BRB No. 02-0844 BLA

| | | |
|---|---|---|
| WOODROW RICE | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| QUEEN CITY RAILROAD CONSTRUCTION COMPANY, INCORPORATED | ) | DATE ISSUED: 09/29/2003 |
| | ) | |
| Employer-Respondent | ) | |
| | ) | |
| 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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (00-BLA-0322) of Administrative Law Judge Robert L. Hillyard 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).[1] This case is before the Board for the fourth time. Claimant filed a claim on August 17, 1984. In a Decision and Order dated June 15, 1993, Administrative Law Judge J. Michael O'Neill initially determined that claimant established eighteen years of coal mine employment, and found that the 1984 claim constituted an original claim inasmuch as claimant withdrew a claim he previously filed on August 6, 1982.[2] Judge O'Neill further determined that because employer did not file a notice of controversion in the 1984 claim, employer waived, pursuant to 20 C.F.R. §725.413(b)(3) (2000), its right to contest the claim and its rights to have claimant examined by a physician of its own choosing or to have claimant's evidence reviewed by its consulting physicians. Judge O'Neill considered the merits of the 1984 claim, therefore, based only on evidence submitted by claimant and the district director. Judge O'Neill concluded that the evidence established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) (2000), that claimant was entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was unrebutted. Judge O'Neill further found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000) and, consequently, awarded benefits. Employer appealed. The Board affirmed Judge O'Neill's finding of eighteen years of coal mine employment, but held that Judge O'Neill's exclusion of medical evidence pursuant to Section 725.413(b)(3) (2000) was erroneous given the facts of this case. *Rice v. Queen City Railroad Construction Co., Inc.*, BRB No. 93-1843 BLA (May 27, 1994)(unpublished). The Board thus reversed Judge O'Neill's application of sanctions to employer, and remanded the case for reconsideration based upon the entirety of the medical evidence of record. *Id*.

---

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed a previous claim on August 6, 1982. Director's Exhibit 22. In a letter to the district director dated August 31, 1982, claimant indicated that he wished to withdraw his claim. *Id.* The district director did not respond to claimant's correspondence, and on January 17, 1983 issued claimant an Order to Show Cause why his claim should not be deemed abandoned. *Id*. Claimant responded in a letter dated January 26, 1983, indicating that he had closed his claim. *Id*. The district director did not respond. Subsequently, on August 17, 1984, claimant filed the instant claim for benefits. Director's Exhibit 1.

In a Decision and Order dated August 31, 1995, Judge O'Neill found the evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) (2000). Judge O'Neill determined that, therefore, he did not need to discuss the remaining elements of entitlement, and he denied benefits. Claimant appealed. The Board affirmed Judge O'Neill's findings pursuant to Section 718.202(a)(1)-(4) (2000) and his consequent denial of benefits. *Rice v. Queen City Railroad Construction Co.*, BRB No. 95-2164 BLA (Feb. 21, 1997)(unpublished). Claimant filed a subsequent claim on March 20, 1997, which the district director appropriately treated as a request for modification. Director's Exhibit 48. After the district director denied modification, the case was assigned to Administrative Law Judge Donald W. Mosser, who held a hearing on September 24, 1998. In a Decision and Order dated February 17, 1999, Judge Mosser credited claimant with eighteen years of coal mine employment based upon the stipulation of the parties, and found the evidence submitted after the previous denial of benefits insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) (2000) and total disability under 20 C.F.R. §718.204(c)(1)-(4) (2000). Judge Mosser also stated that he considered the evidence submitted prior to claimant's modification request, and found this evidence insufficient to establish entitlement under 20 C.F.R. Part 718. Judge Mosser thus determined that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Consequently, Judge Mosser denied benefits.

On April 2, 1999, claimant filed a second request for modification and submitted new evidence. Director's Exhibit 91. The case was referred to Administrative Law Judge Robert L. Hillyard (the administrative law judge), and a hearing was held on May 17, 2000. In a Decision and Order dated March 30, 2001, the administrative law judge credited claimant with eighteen years of coal mine employment. The administrative law judge found the new evidence sufficient to establish total respiratory disability and determined that, therefore, claimant established a change in conditions under Section 725.310 (2000). The administrative law judge then found the evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant appealed, challenging the administrative law judge's weighing of the medical opinion evidence with regard to the existence of pneumoconiosis and disability causation under Sections 718.202(a)(4) and 718.204(c), respectively. The Board affirmed, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and findings pursuant to Sections 725.310 (2000) and 718.202(a)(1)-(3). *Rice v. Queen City Railroad Construction Co., Inc.*, BRB No. 01-0573 BLA (Mar. 11, 2002)(unpublished). The Board vacated the

administrative law judge's findings under Sections 718.202(a)(4) and 718.204(c), however, remanding the case for the administrative law judge to reconsider the opinions of Drs. Taylor, Younes, Fino, Branscomb and Harrison. *Id*. The Board also instructed the administrative law judge to consider whether claimant established total respiratory disability pursuant to Section 718.204(b) based on the entire evidentiary record if he were to find, on remand, that the medical opinion evidence of record is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). *Id*.

In his Decision and Order on Remand dated August 29, 2002, which is the subject of this appeal, the administrative law judge discounted the opinions of Drs. Taylor and Younes, and credited the contrary opinions of Drs. Fino, Branscomb and Harrison in finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4) and total disability due to pneumoconiosis under Section 718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's weighing of the medical opinions of Drs. Taylor, Younes, Fino, Branscomb and Harrison under Sections 718.202(a)(4) and 718.204(c). Claimant contends that the administrative law judge committed the same errors in weighing these conflicting medical opinions that he committed in his prior Decision and Order, thereby failing to follow the remand instructions of the Board. Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In challenging the administrative law judge's finding that the medical opinions of record are insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), claimant first argues that the administrative law judge improperly discounted Dr. Taylor's diagnosis of pneumoconiosis,

committing errors on remand identical to those in his prior Decision and Order. Dr. Taylor examined claimant on August 26, 1999, and diagnosed: 1) chronic obstructive pulmonary disease with components of emphysema, asthma and chronic bronchitis, and 2) probable coal workers' pneumoconiosis. Director's Exhibit 97. In subsequent notes for office visits between September 6, 1999 and April 10, 2000, Dr. Taylor noted a history of coal workers' pneumoconiosis and/or diagnosed the disease, in addition to diagnosing chronic obstructive pulmonary disease. Director's Exhibit 99; Claimant's Exhibit 1. The record also includes a questionnaire from Dr. Taylor dated April 21, 2000, in which Dr. Taylor indicates that claimant's eighteen years of coal dust exposure "could aggravate [claimant's] chronic obstructive pulmonary disease." Claimant's Exhibit 2. In vacating the administrative law judge's prior rejection of Dr. Taylor's opinion at Section 718.202(a)(4), the Board held that while the administrative law judge permissibly deemed equivocal Dr. Taylor's finding that claimant's coal mine employment could aggravate his *chronic obstructive pulmonary disease*, the administrative law judge failed to explain why he also found Dr. Taylor's diagnosis of coalworkers' pneumoconiosis to be equivocal. *Rice v. Queen City Railroad Construction Co., Inc.*, BRB No. 01-0573 BLA (Mar. 11, 2002)(unpublished), slip op. at 4 (emphasis added). The Board further held that it was irrational for the administrative law judge to find Dr. Taylor's opinion undocumented on the basis that Dr. Taylor did not find evidence of pneumoconiosis on the only x-ray he interpreted. *Id.* The Board noted with respect to this x-ray, taken on August 26, 1999, that, in fact, Dr. Taylor indicated that the x-ray revealed chronic obstructive pulmonary disease, hyperinflation and increased markings, and referred to the x-ray as "abnormal." *Id.*; Director's Exhibit 97; Claimant's Exhibit 1.

Claimant contends that the administrative law judge on remand again improperly found equivocal Dr. Taylor's diagnosis of pneumoconiosis, and improperly discounted the doctor's opinion as undocumented, upon finding that Dr. Taylor failed to find evidence of pneumoconiosis on the only x-ray he interpreted. Contrary to claimant's contention, however, the administrative law judge properly discounted Dr. Taylor's diagnosis of pneumoconiosis as equivocal on remand. Decision and Order on Remand at 3-4. In his most recent decision, the administrative law judge provided an adequate explanation for finding equivocal that aspect of Dr. Taylor's opinion which pertains specifically to the existence of pneumoconiosis. Specifically, the administrative law judge found that Dr. Taylor indicated in his August 26, 1999 report, under "Impressions," "? Black lung." *Id.*; Director's Exhibit 97. The administrative law judge further took issue with Dr. Taylor's notations of merely a "*history of black lung*" and "*probable coal workers' pneumoconiosis*" (emphasis added) in several of the subsequent office visit notes between September 1999 and April 2000. Decision and Order on Remand at 4; Director's Exhibit 99; Claimant's Exhibit 1. We hold that the administrative law judge thus properly discounted, as equivocal, Dr.

Taylor's opinion as to whether claimant has pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order on Remand at 3-4; Director's Exhibits 97, 99; Claimant's Exhibits 1, 2.

Furthermore, the administrative law judge properly discounted Dr. Taylor's opinion as unreasoned because Dr. Taylor provided only conclusory statements that claimant has pneumoconiosis, without any reasoning. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order on Remand at 3-4; Director=s Exhibits 97, 99; Claimant's Exhibits 1, 2. Accordingly, while the administrative law judge repeated his error by determining that Dr. Taylor's opinion is undocumented because Dr. Taylor failed to find pneumoconiosis on the only x-ray he reviewed, such error was harmless since the administrative law judge provided other proper reasons for discounting the doctor's opinion. *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1984); Decision and Order on Remand at 4. Accordingly, we affirm the administrative law judge's finding that Dr. Taylor's opinion is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4).

Claimant further contends that the administrative law judge erred in rejecting Dr. Younes' consulting opinion, that claimant has pneumoconiosis, by improperly finding Dr. Younes' opinion to be undocumented and unreasoned. Claimant argues that a consulting opinion, by nature, does not include the physician's own clinical findings or personal observations, and the administrative law judge's treatment of Dr. Younes' opinion on remand raises the issue of whether a consultant's report can ever constitute a reasoned and documented opinion.

Claimant's contention lacks merit. Dr. Younes submitted his opinion that claimant suffers from pneumoconiosis in a questionnaire dated October 18, 1999. Director's Exhibit 101. The record reflects that the questionnaire was sent to Dr. Younes by the district director, who indicated in an accompanying letter that medical evidence was attached for Dr. Younes' review. *Id.* As the administrative law judge correctly stated, the record does not reflect what specific evidence was sent to Dr. Younes. Decision and Order on Remand at 4. Contrary to claimant's assertion that it is nonetheless clear that Dr. Younes had sufficient information available to him to provide an opinion, the administrative law judge properly discounted Dr. Younes' opinion as undocumented because Dr. Younes did not indicate what clinical findings, observations, facts and other data he relied upon in forming his opinion. *Clark*, 12 BLR at 1-155; *Tackett*, 12 BLR at 1-14; Decision and Order on Remand at 5; Director's Exhibit 101. The administrative law judge also properly based his finding that Dr. Younes' opinion is undocumented on the fact that Dr. Younes did not note claimant's symptomology or social history. *Id*.

Moreover, the administrative law judge properly discounted Dr. Younes' opinion on the basis that the record does not include Dr. Younes' qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order on Remand at 5. Accordingly, we affirm the administrative law judge's finding that Dr. Younes' opinion is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4).

Claimant next contends that the administrative law judge erred in relying upon the opinions of Drs. Fino, Branscomb and Harrison, which indicate that claimant does not suffer from pneumoconiosis. Claimant argues that it was irrational for the administrative law judge to rely upon these opinions because Drs. Fino, Branscomb and Harrison did not consider the medical data relied upon by Drs. Taylor and Younes or have the benefit of reviewing their opinions. Claimant argues that the administrative law judge on remand did not explain his rationale for crediting the opinions of Drs. Fino, Branscomb and Harrison.

Claimant's contention lacks merit. The administrative law judge properly accorded greater weight to the opinions of Drs. Fino and Branscomb, which are dated August 6, 1998 and August 18, 1998, respectively, upon finding them to be reasoned, documented and supported by the objective medical evidence of record. *Clark*, 12 BLR at 1-155*; Tackett*, 12 BLR at 1-15; Decision and Order on Remand at 7-10; Director's Exhibits 84, 85. Furthermore, the administrative law judge properly credited the opinions of Drs. Fino and Branscomb as well-reasoned and documented, notwithstanding that these two physicians did not review the more recent 1999 and 2000 reports submitted by Drs. Taylor and Younes. It was rational for the administrative law judge to determine that it was not necessary for Drs. Fino and Branscomb to review the reports of Drs. Taylor and Younes in order for them to render well-reasoned and documented opinions, inasmuch as the administrative law judge properly discounted the opinions of Drs. Taylor and Younes as undocumented, as discussed above. *Clark*, 12 BLR at 1-155; *Tackett*, 12 BLR at 1-15; Decision and Order on Remand at 9-10. Moreover, the administrative law judge properly accorded greater weight to the opinions of Drs. Fino and Branscomb based upon the physicians' qualifications.[3] *Roberts*, 8 BLR at 1-213; Decision and Order on Remand at 6, 8; Director's Exhibits 84, 85.

[3]The administrative law judge properly found that Dr. Fino is Board-certified in internal medicine and pulmonary medicine. Decision and Order on Remand at 6; Director's Exhibit 85. The administrative law judge also correctly stated that Dr. Branscomb is Board-certified in internal medicine. Decision and Order on Remand at 8; Director's Exhibit 84.

Finally, we are not persuaded by claimant's suggestion that, based upon the age of Dr. Harrison's 1988 opinion, it was irrational for the administrative law judge to rely on it. The administrative law judge did not, in fact, rely upon Dr. Harrison's opinion, but rather reasonably found that Dr. Harrison's 1988 opinion, that claimant does not have pneumoconiosis, was not entitled to as much weight as the later opinions of Drs. Fino and Branscomb. *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); Decision and Order on Remand at 10; Director's Exhibit 25. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits on remand. *See* 20 C.F.R. §718.202(a); *Trent*, 12 BLR at 1-28. We, therefore, need not address claimant=s contentions with respect to the administrative law judge=s weighing of the medical opinion evidence pertaining to disability causation under 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge