BRB No. 97-1234 BLA

LEO JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GEUPEL CONSTRUCTION COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

George P. Surmaitis (Crandall, Pyles & Haviland), Charleston, West Virginia, for claimant.

K. Keian Weld (Senior Assistant Attorney General, Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Carrier appeals the Decision and Order (95-BLA-0152) of Administrative Law Judge Edward Terhune Miller awarding 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 second time. In the original Decision and Order, Administrative Law Judge Charles P. Rippey credited claimant with seventeen years of coal mine employment and found the evidence insufficient to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. 20 C.F.R.

§§718.202(a) and 718.204. Accordingly, Judge Rippey denied benefits. In response to claimant's appeal, the Board affirmed Judge Rippey's findings at 20 C.F.R. §§718.202(a)(1) and 718.204(c)(1) and (c)(2). The Board also held that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3). However, the Board vacated Judge Rippey's finding that the opinion of Dr. Crisalli establishes that claimant's obstructive impairment is unrelated to coal mine employment, and remanded the case for reconsideration under *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Hence, the Board instructed Judge Rippey to reconsider all of the relevant evidence under 20 C.F.R. §§718.202(a)(4), 718.203 and 718.204(b) and (c). *Johnson v. Geupel Construction Co.*, BRB No. 95-2021 BLA (Apr. 26, 1996)(unpub.).

On remand, the case was reassigned to Administrative Law Judge Edward Terhune Miller (the administrative law judge) who found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and total disability at 20 C.F.R. §718.204(c). Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits which he ordered to commence as of February 1, 1994. On appeal, carrier contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[1]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1]Inasmuch as the administrative law judge's finding at 20 C.F.R. §718.204(c) is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, carrier contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge considered the opinions of Drs. Crisalli, Gaziano and Rasmussen and found "that of the three physicians who examined Claimant, Dr. Crisalli is the only physician who found that Claimant was not suffering from pneumoconiosis." 1997 Decision and Order at 7. The administrative law judge properly accorded determinative weight to the opinions of Drs. Gaziano and Rasmussen over the contrary opinion of Dr. Crisalli because they "corroborate each other."[2] *Id.* at 8; *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Further, since the administrative law judge relied on the opinion of Dr. Gaziano in support of a finding of pneumoconiosis, by inference, he found the doctor's opinion sufficiently documented and reasoned. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846, 1-851 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984). Moreover, we reject carrier's argument that the administrative law judge erred in relying on Dr. Rasmussen's opinion. Employer notes that the Board previously affirmed Judge Rippey's decision to discredit Dr. Rasmussen's opinion in view of the fact that his diagnosis of pneumoconiosis was based on positive x-ray evidence when the weight of the x-ray evidence of record was negative for pneumoconiosis. Contrary to the Board's prior determination, an administrative law judge may not discredit a physician's opinion solely on the basis that the diagnosis of pneumoconiosis is inconsistent with the weight of the x-ray evidence at 20 C.F.R. §718.202(a)(1). *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). The record reflects that the medical opinion of Dr. Rasmussen, that claimant suffers from pneumoconiosis, is based, *inter alia*, on x-ray evidence, and coal mine employment and smoking histories. Claimant's Exhibits 2, 3. Consequently, we reject carrier's assertion that the administrative law judge erred by relying on the opinions of Drs. Gaziano and Rasmussen.[3]

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[2]The administrative law judge stated that Drs. Gaziano and Rasmussen "both agree that Claimant is suffering from pneumoconiosis." 1997 Decision and Order at 8.

[3]Carrier asserts that the administrative law judge erred by considering the December 21, 1994 and January 17, 1995 opinions of Dr. Rasmussen because they were not admitted into the record. Contrary to carrier's assertion, the opinions of Dr. Rasmussen were properly admitted into the record during a pre-hearing conference. Administrative Law Judge's Exhibit 2.

In addition, we reject carrier's assertion that the opinion of Dr. Crisalli is entitled to greater weight than the contrary opinions of Drs. Gaziano and Rasmussen because Dr. Crisalli's qualifications are superior to the qualifications of Drs. Gaziano and Rasmussen. An administrative law judge is not required to defer to a doctor with superior qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Further, carrier argues that the administrative law judge erred by discounting Dr. Crisalli's opinion on the basis that it violates the holding in *Warth*. In *Warth*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an assumption that an obstructive disorder, rather than a restrictive disorder, cannot be caused by coal mine employment is erroneous. In the instant case, although the administrative law judge discounted Dr. Crisalli's opinion as inconsistent with *Warth*,[4] the administrative law judge also stated that "although Dr. Crisalli was accurate in his recitation of Claimant's smoking history, he did not **adequately explain** why he discounted completely Claimant's history of coal dust exposure, which was at least two thirds as long as his smoking history." 1997 Decision and Order at 8 (emphasis added). Thus, the administrative law judge, within a proper exercise of his discretion as trier of fact, found that Dr. Crisalli failed to provide an adequate reason for his conclusion.[5] *See Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Furthermore, substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[6]

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[4]The administrative law judge stated that "[t]he only reason given by Dr. Crisalli for ruling out coal dust exposure as a cause or aggravation of Claimant's chronic obstructive lung disease is the absence of a restrictive impairment." 1997 Decision and Order at 8.

[5]In view of the administrative law judge's proper basis for discrediting Dr. Crisalli's opinion, we need not address employer's argument that the administrative law judge erred in his application of *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Under the circumstances, any such error would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[6]The administrative law judge did not render a finding on remand regarding whether claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. However, the administrative law judge properly accorded determinative weight to the opinions of Drs. Gaziano and Rasmussen, that claimant suffers from coal workers' pneumoconiosis related to coal dust exposure, than to the contrary evidence of record. Director's Exhibit 9; Claimant's Exhibits 2, 3. Thus, we hold as a matter of law that the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.

Finally, carrier contends that the administrative law judge erred by finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). We disagree. Whereas Drs. Gaziano and Rasmussen opined that claimant's suffers from a totally disabling respiratory impairment due to pneumoconiosis, Director's Exhibit 9; Claimant's Exhibits 2, 3, Dr. Crisalli opined that claimant's disabling respiratory impairment is not due to pneumoconiosis, Employer's Exhibit 2. As previously noted, the administrative law judge properly accorded determinative weight to the opinions of Drs. Gaziano and Rasmussen over the contrary opinion of Dr. Crisalli because they "corroborate each other." Decision and Order [on Remand] at 8; *see Walker, supra*; *Massey, supra*; *Newland, supra*. Additionally, as previously noted, the administrative law judge properly discounted Dr. Crisalli's opinion because the doctor failed to provide an adequate reason for his conclusion. *See Clark, supra*; *Fields, supra*; *Fuller, supra*. Therefore, we affirm the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), as supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge