BRB No. 01-0201 BLA

ALIVIE PATTERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
WEST KEN COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Thomas M. Rhoads (Rhoads & Rhoads, P.S.C.), Madisonville, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig, LLP), Washington, D.C., for employer.

Edward Waldman (Howard M. Radzely, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-980) of Administrative Law Judge Donald W. Mosser 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 found, and the parties stipulated to, at least fourteen years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3-4, 16; Director's Exhibit 1. The administrative law judge found that the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) but concluded that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Decision and Order at 17-22. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis and that his total disability was due to pneumoconiosis established as the administrative law judge did not properly consider all the evidence of record. Employer responds asserting that the denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he agrees with claimant that the administrative law judge did not properly consider the evidence of record.

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[1]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 (2001).

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). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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 made by the parties regarding the impact of the challenged regulations.

[2]Claimant filed his application for benefits on August 13, 1998. Director's Exhibit 1.

[3]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c) (2000) are affirmed as

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order must be vacated and the case remanded to the administrative law judge for further consideration. Claimant argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in failing to find that the evidence established the existence of pneumoconiosis and that claimant's total disability was due to pneumoconiosis because he failed to discuss and consider the opinion of Dr. Canonico, claimant's treating physician. Claimant's Brief at 4-8. We agree.

In finding that claimant failed to establish the existence of pneumoconiosis the administrative law judge noted the relevant opinions of record and concluded that the opinions of Drs. Fino, Dahhan, Branscomb and Caffrey were entitled to greater weight then

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unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See* Director's Exhibit 2; *Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

[5]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 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 30 U.S.C. §932(a).

the contrary opinions of Drs. Traughber and Taylor due to their impressive credentials. The administrative law judge further accorded greater weight to the opinions of Drs. Dahhan and Branscomb in finding that claimant's total disability was not due to pneumoconiosis as they reviewed all the evidence of record and their opinions are consistent with the determination that claimant does not have pneumoconiosis. Decision and Order at 19, 22; Director's Exhibits 13-15; Claimant's Exhibit 1; Employer's Exhibits 1-3, 5, 7, 8. The administrative law judge, however, did not discuss and weigh the opinion of Dr. Canonico, the miner's treating physician. Decision and Order at 19-22; Director's Exhibits 13, 15; Claimant's Exhibit 1. Under the APA, the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although the administrative law judge is empowered to weigh the evidence, inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, the basis for the administrative law judge's credibility determinations in this particular case can not be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984).

Moreover, in addressing the medical opinion evidence of record, the administrative law judge accorded greater weight to the opinions by highly qualified physicians and to the physicians who reviewed all the evidence of record. Decision and Order at 19, 22. These factors are relevant in determining the weight to be assigned a particular medical opinion, but the administrative law judge must first determine if the opinions of record are reasoned and documented and therefore credible. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). In the instant case, the administrative law judge only compared the physicians findings on physical examination. The administrative law judge did not review the medical opinions in the context of their objective evidence which may provide a basis for determining the credibility of the opinions. *See Trumbo, supra*. We therefore vacate the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(b) (2000) and remand this case to the administrative law judge to specifically set forth the basis for finding the opinions reasoned and documented and to specifically discuss the credibility of each opinion including that of Dr. Canonico, the miner's treating physician pursuant to the appropriate standards set forth at 20 C.F.R. §§718.201 and 718.204(c) (2001).

[6]Although not specifically discussed by the administrative law judge, the record indicates that Dr. Taylor possesses similar qualifications to the physicians relied upon by the administrative law judge in finding the existence of pneumoconiosis established. Decision and Order at 10, 19; Director's Exhibit 15; Claimant's Exhibit 4; Employer's Exhibit 14.

[7]Although claimant's assertion that the treating physician should be accorded deference in

the weighing of medical reports is not without merit, such deference is not accorded as a matter of course. The United States Court of Appeals for the Sixth Circuit has held that "...opinions of treating physicians are entitled to greater weight than those of non-treating physicians." *Tussey v. Island Creek Coal Co.*, 982 F. 2d 1036, 1042, 17 BLR 2-16 (6th Cir. 1993). However, in setting this standard the Sixth Circuit did not overrule its earlier admonition that there is no "mechanical rule insulating a treating doctor's opinion from attack...[it] is still subject to attack when thrown in contest with other and contrary respectable opinions." *Halsey v. Richardson*, 441 F.2d 1230, 1236 (6th Cir. 1971).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge