BRB No. 98-0161 BLA

CHARLES RAMEY Claimant-Petitioner v. TRIPLE R COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Martin Wegbreit (Client Centered Legal Services of Southwest Virginia, Inc.), Castlewood, Virginia, for claimant.

Terri L. Bowman (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (86-BLA-0864) of Administrative Law Judge Robert D. Kaplan 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). This case is before the Board for the fourth time. In our previous decision, we discussed fully the procedural history of this claim. *Ramey v. Triple R Coal Co*., BRB No. 94-2628 BLA at 2-3 (Jul. 23, 1996)(unpub.). We now focus only on those procedural aspects relevant to the arguments raised in this appeal.

In a Decision and Order on Remand issued on May 31, 1994, Administrative Law Judge Nicodemo DeGregorio credited claimant with twenty years of coal mine employment, found that the medical evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), and therefore invoked the presumption that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.305. The administrative law judge found that employer failed to rebut this presumption and, accordingly, awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding of twenty years of coal mine employment, but concluded that the administrative law judge failed to resolve properly the conflicting medical evidence at Section 718.204(c) or to provide a sufficient rationale for his conclusion that rebuttal was not established. [1996] *Ramey*, slip op. at 6-7. Accordingly, the Board vacated the administrative law judge's decision in part and remanded the case for him to reweigh the disability evidence pursuant to Section 718.204(c) and to reconsider rebuttal, if reached.

On remand, because Judge DeGregorio was unavailable the case was reassigned, without objection, to Administrative Law Judge Robert D. Kaplan. Judge Kaplan found that although one of the pulmonary function studies supported a finding of total respiratory disability pursuant to Section 718.204(c)(1), the non-qualifying[1] blood gas studies at Section 718.204(c)(2) and the medical opinions that he found most credible at Section 718.204(c)(4) did not support a finding of total respiratory disability. Weighing all of these items of evidence together, he concluded that the blood gas studies and medical opinions outweighed the pulmonary function study evidence and concluded therefore that total respiratory disability was not established, which precluded invocation of the Section 718.305 presumption.

[1] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his consideration of the pulmonary function studies pursuant to Section 718.204(c)(1). Claimant further asserts that the administrative law judge erred at Section 718.204(c)(4) by crediting medical opinions that claimant alleges are unreasoned, hostile to the Act, and biased. In addition, claimant alleges that the administrative law judge failed to accord sufficient weight to the medical opinion of claimant's treating physician and mechanically credited later evidence. Employer responds, urging affirmance. Claimant has filed a reply. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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 Part 718 claims filed before January 1, 1982, where a miner has at least fifteen years of employment in underground mining or comparable surface mining and proves the existence of a totally disabling respiratory impairment, the miner is presumed to be totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(a),(d). The party opposing entitlement may rebut this presumption by showing either that the miner does not have pneumoconiosis or that pneumoconiosis does not contribute to the miner's disability. 20 C.F.R. §718.305(a); *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65 (4th Cir.1995). For purposes of applying this presumption, the administrative law judge must determine the existence of a totally disabling respiratory or pulmonary impairment in

[2] We affirm as unchallenged on appeal the administrative law judge's finding that claimant's height is sixty-nine inches for purposes of assessing the pulmonary function studies pursuant to 20 C.F.R. §718.204(c)(1), and his findings that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(c)(2) or (c)(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

accordance with 20 C.F.R. §718.204(c). 20 C.F.R. §718.305(c); *see Tanner v. Freeman United Coal Co*., 10 BLR 1-85, 1-87 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). If the administrative law judge finds that the evidence fails to establish total respiratory disability pursuant to Section 718.204(c), the miner is not entitled to the Section 718.305 presumption. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987).

Pursuant to Section 718.204(c)(1), the administrative law judge found that one of the four pulmonary function studies of record supported a finding of total respiratory disability. Although two pulmonary function studies were qualifying, the administrative law judge concluded that the July 14, 1981 qualifying study was invalid. The July 14, 1981 pulmonary function study was administered by Dr. Taylor, whose credentials are not of record. Dr. Taylor noted that claimant's cooperation and effort on the test were good, but did not include an interpretation of the study results with his medical opinion. Director's Exhibits 6, 8. Dr. Stewart, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the tracings and opined that the July 14, 1981 study was invalid because of sub-optimal effort and because the study was improperly performed. Employer's Exhibit 6. Based upon Dr. Stewart's credentials, the administrative law judge found that the July 14, 1981 pulmonary function study was invalid. Decision and Order on Remand at 5.

Claimant contends that the administrative law judge erred by finding the July 14, 1981 pulmonary function study invalid for reasons that claimant alleges are outside of the quality standards set forth at Appendix B of 20 C.F.R. Part 718.[3] Claimant's Brief at 25-28. Review of the record indicates that Dr. Stewart identified at least two specific deviations from the Part 718 Appendix B quality standards. Dr. Stewart noted claimant's failure on one of the forced expiration maneuvers to exert sustained effort for at least five seconds or until an obvious plateau in the volume-time curve occurred, and also observed that the "MVV did not correlate well with the FEV1 suggesting submaximal effort." Employer's Exhibit 6; 20 C.F.R. §718.103(c); Part 718 App. B2(ii)(C), (iii)(A). Claimant argues that the first reason was improper because, claimant asserts, only two out of three forced expiration efforts need comply with the five-second quality standard. The applicable regulation does not state that only two out of three forced expirations need comply; it simply states that

[3] Claimant asserts that although the administrative law judge ultimately found total disability established at Section 718.204(c)(1) based upon the September 9, 1985 qualifying pulmonary function study, his failure to find that there were two qualifying and valid studies at (c)(1) caused an inaccurate weighing of the contrary probative evidence at 718.204(c). Claimant's Brief at 28.

to be acceptable, a forced expiration must be maintained for at least five seconds or until a plateau in the volume-time curve occurs. Part 718 App. B2(ii)(C). Instead of this regulation, claimant cites a different quality standard regulation which provides that the variation between the two largest FEV1 curves should not exceed 5% of the largest FEV1 or 100 ml, whichever is greater. Part 718 App. B 2(ii)(G). It is not clear to us, nor does claimant explain his assertion, that this latter standard specifying the acceptable variation between tracings also means that only two out of three forced expiration efforts need be maintained for the requisite time period. Even if claimant is correct, however, the record does not reveal which one of the three forced expiration efforts was reported at Director's Exhibit 6--one of the two efforts held for the requisite five seconds, or the one that was not, according to Dr. Stewart. Therefore, we conclude that substantial evidence supports the administrative law judge's determination to question the validity of the study based upon the first reason offered by Dr. Stewart. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 171, 21 BLR 2-34, 2-43 (4th Cir. 1997).

Claimant also asserts that Dr. Stewart's comment that the MVV did not correlate well with the FEV1 is a requirement not included in the Part 718 quality standards. Claimant, however, ignores the conclusion of Dr. Stewart's notation which was, "suggesting submaximal effort." Employer's Exhibit at 6. Sustained effort is required for a valid MVV maneuver. Part 718 App. B 2(iii)(A). The administrative law judge accurately noted that the July 14, 1981 pulmonary function study was qualifying based only upon its FEV1 and MVV values. Decision and Order on Remand at 5; Director's Exhibit 6. In sum, Dr. Stewart provided legitimate reasons for invalidating the July 14, 1981 pulmonary function study, and the administrative law judge permissibly relied upon Dr. Stewart's credentials to find the study invalid. *See Lane, supra*; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-154 (1989)(*en banc*). Therefore, we reject claimant's contention and we affirm the administrative law judge's finding pursuant to Section 718.204(c)(1).

Pursuant to Section 718.204(c)(4) claimant contends that the administrative law judge erred by finding Dr. Dahhan's opinion to be reasoned. Claimant's Brief at 17-18. Specifically, claimant asserts that Dr. Dahhan found claimant not disabled without addressing the qualifying pulmonary function study that he obtained on September 9, 1985. *Id*. Contrary to claimant's contention, Dr. Dahhan did address the results of the September 9, 1985 pulmonary function study in his examination report. Employer's Exhibit 1. He interpreted the test results as indicating a "moderate degree of airway obstruction," but based upon the examination, normal blood gas exchange at rest and on exercise, and a normal diffusion study, Dr. Dahhan concluded that claimant retained the respiratory capacity to perform his usual coal mine employment. *Id*. During Dr. Dahhan's 1987 examination, claimant refused to take another pulmonary function study for reasons that are not reflected in

the record. However, based upon the examination and normal blood gas studies obtained at rest and on exercise, Dr. Dahhan again diagnosed no respiratory or pulmonary disability. Employer's Exhibit 4. In reviewing the medical evidence of record, Dr. Dahhan considered all of the pulmonary function and blood gas studies, and repeated his view that the September 9, 1985 pulmonary function study revealed a moderate obstructive defect which, in light of otherwise normal examination and objective findings, resulted in a mild to moderate impairment that was not severe enough to disable claimant. Employer's Exhibit 5, 8.

The administrative law judge discussed Dr. Dahhan's opinions and noted his qualifications in Internal Medicine and Pulmonary Disease. Decision and Order on Remand at 9-11. The administrative law judge found that "despite the qualifying pulmonary function test of September 9, 1985, Dr. Dahhan's opinion was that claimant was not totally disabled. Because he explained his opinion by reference to physical examinations and arterial blood gas studies, I find that [his] 1985 opinion that claimant is not totally disabled is both well-reasoned and documented." Decision and Order on Remand at 9-10.

It is the province of the administrative law judge as trier-of-fact to determine whether a medical opinion is adequately reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark, supra*. Since Dr. Dahhan addressed the September 9, 1985 pulmonary function study results, *see Beavan v. Bethlehem Mines Corp*., 741 F.2d 689, 691, 6 BLR 2-101, 2-109 (4th Cir. 1984), opined that the obstructive impairment that he detected based upon this study was not totally disabling, and explained that his opinion was based upon otherwise normal objective tests and examination results, substantial evidence supports the administrative law judge's determination that Dr. Dahhan's opinion is adequately reasoned to be considered at Section 718.204(c)(4). *See Hoffman v. B & G Construction Co*., 8 BLR 1-65, 1-66-67 (1985)(physician may properly find a claimant not totally disabled even though studies reveal qualifying results).

Claimant, citing *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), next contends that Dr. Dahhan's opinion is hostile to the Act and merits no weight because it is based on the erroneous assumption that obstructive disorders cannot be caused by coal mine employment. Claimant's Brief at 18-24. Contrary to claimant's contention, Dr. Dahhan did not premise his non-disability opinion on the belief that coal mine employment cannot cause obstructive disorders. *See Stiltner v. Island Creek Coal Co*., 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth, supra.* Therefore, the administrative law judge did not err in declining to discredit Dr. Dahhan's opinion under *Warth*. In light of our holding on this issue, we reject claimant's additional contention that Dr. Dahhan's hostility constitutes

evidence of bias which required the administrative law judge to credit the opinion of a physician retained by the Department of Labor. Claimant's Brief at 29-30; *see Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-36 (1991)(*en banc*).

Claimant asserts that Dr. Stewart's opinion was unreasoned because he agreed with Dr. Dahhan's unreasoned opinion. Claimant's Brief at 25. We reject this contention first, because Dr. Dahhan's opinion was properly found to be reasoned, and second, because the administrative law judge permissibly found Dr. Stewart's opinion to be reasoned independently of Dr. Dahhan's opinion. Dr. Stewart reviewed the medical evidence of record and concluded that claimant retained the respiratory capacity to perform his coal mine employment. Employer's Exhibits 6, 9. The administrative law judge permissibly found Dr. Stewart's opinion reasoned because it was "based . . . on a thorough review of claimant's records, and [he] provided a detailed analysis of those records." Decision and Order on Remand at 11; *see Hicks, supra; Akers, supra; Clark, supra*.

Claimant next argues that the administrative law judge failed to accord proper weight to the opinion of claimant's treating physician, Dr. Van Zee. Claimant's Brief at 28-29. An administrative law judge need not accord determinative weight to the opinion of a treating physician. *See Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992). Here, the administrative law judge considered Dr. Van Zee's treating status and gave his overall disability opinion some weight despite the fact that the administrative law judge questioned the level of documentation and reasoning provided in some of Dr. Van Zee's reports.[4] After noting that Dr. Van Zee's credentials were not of record and after discussing his five reports at length, Decision and Order on Remand at 7-9, the administrative law judge found that because Dr. Van Zee "apparently had access" to claimant's most recent qualifying pulmonary function study in formulating his disability opinion, and "because of his history of treatment with claimant and his familiarity with claimant's condition, I find his opinion to be both documented and reasoned." Decision and Order on Remand at 9. Ultimately, however, the administrative law judge was persuaded by the contrary opinions of Drs. Dahhan and Stewart based upon their superior qualifications, the thoroughness of their reviews of claimant's entire medical record,

[4] The administrative law judge noted that in his October 27, 1980 referral letter, Dr. Van Zee did not indicate the severity of claimant's respiratory condition. Decision and Order on Remand at 8; Director's Exhibit 15. He also noted that in his June 23, 1981 and September 29, 1987 reports, Dr. Van Zee did not set forth the pulmonary function study results that he relied upon to diagnose total disability. Decision and Order on Remand at 8-9; Claimant's Exhibit 4.

and because they had the benefit of claimant's most current examination. *See Hicks, supra; Akers, supra; Clark, supra*. Therefore, we hold that the administrative law judge adequately considered Dr. Van Zee's treating status and provided valid reasons for the weight that he accorded to the contrary medical opinions.

Finally, claimant asserts that the administrative law judge mechanically applied the later evidence rule in according greater weight to the opinions of Drs. Dahhan and Stewart based in part upon their consideration of the results of claimant's most recent examination. Claimant's Brief at 30-33. We note that the administrative law judge did not exclude from consideration the earlier evidence supportive of a finding of disability; he considered it, found part of it to be invalid (the July 14, 1981 pulmonary function study), and concluded that the rest was outweighed. Decision and Order on Remand at 4-11. Moreover, in the context of the administrative law judge's observation that Drs. Dahhan and Stewart rendered thorough opinions based upon a review of claimant's entire medical record, we read the administrative law judge's additional reference to their reliance upon claimant's most current examination as part of the administrative law judge's apparent conclusion that Drs. Dahhan and Stewart had a more complete picture of the miner's pulmonary condition as of the date of the hearing. *See Gray v. Director, OWCP*, 943 F.2d 513, 520-21, 15 BLR 2-214, 2-224-25 (4th Cir. 1991); *Cooley v. Island Creek Coal Co*., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). This is a valid reason for the administrative law judge's weighing of the evidence, and is not a mindless application of the later evidence rule. *See Thorn v. Itmann Coal Co*., 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). Therefore, we reject claimant's contention and we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).

Claimant raises no further challenge to the administrative law judge's weighing of the evidence pursuant to Section 718.204(c)(1), (4) or to the administrative law judge's finding that substantial contrary probative evidence outweighed the evidence tending to establish total respiratory disability pursuant to Section 718.204(c). *See Lane; supra; Shedlock; supra*. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c), and his finding that claimant is not entitled to the Section 718.305 presumption. *See Trent, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge