, 13, twenty-five readings are positive, Director's Exhibits 21, 29-32, 39, 40, 42, 49, 50, and four x-rays are unreadable, Employer's Exhibit 13. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The administrative law judge stated that "the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians." Decision and Order at 15. Thus, we reject claimant's assertion that the administrative law judge erroneously relied on the numerical superiority of the negative x-ray readings. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Next, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Whereas Drs. Anderson, Baker, Botto and Myers opined that claimant suffers from pneumoconiosis, Director's Exhibits 29, 50; Employer's Exhibit 3, Drs. Broudy, Fino, Vuskovich and Wicker opined that claimant does not suffer from pneumoconiosis, Director's Exhibits 13, 50; Employer's Exhibits 5, 9, 14. Dr. Branscomb diagnosed a mild reversible obstructive impairment. Employer's Exhibit 11. The administrative law judge stated that "the opinions which support a finding that [c]laimant does not have pneumoconiosis are entitled to more weight than the

[3]The administrative law judge stated that "[t]he evidence of record contains sixty-three interpretations of thirteen chest x-rays." Decision and Order at 15. The administrative law judge characterized the record as containing two positive readings of the February 24, 1993 x-ray by Dr. Lane. However, the record indicates that this x-ray was read only one time by Dr. Lane on February 25, 1993. Director's Exhibits 29, 50.

opinions which support a finding that [c]laimant does have pneumoconiosis." Decision and Order at 16.

Claimant asserts that the administrative law judge erred in discounting Dr. Baker's opinion because it is based on an inaccurate coal mine employment history. Claimant's assertion is based on the premise that since all of the physicians of record relied on inaccurate coal mine employment histories, the administrative law judge should not have discounted only Dr. Baker's opinion on this basis. As previously noted, the administrative law judge credited claimant with 17.05 years of coal mine employment. Whereas Dr. Baker relied upon a history of thirty-eight years of coal mine employment, Director's Exhibits 29, 50, Drs. Anderson, Broudy and Vuskovich relied upon histories of twenty-two years of coal mine employment, Director's Exhibit 50. Drs. Fino and Myers relied upon histories of twenty years of coal mine employment. Director's Exhibits 29, 50; Employer's Exhibit 5. Dr. Wicker lists claimant's last coal mine employment with P & P Trucking from 1978 to 1992. Director's Exhibit 13. An employment history form is also attached to Dr. Wicker's report. *Id*.

Although none of the doctors of record relied on a history of 17.05 years of coal mine employment, the administrative law judge only discounted Dr. Baker's opinion because it was based on an inaccurate coal mine employment history. The administrative law judge stated that Dr. Baker "used a greatly exaggerated coal mining history." Decision and Order at 16. However, the administrative law judge did not consider the coal mine employment histories relied upon by the other physicians of record. Since the administrative law judge did not explain why he did not apply the same reasoning to discount the opinions of the other doctors of record who relied on inaccurate coal mine employment histories, we hold that the administrative law judge erred in discounting Dr. Baker's opinion on this basis. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Claimant also asserts that the administrative law judge erred in discounting the opinions of Drs. Anderson, Baker and Myers because they are based on inaccurate smoking histories. The administrative law judge stated, "[a]lthough [c]laimant reported very different smoking histories to different physicians, I note that he reported a...thirty year, two pack per day history to one of his treating physicians, Dr. Juan Botto." Decision and Order at 16; Employer's Exhibit 3. Further, the administrative law judge stated, "I credit this history as the most accurate since [c]laimant would have been motivated to give a truthful and carefully considered smoking history to the physician responsible for his health." Decision and Order at 16. While the administrative law judge found that Drs. Anderson, Baker and Myers

"seriously underestimated [c]laimant's smoking history,"[4] *id*., he did not discount the contrary opinions of the other doctors who also relied on inaccurate smoking histories.[5] Rather, the administrative law judge stated, "[a]lthough some of the physicians who opined that [c]laimant did not have pneumoconiosis also utilized deflated smoking histories, their opinions are not entitled to less weight since they actually underestimated the likelihood that cigarette smoke was responsible for [c]laimant's respiratory condition, but still found that his condition was not caused by coal dust." *Id*. However, inasmuch as the administrative law judge did not apply the same reasoning to discount the opinions of the other doctors who relied upon inaccurate smoking histories, we hold that it was irrational for the administrative law

[4]Dr. Anderson relied upon a smoking history of one pack of cigarettes per day for twenty-nine years. Director's Exhibit 50. Dr. Baker relied upon a smoking history of one pack of cigarettes per day for twenty years. Director's Exhibits 29, 50. Dr. Myers relied upon a smoking history of one to two packs of cigarettes per day for twenty years. Director's Exhibits 29, 50.

[5]Dr. Wicker relied upon a smoking history of one to two packs of cigarettes per day for fifteen years. Director's Exhibit 13. Dr. Fino relied upon a smoking history of one pack of cigarettes per day for twenty-eight years. Employer's Exhibit 5. Dr. Branscomb relied upon a smoking history of more than one pack of cigarettes per day for twenty-eight years. Employer's Exhibit 11. Dr. Broudy relied upon a smoking history of two to three packs of cigarettes per day for twenty-five to thirty years. Director's Exhibit 50. Dr. Vuskovich relied upon a smoking history of one and one-half packs of cigarettes per day for twenty-two to twenty-seven years. Director's Exhibit 50.

judge to discount the opinions of Drs. Anderson, Baker and Myers on this basis. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Further, in considering the conflicting opinions of record, the administrative law judge stated that "[t]he opinions of Drs. Broudy, Fino, and Branscomb are entitled to additional weight since these physicians all hold [B]oard certifications in fields relevant to this cause of action." Decision and Order at 16. Dr. Branscomb is Board-certified in internal medicine, Employer's Exhibit 11, and Drs. Broudy and Fino are Board-certified in internal medicine and pulmonary disease, Employer's Exhibits 5, 7, 14. The record does not contain the credentials of Drs. Baker and Myers. However, the record indicates that Dr. Anderson is Board-certified in internal medicine and pulmonary disease. Director's Exhibit 50. Additionally, while the administrative law judge acknowledged that Dr. Botto is claimant's treating physician, he did not note what weight, if any, he accorded to the opinion of Dr. Botto based on Dr. Botto's status as claimant's treating physician. *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, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). Thus, we vacate the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the evidence thereunder. If reached, the administrative law judge must also consider whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.

In addition, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Whereas Drs. Anderson, Baker, Myers and Vuskovich opined that claimant suffers from a disabling respiratory impairment,[6] Director's Exhibit 50; Employer's Exhibit 9, Drs. Branscomb and Fino[7] opined that claimant does not suffer from a disabling respiratory impairment, Employer's Exhibits 11, 14. Dr. Wicker opined that

[6]The administrative law judge rationally found that Dr. Broudy's opinion "that [c]laimant was unable to perform the work of an underground coal miner...is irrelevant since [c]laimant's last coal mining job was as a truck driver." Decision and Order at 18; Director's Exhibit 50.

[7]The administrative law judge correctly stated that "Dr. Fino initially opined that [c]laimant was unable to perform his last job as a coal miner, but he changed his opinion when he realized that [c]laimant's last job was as a truck driver." Decision and Order at 17; Employer's Exhibits 5, 14.

claimant's respiratory capacity was borderline to perform his last coal mining job. Director's Exhibit 13. The administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb and Fino than to the contrary opinions of Drs. Baker, Myers and Vuskovich because of their superior qualifications.[8] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also properly accorded greater weight to the opinions of Drs. Branscomb and Fino than to the contrary opinion of Dr. Anderson because he found their opinions to be based on more extensive documentation.[9] *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). Further, the administrative law judge permissibly discounted Dr. Wicker's opinion because he found it "to be vague." Decision and Order at 17; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Claimant asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Branscomb than to the contrary opinions of Drs. Anderson, Baker, Myers and Vuskovich since Dr. Branscomb did not examine him. Contrary to claimant's assertion, the opinion of a non-examining physician may be accorded greater weight than that of an examining physician where the administrative law judge has provided valid reasons for doing so. *See Wetzel, supra*; *see also Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). As previously noted, in the instant case, the administrative law judge properly accorded greater weight to the opinion of Dr. Branscomb over the contrary opinions of Drs. Anderson, Baker, Myers and Vuskovich because of Dr. Branscomb's superior qualifications, *see Martinez, supra*; *Dillon, supra*; *Wetzel, supra*, and because he found Dr. Branscomb's opinion to be based on more extensive documentation, *see Sabett, supra*. Thus, we reject claimant's assertion that the administrative law judge erred in according greater weight to the opinion of Dr. Branscomb than to the contrary opinions of Drs. Anderson, Baker, Myers and Vuskovich since Dr. Branscomb did not examine him.

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[8]Dr. Branscomb is Board-certified in internal medicine, Employer's Exhibit 11, and Dr. Fino is Board-certified in internal medicine and pulmonary disease, Employer's Exhibit 5. The record does not contain the credentials of Drs. Baker and Myers. Dr. Vuskovich is Board-eligible in emergency medicine and Board-eligible in pain management. Employer's Exhibit 7.

[9]The administrative law judge stated, "I give the most weight to the opinions of Drs. Fino and Branscomb since they reviewed a large quantity of the medical evidence relevant to this case." Decision and Order at 18.

Claimant further asserts that Dr. Fino's opinion is hostile to the Act because Dr. Fino "has essentially testified that coal dust exposure cannot cause more than clinically insignificant respiratory impairment." Claimant's Brief at 6. Contrary to claimant's assertion, Dr. Fino's opinion does not foreclose all possibility that simple pneumoconiosis can be disabling. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). In a deposition dated February 23, 1998, Dr. Fino stated, "[c]oal workers' pneumoconiosis can cause an impairment, can cause disability and I believe that and I have witnessed that and I have testified to that extent." Employer's Exhibit 14 (Dr. Fino's Deposition at 22).

Finally, claimant asserts that the administrative law judge erred in failing to consider the doctors' opinions in light of the exertional demands of his job as a coal truck driver. Claimant specifically asserts that his job as a truck driver constitutes "very hard work." The administrative law judge stated, "Dr. Slone opined that [c]laimant had a 'moderate' respiratory impairment, but it is unclear whether he viewed this impairment as sufficient to prevent [c]laimant from performing his last coal mining job." Decision and Order at 17; Director's Exhibit 50. The administrative law judge also stated that although "Dr. Botto noted that [c]laimant only experiences shortness of breath on extreme exertion...[i]t is unclear whether Dr. Botto would have considered the exertion required of [c]laimant in his last coal mining job to be 'extreme.'" Decision and Order at 17; Employer's Exhibit 3. However, an administrative law judge must determine the exertional requirements of a miner's usual coal mine work, and compare those requirements with the doctor's opinions regarding the degree of the miner's disability and/or inability to perform usual coal mine work. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Keen v. Laurel Creek Coal Co.*, 7 BLR 1-498 (1984). In the instant case, Drs. Botto and Slone are the only doctors who did not render an explicit opinion with regard to whether claimant suffers from a totally disabling respiratory impairment. Nonetheless, there is no indication that the administrative law judge compared the aforementioned doctors' opinions with the exertional requirements of claimant's usual coal mine employment.[10] The opinions of Drs. Botto and Slone may, if

[10]The administrative law judge stated that "[c]laimant's last year of coal mine employment was as a truck driver hauling coal from the pit to the tipple for P & P." Decision and Order at 4. The administrative law judge observed that this position required him to fix flat tires and perform other maintenance on the truck." *Id*. The record contains claimant's testimony regarding the exertional requirements of his usual coal mine employment as a truck driver. Hearing Transcript at 24. When asked if his job duties included changing tires, claimant responded by testifying that

credited, and when compared with the exertional requirements of claimant's usual coal mine employment, support a finding of total disability. *See Budash, supra*; *cf. Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Thus, we vacate the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c), and remand the case for further consideration of the evidence in accordance with *Cornett v. Benham Coal Co.*, No. 99-3469, F.3d , BLR (6th Cir. Sept. 7, 2000). *See also Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash, supra*; *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983).

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 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), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). The administrative law judge must also consider whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), if reached. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

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his "work[] on the trucks [included]...[c]hanging motors and everything else." *Id*. Claimant also testified that his job duties required him to lift at least one hundred pounds "plenty of times" and to lift fifty pounds frequently. *Id*. In addition, claimant testified that his job duties required him to hand-load coal of at least twenty pounds. *Id*. In claimant's Description of Coal Mine Work form, claimant indicated that his duties as a truck driver included driving to the mine site, loading coal, and hauling it to the tipple ten or twelve times a day without an air conditioner. Director's Exhibit 9. Claimant also indicated that he did the mechanic work on the truck whenever it broke down. *Id*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings 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