BRB No. 01-0215 BLA

CORBIN L. WRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANNING COAL INSURANCE	)	DATE ISSUED:
	)	
and	)	
	)	
KENTUCKY CENTRAL INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Joseph E. Wolfe (Wolfe & Farmer), Norton, Virginia, for claimant.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Awarding Benefits (90-BLA-2381) of Administrative Law Judge Thomas F. Phalen, Jr., rendered 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). This case is before the Board for the third time. Pursuant to the most recent appeal by employer, the Board affirmed, *inter alia*, the administrative law judge's finding that the evidence did not establish total disability at 20 C.F.R. §718.204(c)(1)-(3)(2000), but vacated the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(c)(4)(2000) and remanded the case for reconsideration of the opinions of Drs. Williams and Baker thereunder. The Board further instructed the administrative law judge that if he determined on remand that total disability was established, he must then determine whether claimant's total disability was due at least in part to pneumoconiosis. *Wright v. Manning Coal Corp.*, BRB No. 99-0681 BLA (Mar. 28, 2000)(unpub.). On remand, the administrative law judge concluded that the evidence was sufficient to establish total disability and that total disability was due, at least in part, to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the opinion of Dr. Williams was sufficient to establish total disability and total disability due to pneumoconiosis. Claimant responds urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he would not participate 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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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 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from 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. 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*).

Employer first contends that the administrative law judge failed to provide any discussion regarding the validity of Dr. Williams's opinion in light of the non-qualifying pulmonary function and blood gas study evidence of record. Specifically, employer contends that the administrative law judge erred in finding Dr. Williams's opinion reasoned and documented when Dr. Williams never reconciled his finding of a "moderately severe respiratory impairment" with non-qualifying pulmonary function and blood gas studies. In considering the opinion of Dr. Williams, however, the administrative law judge permissibly found it documented and well-reasoned as it was based on examination, findings, symptoms and histories. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94, 13 BLR 2-348, 355-356 (7th Cir. 1990)(upholding administrative law judge's reliance on a medical report stating an opinion without providing an explanation, in part because the report was based on a physical examination, objective test symptoms, work and medical histories); *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8 (1996), *modif'd on recon*. 21 BLR 1-52 (1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lipka v. Director, OWCP*, 8 BLR 1-360 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-262 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). The administrative law judge noted that Dr. Williams acknowledged that claimant's pulmonary function and blood gas studies produced results which were within the normal range, yet opined that claimant had a moderately severe respiratory impairment. Decision and Order on Second Remand at 4. Thus, contrary to employer's argument, we cannot say that the administrative law judge erred in crediting Dr. Williams's opinion. *See Island Creek Coal Company v. Compton*, 211 F.3d 203, 212, BLR (4th Cir. 2000)("An administrative law judge may choose to discredit an opinion that lacks a thorough explanation, but is not legally compelled to do so."). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Lipka, supra*; *Sabett v.*

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[2] As instructed by the Board, the administrative law judge reconsidered Dr. Baker's opinion and permissibly found the opinion insufficient to establish total disability as it was equivocal and did not contain a diagnosis of emphysema, unlike the other physicians' opinions of record. Director's Exhibit 37; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Claimant has not challenged this finding on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director, OWCP, 7 BLR 1-299 (1984); *Fuller v. Gibralter Coal Corp.*, 6 BLR 1-1291 (1984).

Next, employer contends that the administrative law judge failed to compare Dr. Williams's opinion with the specific exertional requirements of claimant's usual coal mine employment in making his finding on total disability. Contrary to employer's argument, however, the administrative law judge did compare the exertional requirements of claimant's usual coal mine employment to Dr. Williams's findings and permissibly found that Dr. Williams's opinion was sufficient to establish a totally disabling respiratory impairment in light of those requirements. Decision and Order on Second Remand at 4; *Cornett*, *supra*; *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc recon.*); *Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984). Thus, we affirm the administrative law judge's finding that Dr. Williams's opinion, even when considered in light of the contrary probative evidence, is sufficient to establish a totally disabling respiratory impairment. *See Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (1995); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff'd on recon*. 9 BLR 1-236 (1987); *Fields*, *supra*; *Scott*, *supra*.

Finally, employer contends that the administrative law judge erred in finding that the opinion of Dr. Williams established total disability causation. Citing *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 63 (6th Cir. 1989), the administrative law judge found that the opinion of Dr. Williams established total disability causation because Dr. Williams found that coal workers' pneumoconiosis/chronic obstructive pulmonary disease caused, at least in part, claimant's pulmonary impairment and that Dr. Williams's opinion, which indicated that coal dust exposure was also a contributor to emphysema, further connected the claimant's disability with coal mine employment. Decision and Order at 5.

Subsequent to the issuance of the administrative law judge's Decision and Order, however, the regulations concerning total disability causation were amended and became applicable to all pending claims. *See supra* at 2 n.1. Pursuant to 20 C.F.R. §718.204(c)(2001):

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in 20 C.F.R. §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which was caused by a disease or exposure that is unrelated to coal mine employment.

Because the administrative law judge has not considered the evidence relevant to disability causation under this standard, the case must be remanded for him to do so.

Accordingly, the administrative law judge's Decision and Order on Second Remand Awarding Benefits is affirmed in part, 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

REGINA C. McGRANERY
Administrative Appeals Judge