BRB No. 02-0238 BLA

WILLIAM RUBENDALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Upon Modification of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Modification (01-BLA-0551) of Administrative Law Judge Ralph A. Romano 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] Claimant filed a miner's claim for benefits on August 30,

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

1996. In a Decision and Order dated December 1, 1998, the administrative law judge credited claimant with twelve and one-quarter years of coal mine employment, and considered the claim pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) (2000) and 718.203(b) (2000). The administrative law judge also found the evidence insufficient, however, to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204 (2000). Consequently, the administrative law judge denied benefits. Claimant appealed. The Board affirmed the administrative law judge's findings under Sections 718.202(a) (2000), 718.203(b) (2000) and 718.204 (2000), and, accordingly, affirmed the denial of benefits. *Rubendall v. Director, OWCP*, BRB No. 99-0354 BLA (June 28, 2000)(unpublished).

Claimant subsequently filed with the district director a timely request for modification of the denial of benefits. The case was referred to the administrative law judge, who held a hearing on modification on September 21, 2001. At the hearing, the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant established total disability pursuant to 20 C.F.R. §718.204(b).[2] 2001 Hearing Tr. at 6-7. In his Decision and Order dated November 29, 2001, the administrative law judge stated that the remaining issue in the instant case is thus whether claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge considered the previously submitted evidence and the evidence submitted in connection with modification and found the evidence insufficient to establish total disability due to pneumoconiosis. The administrative law judge thus found that claimant failed to establish modification by failing to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in rejecting Dr. Kraynak's opinion, and in crediting Dr. Rashid's opinion, to find the evidence insufficient to establish total disability due to pneumoconiosis under Section 718.204(c). The Director responds in support of the administrative law judge's decision denying benefits.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

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).

The relevant evidence of record with regard to the issue of whether claimant's total disability is due to pneumoconiosis consists solely of previously submitted opinions of Drs. Kraynak and Rashid, and recent opinions from the two physicians submitted in connection with the request for modification. In arguing that the administrative law judge erred in discounting Dr. Kraynak's opinion that claimant is totally disabled due to pneumoconiosis, and erred in crediting Dr. Rashid's contrary opinion, claimant contends that Dr. Kraynak's opinion was entitled to determinative weight because Dr. Kraynak is claimant's treating physician who examined claimant on numerous occasions, while Dr. Rashid saw claimant only twice over a five year period. Claimant also asserts that Dr. Kraynak's opinion is better reasoned and documented than Dr. Rashid's opinion because only Dr. Kraynak gave careful consideration to the medical evidence of record, and because Dr. Rashid failed to provide any rationale for his opinion that pneumoconiosis played no role in claimant's totally disabling respiratory impairment.

We reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Kraynak's opinion due to his status as the miner's treating physician. 20 C.F.R. §718.104(d) provides that the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record, and weigh various factors in considering a treating physician's opinion. *See* 20 C.F.R. §718.104(d)(1)-(5). The provision at Section 718.104 applies to evidence developed after January 19, 2001, and thus applies to Dr. Kraynak's deposition testimony taken on August 31, 2001. *See* 20 C.F.R. §718.104; Claimant's Exhibit 2. While an administrative law judge must give consideration to a physician's status as a miner's treating physician, an administrative law judge is not required to give greater weight to the opinion of a treating physician, especially where the administrative law judge finds the opinion flawed. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); 20 C.F.R. §718.104. In the instant case, the administrative law judge duly considered Dr. Kraynak's deposition testimony that he treated claimant every two months since he began seeing claimant in November, 1997. Decision and Order at 6; Claimant's Exhibit 2 at 5-6. The administrative law judge properly discounted Dr. Kraynak's opinion, however, as not well-reasoned based upon flaws in the opinion. *See 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*). Specifically, the administrative law judge concluded that Dr. Kraynak's previous deposition testimony in 1996 was inconsistent with his later deposition testimony in

2001 with regard to the decrease in claimant's pulmonary function as a result of the removal of two-thirds of his right lung in 1996 due to cancer, and that Dr. Kraynak did not explain the bases for his conclusions. Decision and Order at 7; Director's Exhibit 33; Claimant's Exhibit 2. The administrative law judge further found that Dr. Kraynak did not explain whether claimant's obesity, high blood pressure and coronary artery disease, identified in Dr. Rashid's May 24, 2001 and June 12, 2001 reports which Dr. Kraynak stated he reviewed, contributed to claimant's pulmonary disability. Decision and Order at 8; Director's Exhibits 33, 36, 51, 54; Claimant's Exhibit 2. The administrative law judge also properly noted that while Dr. Kraynak relied upon a coal mine employment history of twenty-five years in reaching his opinion, the record establishes, and the parties stipulated to, a coal mine employment history of only twelve and one-quarter years.[3] *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order at 8; 2001 Hearing Tr. at 6.

[3]The administrative law judge also found that it was not clear from Dr. Kraynak's most recent deposition testimony what smoking history the doctor relied upon in formulating his opinion. Decision and Order at 7. The administrative law judge noted that claimant gave various accounts of his smoking history, indicating at the initial hearing in 1998, and to Dr. Rashid, that he smoked cigarettes for thirty-five years, while indicating to Dr. Kraynak that he smoked cigarettes for only fifteen years. Decision and Order at 7-8. The administrative law judge noted that Dr. Kraynak stated that he was aware of the longer history provided to Dr. Rashid, but the administrative law judge further found that it did not appear from Dr. Kraynak's testimony that Dr. Kraynak accepted or took into account the longer smoking history. To the extent the administrative law judge may have incorrectly found that Dr. Kraynak failed to consider an accurate smoking history or may have erred in discounting the doctor's opinion on that basis, any such error was harmless in view of the administrative law judge's otherwise proper bases for discounting Dr. Kraynak's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Furthermore, contrary to claimant's contention, the administrative law judge properly credited Dr. Rashid's opinion as well-reasoned and documented because Dr. Rashid took note of all of claimant's medical conditions, including pneumoconiosis, and based his opinion that claimant's total disability is due to the partial lung resection, smoking history and obesity on recent objective medical tests, claimant's occupational and smoking histories and physical examinations. *See Clark, supra; Tackett, supra*; Decision and Order at 8; Director's Exhibits 36, 51, 54. Moreover, the administrative law judge properly credited Dr. Rashid's opinion over Dr. Kraynak's opinion based upon a comparison of the physicians' qualifications.[4] *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 8-9; Director's Exhibits 33 at 4; 55. We affirm, therefore, the administrative law judge's finding that the evidence of record was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), a requisite element of entitlement under 20 C.F.R. Part 718, and affirm the administrative law judge's denial of benefits on the merits.[5] *See 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*).

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[4]Dr. Rashid is Board-certified in internal medicine. Director's Exhibit 55. Dr. Kraynak testified that he is Board-eligible in family medicine, but neither Board-certified nor Board-eligible in pulmonary medicine or internal medicine. Director's Exhibit 33 at 4.

[5]In view of the administrative law judge's proper consideration of the claim on the merits based upon all the evidence of record, we need not address specifically the administrative law judge's consideration of whether a mistake in a determination of fact or a change in conditions was established on modification pursuant to 20 C.F.R. §725.310 (2000).

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge