BRB No. 99-1214 BLA

JACOB SANCHEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE PITTSBURG & MIDWAY COAL MINING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
MOUNTAIN STATES MUTUAL CASUALTY COMPANY	)	
	)	
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 Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

James A. Kent, Jr.,Middleburg, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (90-BLA-2674) of Administrative Law Judge Stuart A. Levin 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).[1] This is the fourth time that this case has been appealed to

[1] Claimant initially filed a claim on May 7, 1987 which was denied by the district

director on July 20, 1987. Director's Exhibit 30. No further action was taken by claimant until the filing of the instant claim on October 6, 1988. Director's Exhibit 1. On July 29, 1991, Administrative Law Judge Thomas Schneider issued a Decision and Order denying benefits. Judge Schneider found that, while the evidence established total disability and a material change in conditions, benefits were precluded as claimant failed to establish the existence of pneumo pursuant to 20 C.F.R. §718.202(a). Subsequent to an appeal by claimant, the Board vacated the denial of benefits and remanded the claim for further consideration of the existence of pneumoconiosis at Section 718.202(a)(4), causality at 20 C.F.R. §718.203(b) and total disability pursuant to 20 C.F.R. §718.204(c), (b). *Sanchez v. The Pittsburg & Midway Coal Mining Co.*, BRB No. 91-2016 BLA (May 21, 1993)(unpub.). On remand, Judge Schneider awarded benefits. Subsequent to an appeal by employer, the Board vacated the award of benefits and remanded the claim. *Sanchez v. The Pittsburg & Midway Coal Mining Co.*, BRB No. 94-0279 (unpub.). Specifically, the Board vacated Judge Schneider's finding of pneumoconiosis at Section 718.202(a)(4), the finding of total disability at Section 718.204(c), and the finding of causation at Section 718.204(b). *Id*. On remand, the Judge Schneider again awarded benefits as he found the evidence established the existence of pneumo and total disability pursuant to Section 7 18.204(c), (b). Subsequent to

the Board. Pursuant to the Board's latest remand, Administrative Law Judge Stuart A. Levin (the administrative law judge) found that the Board had previously affirmed Administrative Law Judge Thomas Schneider's finding of pneumoconiosis. Turning to the other issues before him, the administrative law judge found that the evidence established the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), and that pneumoconiosis was a contributing factor to claimant's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded.

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an appeal by employer, the Board again vacated the award of benefits. *Sanchez v. The Pittsburg & Midway Coal Mining Co.*, BRB No. 97-0101 BLA (Sep 25, 1999)(unpub.). The Board affirmed Judge Schneider's finding of pneumoconiosis pursuant to Section 718.202(a)(4), but vacated the findings at Section 718.204(b), (c) and remanded the claim for further consideration. *Id*. On remand, Judge Stuart A. Levin issued a Decision and Order awarding benefits from which employer now appeals.

On appeal, employer contends that the administrative law judge erred in relying upon the blood gas studies of record and the medical opinion of Dr. Slonim as support for a finding of total disability due to pneumoconiosis pursuant to Section 718.204(c), (b).[2] Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the record establishes that claimant is totally disabled only due to obesity and that there is no credible evidence supporting a conclusion that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). Employer asserts that the qualifying blood gas study evidence[3] results from claimant's obesity. Employer further asserts that the administrative law judge erred in concluding that the opinion of Dr. Phelps, Director's Exhibit 12, supported a finding of total disability inasmuch as the physician made no such finding. Employer also asserts that the opinion of Dr. Slonim, that claimant suffered from a totally disabling respiratory impairment, Director's Exhibit 25; Claimant's Exhibit 11, did not constitute a credible medical opinion and thus should not have been relied upon by the administrative law judge.

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[2] We reject employer's assertions regarding the existence of pneumoconiosis, as the previous finding of the existence of the disease was affirmed and therefore constitutes the "law of the case," and is not properly before the Board at this time. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

When this case was most recently before it, the Board held that the administrative law judge failed to address Dr. Phelps's medical opinions and erred in his analysis of Dr. Slonim's medical opinion. *Sanchez*, BRB No. 97-0101 BLA at 3. The Board thus instructed the administrative law judge to reconsider his findings of total disability at Section 718.204(c)(4). The Board further held that the administrative law judge, on remand, was to weigh the entirety of relevant evidence at Section 718.204(c) together and to provide a rationale for his assessment of the evidence.[4] *Id*.

On remand, the administrative law judge found that the medical opinion evidence at Section 718.204(c)(4) was not probative evidence demonstrating the absence of a totally disabling respiratory impairment, and is not contrary to the finding that total disability is established under Section 718.204(c)(2) as affirmed by the Board. Decision and Order on Remand at 12. The administrative law judge also found that the non-qualifying pulmonary function study evidence, and the evidence regarding the absence of cor pulmonale with right side congestive heart failure, similarly did not constitute probative evidence "contrary to the blood gas data indications of total disability." Decision and Order on Remand at 12. The administrative law judge, therefore, concluded that claimant established total disability at Section 718.204(c).

In considering the medical opinion evidence, the administrative law judge permissibly found that the opinions of Drs. Coultas, Stoltzfus and Naylor, Claimant's Exhibit 1; Employer's Exhibit 4, were not relevant to the issue of total disability inasmuch as the physicians did not address the issue or provide a sufficient assessment of claimant's work capability for the administrative law judge to reach a conclusion on the issue of total disability. Decision and Order on Remand at 12. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Further, the administrative law judge, in a permissible exercise of his discretion, accorded little weight to Dr. Van As's conclusion of a "negligible respiratory impairment," Director's Exhibit 6, inasmuch as the physician did not base his conclusion on extensive medical evidence, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985).

[4] In reaching this determination, the Board recognized that it previously affirmed the administrative law judge's finding that total disability was established pursuant to Section 718.204(c)(2), but was not established at Section 718.204(c)(1) and (3). *Id*.

The administrative law judge permissibly accorded greater weight to the opinion of Dr. Phelps, who indicated that while claimant did not suffer from pneumoconiosis, he suffered from congestive heart failure as well as hypoxia and a pulmonary condition, because Dr. Phelps also provided a list of claimant's exertional limitations resulting from these conditions. Director's Exhibit 12. Contrary to employer's assertion, the opinion of a physician need not be stated explicitly in terms of "total disability" in order to be supportive of a finding of such at Section 718.204(c)(4). *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Budash, supra*; *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275 (1982). In the instant case, the administrative law judge properly found that claimant's regular coal mine employment as a general utility man, "involved levels of exertion which exceed the limitations of Claimant's respiratory capacity as evaluated by Dr. Phelps," Decision and Order at 13. We conclude, therefore, that the administrative law judge properly concluded that Dr. Phelps's medical opinion was supportive of a finding of total respiratory disability. *See Budash, supra*; *Mazgaj, supra*.

The administrative law judge then addressed the opinions of Dr. Repsher, who concluded that claimant suffered from no totally disabling respiratory or pulmonary impairment, Director's Exhibit 30, and Dr. Slonim, who found that claimant suffered from totally disabling coal workers' pneumoconiosis, Director's Exhibit 25; Claimant's Exhibit 11. The administrative law judge concluded that Dr. Repsher's opinion was entitled to little weight because the physician erroneously concluded that the miner did not suffer from any chronic dust disease of the lungs. An administrative law judge may accord less weight to those opinions which fail to represent an incomplete picture of the miner's entire health, *see Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Moreover, the administrative law judge recognized that, to the extent that Dr. Repsher suggested that the qualifying blood gas evidence did not support a finding of total disability at Section 718.204(c), the physician's opinion was unexplained and insufficiently reasoned. The administrative law judge may accord less weight to those opinions based on unsupported statements. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983).

In considering the opinion of Dr. Slonim, the administrative law judge found that although Dr. Slonim's opinion was not "without flaws," the opinion was the best reasoned regarding the extent of claimant's total disability inasmuch as it was better supported by underlying documentation, *see Clark, supra*; *Peskie, supra*; *Lucostic, supra*. We conclude, therefore, that the administrative law judge has complied with our remand instructions and after reviewing all the evidence has rationally concluded that claimant has established the

presence of a totally disabling respiratory impairment pursuant to Section 718.204(c).[5] *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987), and *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Accordingly, the administrative law judge's finding of total disability at Section 718.204(c) is affirmed.

Employer next contends that the record is devoid of credible evidence sufficient to support claimant's burden of establishing total disability due to pneumoconiosis pursuant to Section 718.204(b). Employer asserts that the administrative law judge again improperly relied upon the opinion of Dr. Slonim as support for his causation finding inasmuch as Dr. Slonim's opinion was not sufficiently reasoned or documented and was outweighed by other more credible evidence.

The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that in order to carry his burden at Section 718.204(b), a claimant must demonstrate that his pneumoconiosis was at least a contributing cause of his total disability. *Mangus v. Director, OWCP*, 882 F.2d 152, 13 BLR 2-9 (10th Cir. 1989). In the instant case, the administrative law judge concluded that Dr. Slonim's opinion, that pneumoconiosis played a role in claimant's totally disabling respiratory impairment, was entitled to greater weight than Dr. Repsher's contrary opinion. Decision and Order on Remand at 15.

The administrative law judge, in a permissible exercise of his discretion, found that because Dr. Repsher failed to account for claimant's chronic industrial bronchitis, *i.e.*, legal pneumoconiosis, *see* 20 C.F.R. §§718.201, 718.202(a)(4), the credibility of his opinion was undermined, *see Stark, supra*; *Hutchens, supra*. The administrative law judge permissibly accorded greater weight to the opinion of Dr. Slonim as he recognized that Dr. Slonim "met with Claimant three times, examined him twice and provided a well-reasoned, well-documented evaluation," Decision and Order at 14. *See Clark, supra*; *Peskie, supra*, *Lucostic, supra*. Finally, the administrative law judge, in a permissible exercise of his discretion, properly accorded greater weight to the conclusions of Dr. Slonim because of the physician's superior credentials.[6] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987);

[5] Inasmuch as the administrative law judge has provided an affirmable basis for the crediting of Dr. Slonim's opinion, we need not address employer's other assertions of error regarding the analysis of the opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[6] The administrative law judge found that while Dr. Repsher's credentials were also "impressive," the physician had not examined nearly as many miners as had Dr. Slonim and professed to have more of a professional interest in asbestosis than in black lung disease.

Wetzel v. Director, OWCP, 8 BLR 1-139 (1985). We conclude, therefore, that the administrative law judge has properly determined that pneumoconiosis has played a contributing role in the miner's totally disabling respiratory impairment pursuant to Section 718.204(b). *See Mangus, supra*; *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991).

Decision and Order at 14.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge