BRB No. 00-1157 BLA

ERNEST WORKMAN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED:
	)	
	)	
Employer-Petitioner	)	
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Tab R. Turano (Greenberg Traurig, LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-259) of Administrative Law Judge Gerald M. Tierney 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 case has been before the Board

[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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*,

previously.[2] In the prior Decision and Order, the administrative law judge noted that the instant claim is a modification request and considering entitlement pursuant to the provisions of 20 C.F.R. Part 718 (2000), the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and therefore insufficient to establish a change in conditions or a mistake of fact pursuant to 20 C.F.R. §725.310 (2000). On appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to consider the deposition testimony of Dr. Rasmussen. *See Workman v. Eastern Associated Coal Corp.*, BRB Nos. 95-2212 BLA and 98-1438 BLA (October 29, 1999)(unpublished).

Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The procedural history of this case has previously been set forth in detail in the Board's prior decision in *Workman v. Eastern Associated Coal Corp.*, BRB Nos. 95-2212 BLA and 98-1438 BLA (October 29, 1999)(unpublished), which is incorporated herein by reference.

On remand, the administrative law judge concluded that claimant established a change in conditions as the deposition testimony of Dr. Rasmussen was sufficient to establish the existence of pneumoconiosis. Decision and Order on Remand at 3. The administrative law judge further determined that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) (2000) and 718.204(b), (c) (2000). Decision and Order on Remand at 3-6. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) (2000), in finding that total disability was established pursuant to 20 C.F.R. §718.204(c)(4) (2000) and that the disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Claimant responds asserting that substantial evidence supports the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[3]

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 the 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer initially contends that the administrative law judge erred in finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) (2000) as he failed to specifically discuss the basis for the physicians' conclusions and failed to fully

[3]The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203 and 718.204(c)(1)-(3) (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

consider the medical opinion evidence of record. We agree. In addressing the medical opinions of record pursuant to 20 C.F.R. §718.202(a)(4) (2000), the administrative law judge gave less weight to the opinions of Drs. Fino, Renn and Tuteur as the physicians did not examine claimant. Decision and Order on Remand at 2-3. The administrative law judge concluded that the opinion of Dr. Rasmussen, who addressed the challenges to his opinion by the other physicians of record and coupled with his experience in coal workers' pneumoconiosis, was more persuasive than the opinion of Dr. Zaldivar, who also examined the miner and is a board-certified pulmonary specialist. Decision and Order on Remand at 2-3. The administrative law judge then concluded that the weight of the medical opinion evidence establishes the existence of pneumoconiosis. Decision and Order on Remand at 3; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000).

The factors to which the administrative law judge referred are relevant in determining the weight to be assigned a particular medical opinion, but the administrative law judge must first specifically determine if the opinions of record are reasoned and documented and therefore credible.[4] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In the instant case, the administrative law judge did not determine if the opinions were reasoned and documented but only compared the physicians' findings on physical examination. Decision and Order on Remand at 2-3. The administrative law judge did not review the medical opinions in the context of their objective evidence which may provide a basis for determining the credibility of the opinions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987);

[4]Contrary to employer's contention, the administrative law judge properly considered the curriculum vitea of Dr. Rasmussen as it was properly admitted into the record. The parties agreed at the physician's deposition that the curriculum vitae would be attached and as this exhibit was admitted into the record for consideration by the administrative law judge, we discern no abuse of discretion by the administrative law judge in the instant case by his reliance upon Dr. Rasmussen's curriculum vitea. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1985) *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); Claimant's Exhibit 2.

Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); Decision and Order on Remand at 2-3.

In determining if a party has met its burden of proof, the United States Court of Appeals for the Fourth Circuit has held that an administrative law judge should consider the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions.[5] *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). Moreover, a physician's opinion based upon the review of other opinions and objective test results, may be substantial evidence in support of an administrative law judge's findings. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). In evaluating the medical opinion evidence, the administrative law judge should assess "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgements and the sophistication and bases of their diagnosis." *Akers, supra*; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

In this case, the administrative law judge did not specifically consider and discuss the weight he accorded the various medical opinions of record, including the opinions of the non-examining physicians. In view of the case law from the Fourth Circuit, we vacate the administrative law judge's findings that the existence of pneumoconiosis was established by the medical opinion evidence and remand this case to the administrative law judge for a full review of the record as a whole in light of these authorities. Furthermore, the administrative law judge, in determining if claimant has met his burden of proof, must consider all factors relevant to the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo, supra*; *Fields, supra*; *Lucostic, supra*.

Employer further contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to Section 718.204(c)(4) (2000). Employer specifically contends that the administrative law judge failed to properly consider the exertional requirements of claimant's usual coal mine employment in determining whether the medical opinions were sufficient to establish a totally disabling respiratory impairment. We disagree. The administrative law judge discussed the medical

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

opinions of record and rationally found that the opinions of Drs. Fino, Tuteur, Zaldivar, Renn and Rasmussen were sufficient to establish that claimant is totally disabled. Decision and Order on Remand at 4-5; Director's Exhibits 5, 11, 24, 34-36, 46, 58; Employer's Exhibits 1, 2, 6, 7; Claimant's Exhibit 2. The administrative law judge found that claimant's usual coal mine employment was as a heat dryer operator since his last job was that of a truck driver which he held for five days and prior to that, claimant worked as a general laborer for five months. Decision and Order on Remand at 4; Director's Exhibit 3; Hearing Transcript at 18-20, 25-26.

Before the administrative law judge can determine whether the miner is able to perform his usual coal mine work, he must identify the employment that was the miner's usual coal mine work[6] and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. (emphasis added) *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984). Contrary to employer's assertions, the administrative law judge rationally determined that claimant's employment as a heat dryer operator constituted heavy work based on claimant's testimony. Hearing Transcript at 19, 25-30; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Co.*, 12 BLR 1-77 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, the administrative law judge, within his discretion as fact-finder, reasonably found that the medical opinion evidence was sufficient to establish total disability pursuant to Section 718.204(c)(4) in light of his finding that claimant's coal mine employment was heavy work and the physicians' assessment of claimant's respiratory impairment. Decision and Order on Remand at 4-5; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *McMath, supra*; *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry, supra*.

[6]An individual's usual coal mine work is "the most recent job the miner performed regularly and over a substantial period of time," *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of respiratory inability to do his usual coal mine work. *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984).

Employer also challenges the administrative law judge's finding that the miner's total disability was due to pneumoconiosis. Employer argues that, contrary to *Hicks*, *supra* and *Akers*, *supra*, the administrative law judge failed to explain his assessment or provide any rationale for finding the evidence supportive of claimant's burden. For the same reasons previously discuss with respect to the administrative law judge's findings pursuant to Section 718.202(a)(4) (2000), we must also vacate the administrative law judge's findings that the medical opinion evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis. On remand, the administrative law judge must specifically determine if the opinions of record are reasoned and documented and review the medical opinions in the context of their objective evidence which may provide a basis for determining the credibility of the opinions. *See Trumbo, supra*; *Fields, supra*; *Lucostic, supra*. Additionally, in determining if a party has met its burden of proof, the Fourth Circuit Court has held that an administrative law judge is obligated to consider all the relevant factors in accessing the credibility of the medical evidence. *See Hicks, supra*; *Akers, supra*. As the administrative law judge, in this case did not specifically consider and discuss the credibility of all of the record evidence, including the opinions of the non-examining physicians and in view of the case law from the Fourth Circuit, we vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis and remand this case to the administrative law judge for a full review of the record as a whole. *See Hicks, supra*; *Akers, supra*; *Collins, supra*; *Trumbo, supra*; *Fields, supra*; *Lucostic, supra*. On remand, the administrative law judge is instructed to reconsider his findings on this issue, if reached, in accordance with the proper causation standard. *See* Black Lung Benefits Amendments, 65 Fed. Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(c); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225, (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Additionally, the administrative law judge should make a specific determination concerning the impact of claimant's disabling back condition. *See Robinson, supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge