BRB No. 00-0173 BLA

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| DAVID SANDERS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| PEABODY COAL COMPANY | ) | |
| | ) | DATE ISSUED: |
| Employer-Respondent | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Paul (Rick) Rauch (McNamar, Fearnow & McSharar, P.C.), Indianapolis, Indiana, for claimant.

Gregory S. Feder (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, appeals the Decision and Order (1999-BLA-257) of Administrative Law Judge Rudolf L. Jansen denying 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). The administrative law judge found that claimant established thirteen years of qualifying coal mine employment and the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b) but failed to

[1]Claimant is David W. Sanders, the miner, who filed a claim for benefits on November 12, 1997. Director's Exhibit 1.

establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in allowing Dr. Tuteur to testify at the hearing, in his consideration and weighing of the deposition testimony of Drs. Tuteur, Wiot, Repsher, Castle and Renn, and in failing to find that claimant established total respiratory disability pursuant to Section 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on 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).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements by a preponderance of the evidence compels a denial of benefits. *See Anderson, supra*; *Baumgartner, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially contends that the administrative law judge improperly allowed Dr. Tuteur to testify at the hearing because employer failed to provide adequate notice of its intent to present Dr. Tuteur's testimony in violation of 20 C.F.R. §725.457(a). Claimant's Brief at 4-6. Section 725.457(a) states that:

> . . .Any party who intends to present the testimony of an expert witness at a hearing shall so notify all other parties to the claim at least 10 days before the hearing. The failure to give notice of the appearance of an expert witness in accordance with this paragraph, unless notice is waived by all parties, shall preclude the presentation of testimony by such expert witness.

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[2]The administrative law judge's findings regarding the length of the miner's coal mine employment, that the evidence established the existence of pneumoconiosis arising out claimant's coal mine employment pursuant to 20 C.F.R.§§718.202(a) and 718.203 and pursuant to 20 C.F.R. §718.204(c)(1)-(3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. §725.457(a). At the hearing, employer's counsel stated that notice of employer's intent to present the testimony of an expert witness was sent to all parties on March 29, 1999 and that claimant received his copy on April 1, 1999. Hearing Transcript at 52. The hearing was held on April 8, 1999. At the hearing, and in his brief on appeal, claimant argued that because the notice was not received ten days before the hearing, he was not properly notified of employer's intent to present testimony. Hearing Transcript at 50-51. The administrative law judge considered claimant's arguments and rationally determined that because there is no specific rule applicable to the black lung program as to the mailing of notice, the general rule at 29 C.F.R. §18.4(c)(2), which states that serviceable documents, other than complaints, are effective at the time of mailing, applies to this case. Hearing Transcript at 54. Consequently, inasmuch as employer mailed the notice to claimant ten days prior to the date of the hearing, the administrative law judge acted within his discretion in holding that the mailing of the notice was timely and in overruling claimant's objection to Dr. Tuteur's testimony. 20 C.F.R. §725.457(a); Hearing Transcript at 54; *see Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Hamric v. Director, OWCP*, 6 BLR 1-1091 (1984).

Claimant next contends that the administrative law judge erred in considering the deposition testimony of Drs. Tuteur, Repsher, Renn and Castle because they reviewed evidence developed after the twenty day rule deadline. Claimant's Brief at 7-13; 20 C.F.R §725.456(b)(1). Contrary to claimant's contention, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this claim arises, has held that the materials on which an expert witness can base his opinion "need not be admissible, let alone admitted, in evidence, provided that they are the sort of thing on which a responsible expert draws in formulating a professional opinion." *Peabody Coal Co. & Old Republic Insurance Co. v. Durbin*; 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999). In the instant case, the administrative law judge considered claimant's objection to the depositions and stated that the opinions expressed by the physicians were also based in part upon evidence which was in the record. Decision and Order at 12. The administrative law judge then acted within his discretion in declining to exclude the depositions and properly stated that it is within his discretion to give more weight to the opinions that are better supported by the objective evidence of record. Decision and Order at 12; *Durbin, supra; Cochran, supra; Clark, supra.* As a result, we reject claimant's contention of error.

Claimant next contends that the administrative law judge erred in failing to find that claimant established total respiratory disability pursuant to Section 718.204(c)(4) because he improperly weighed the medical opinion evidence of record and claimant's testimony regarding the physical requirements of his usual coal mine employment. Claimant's Brief at 14-17. Initially, claimant contends that the administrative law judge erred in assigning less weight to Dr. Garcia's opinion because Dr. Garcia stated that he had no idea as to the physical requirements of claimant's coal mine employment. Dr. Garcia opined that claimant does not have the pulmonary capacity to perform his usual coal mine employment. Director's

Exhibits 8, 17. In his deposition, Dr. Garcia stated that claimant worked unloading shuttle cars and that he was exposed to significant dust in doing his job. Claimant's Exhibit 1. Additionally, when asked whether he knew the physical requirements of that job, Dr. Garcia responded: "I have no idea." Claimant's Exhibit 1 at 34. Dr. Garcia further stated that he did not know how much claimant had to lift, how many steps he had to climb or if he had to do any walking. Claimant's Exhibit 1 at 35. Inasmuch as Dr. Garcia stated that he was unaware of the physical requirements of claimant's usual coal mine employment, the administrative law judge rationally questioned his opinion that claimant does not have the respiratory capacity to perform his usual coal mine employment. Decision and Order at 18; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *DeBusk v. Pittsburg & Midway Coal Co.*, 12 BLR 1-15 (1988); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). As a result, we reject claimant's contention of error and affirm the administrative law judge's finding that Dr. Garcia's opinion is entitled to less weight.

Claimant next contends that the administrative law judge erred in failing to assign greater weight to the opinions of Drs. Garcia and Farber, both of whom opined that claimant is totally disabled from a pulmonary standpoint, on the basis of the their status as claimant's treating physicians and their superior credentials. Claimant's Brief at 18-23. Contrary to claimant's contention, an administrative law judge may assign greater weight to a physician with superior credentials, but he is not required to do so. *Clark, supra.* Additionally, the Board has held that a physician's status as claimant's treating physician is just one of the factors to be considered in rendering a decision. *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Further, the Seventh Circuit has held that an administrative law judge need not defer to the opinion of a treating physician where it has not been established that the ability to observe the claimant over an extended period of time is essential to an understanding of claimant's condition. *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992).

In the instant case, the administrative law judge, as stated above, found Dr. Garcia's opinion entitled to less weight. Decision and Order at 18. The administrative law judge then found that Drs. Repsher, Renn, Castle and Cook, none of whom diagnosed total respiratory disability, and Dr. Farber are all highly qualified physicians who defended their opinions at deposition. Decision and Order at 18. The administrative law judge then acted within his discretion in concluding that he found no reason to credit the opinions of Drs. Garcia and Farber over the opinions of Drs. Repsher, Renn, Castle and Cook. Decision and Order at 18; *Lafferty, supra.* As a result, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4).

Additionally, the administrative law judge rationally concluded that, in weighing all of the medical evidence together, that the arterial blood gas study evidence, which supports a finding of total respiratory disability, is not sufficient to overcome the medical opinion evidence and objective pulmonary function study evidence, which does not support a finding

of total respiratory disability. Decision and Order at 18; *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)*; Lafferty, supra*; *Clark, supra; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability and the denial of benefits. *See Mangifest, supra.*

Accordingly, the administrative law judge's Decision and Order denying 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