

BRB No. 04-0219 BLA

MARY E. GUMP)
(Widow of JAMES R. GUMP))
)
Claimant- Respondent)
)
v.)
)
CONSOLIDATION COAL COMPANY) DATE ISSUED: 09/28/2004
)
Employer-Petitioner)
)
and)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Further Remand - Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dorothea J. Clark and William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Further Remand – Awarding Benefits (97-BLA-1827) of Administrative Law Judge Richard A. Morgan, 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 claim has been before the Board previously. In our most recent Decision and Order, we discussed fully this claim’s procedural history.¹ *See Gump v. Consolidation Coal Co.*, BRB No. 02-0305

¹ Mary E. Gump is the widow of the miner, James R. Gump. Mrs. Gump is pursuing benefits in this miner’s claim.

BLA (Feb. 27, 2003)(unpub.). When this claim was last before this Board in 2003, we vacated the administrative law judge's finding of total disability due to pneumoconiosis, and remanded the case to the administrative law judge for clarification of his findings on disability causation under 20 C.F.R. §718.204(c). *Id.* Thus, the only issue before the administrative law judge was the cause of the miner's disability. On remand, the administrative law judge again found the evidence of record sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

Employer appeals, arguing that the administrative law judge failed to follow the Board's instructions on remand and that a preponderance of the evidence does not support the administrative law judge's finding that the miner was totally disabled due to pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the miner's pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first argues that the administrative law judge erred in crediting Dr. Pinkerton's opinion automatically, based on his status as the miner's treating physician, and because he was the partner of the miner's previous treating physician. Since in our prior decision we affirmed the administrative law judge's reasons for crediting the opinion of Dr. Pinkerton, we need not address these contentions again. Additionally, we note that on remand the administrative law judge reaffirmed his preference for Dr. Pinkerton's opinion which, the administrative law judge found, demonstrated a long history of treatment for breathing problems, citing appropriate circuit authority. *See Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978); *Mancia v. Director, OWCP*, 150 F.3d 579, 591, 21 BLR 2-215, 238 (3d Cir. 1997); Decision and Order at 11. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Third Circuit, wherein jurisdiction of this case arises, indicated, "It is well-established in this circuit that treating physicians' opinions are assumed to be

more valuable than those of non-treating physicians.” *Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004)(Roth, J., dissenting). The administrative law judge’s decision to rely on Dr. Pinkerton’s opinion is consistent with *Soubik*.

Further, employer’s contention that the administrative law judge erred in crediting the miner’s testimony at the 1988 hearing that he suffered from longstanding breathing problems, is not well-founded. The administrative law judge properly determined that the lay evidence supported Dr. Pinkerton’s opinion, that the miner was totally disabled due to chronic obstructive pulmonary disease related to coal dust exposure, and permissibly found this opinion entitled to determinative weight. *Soubik*, 366 F.3d at 235, 23 BLR at 2-100.

Employer next argues that the administrative law judge erred by not providing a basis for crediting the opinions rendered by Drs. Martin, Gaziano, Parkinson, and Kristofic, that the miner had a totally disabling respiratory impairment due to coal dust exposure. Specifically, employer asserts that the administrative law judge did not address its arguments as to why these physicians’ opinions should not be credited. The administrative law judge initially found that all of the medical opinions of record were adequately reasoned and documented. Decision and Order at 11. The administrative law judge further found that the opinions of the physicians who diagnosed a totally disabling respiratory impairment years before the miner developed scleroderma, were supported by the miner’s testimony of difficulty in breathing, hospitalizations for breathing and dyspnea problems dating back to 1981, qualifying blood gas studies, and Dr. Pinkerton’s observations well before the miner was diagnosed with scleroderma in 1991. Because the administrative law judge found, on remand, that these opinions were consistent with the treating physician’s opinion, the lay testimony and objective evidence of record, he properly found that the opinions of Drs. Parkinson, Kristofic, Martin, and Gaziano “buttressed” the treating physician’s opinion. *Soubik*, 366 F.3d at 235, 23 BLR at 2-101; Decision and Order at 11. The administrative law judge’s ultimate decision on remand to rely on Dr. Pinkerton’s opinion because he found it to be “more consistent with the relevant, credible evidence,” Decision and Order at 11, is thus supported by substantial evidence in the record.

Further, pursuant to the Board’s remand order, the administrative law judge considered the respective qualifications of the physicians of record, concluding that those physicians who rendered opinions supportive of employer’s position had superior credentials. Notwithstanding this finding, the administrative law judge declined to rely on the relative credentials of the physicians as a “criteria for making a determination herein.” Decision and Order at 10. An administrative law judge is not required to defer to the opinions of physicians with superior qualifications. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996).

Based on the foregoing, we affirm the administrative law judge's finding that the evidence establishes that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). We affirm, therefore, the administrative law judge's award of benefits in the instant claim.

Accordingly, the Decision and Order on Further Remand – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge