BRB No. 98-0725 BLA

GLENN D. HOSKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WILLIAM HUBBARD TRUCKING	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Jeffrey S. Goldberg (Henry L. Solano, 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (96-BLA-0755) of

[1] Claimant is Glenn D. Hoskins, the miner, who filed his application for benefits on June 21, 1994. Director's Exhibit 1.

Administrative Law Judge Thomas F. Phalen, Jr. 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established twelve years of qualifying coal mine employment, but failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erroneously found that he failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) and total disability under 20 C.F.R. §718.204(c)(4). Employer has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a response brief, arguing that the administrative law judge failed to weigh the medical opinion evidence at 20 C.F.R. §718.202(a)(4), explain his findings thereunder, and determine the exertional requirements of claimant's usual coal mine work under 20 C.F.R. §718.204(c)(4).[2]

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 the applicable law, they are binding upon this Board and may not be disturbed. 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).

[2] We affirm the administrative law judge's determinations with respect to length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(3) inasmuch as these findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 7, 8.

Claimant argues that the administrative law judge irrationally found the two medical opinions of record to be in "equipoise," because he failed to weigh either medical opinion.[3] In addition, claimant asserts that Dr. Kabani's opinion is both well reasoned and documented, and hence, entitled to determinative weight. The Director contends that the administrative law judge's finding that the opinions of Drs. Kabani and Dahhan are in "equipoise" requires more than the existence of contrary opinions; rather, the medical opinions must be found to be equally probative. The Director argues further that because the administrative law judge failed to determine whether either medical opinion is credible, he violated the Administrative Procedure Act (APA) by failing to provide a rationale for his conclusions, *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), and thus, his Section 718.202(a)(4) finding should be vacated. We agree.

Although the administrative law judge found the evidence to be "in equipoise," Decision and Order at 8, he failed to evaluate whether the opinion of either Dr. Kabani or Dr. Dahhan is probative, and consequently, entitled to determinative weight. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997);

[3] Two physicians, Dr. Kabani and Dr. Dahhan, examined claimant and rendered the only medical opinions of record. Dr. Kabani opined that claimant suffers from chronic obstructive pulmonary disease due to smoking and coal dust exposure. Director's Exhibit 7. Dr. Dahhan opined that claimant has a mild chronic obstructive ventilatory defect as a result of his 33-pack years of cigarette smoking. Director's Exhibit 28.

Director, OWCP v. Rowe, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*) (administrative law judge must consider and weigh each opinion to ascertain whether claimant established existence of pneumoconiosis).[4] We, therefore, vacate the administrative law judge's Section 718.202(a)(4) finding inasmuch as the administrative law judge did not render a proper weighing of the medical opinion evidence.

[4] Legitimate considerations for the administrative law judge in determining the weight to be accorded conflicting medical opinions include, *inter alia*, the physician's medical expertise, *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984), objective underlying documentation, *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985), reasonedness, *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985), and an adequate explanation of the rationale and clinical basis for the physician's conclusions, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989).

Relevant to Section 718.204(c)(4), claimant argues that the administrative law judge's finding that he is not totally disabled is flawed because the administrative law judge provided an inadequate basis for rejecting Dr. Kabani's well reasoned and documented opinion, improperly discredited Dr. Kabani's opinion because the accompanying pulmonary function study was non-qualifying, substituted his opinion for that of the physicians by interpreting medical tests, failed to identify the exertional requirements of claimant's usual coal mine work and compare such to the physicians' disability assessments, and failed to address claimant's age, education or work experience in his total disability analysis. The Director asserts that the administrative law judge violated the APA by failing to explain why he credited Dr. Dahhan's opinion over that of Dr. Kabani. In addition, the Director agrees with claimant that the administrative law judge failed to determine the exertional requirements of claimant's usual coal mine work and compare them with the doctors' opinions as to his respiratory capacity.[5] The administrative law judge noted the opinions of Drs. Kabani and Dahhan and stated, "Even if Claimant had established that he suffers from pneumoconiosis, he has not shown by a preponderance of the evidence that he is totally disabled from performing his usual coal mine employment." Decision and Order at 8. Because the administrative law judge failed to state the basis for his finding that claimant is not totally disabled, that determination lacks an adequate rationale, and therefore, is not in accordance with the APA. *See Schegan v. Waste Management & Processors Inc.*, 18 BLR 1-41 (1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Furthermore, under Section 718.204(c)(4), the ultimate finding of total respiratory disability is a legal determination to be made by the administrative law judge through consideration of the exertional requirements of claimant's usual coal mine work, *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989),[6] in conjunction

[5] The Director additionally asserts that the administrative law judge failed to resolve the following deficiencies in Dr. Kabani's opinion: whether Dr. Kabani had any knowledge of claimant's duties in his coal mine work, whether Dr. Kabani's opinion is a recommendation not to return to coal mine employment, and whether the pulmonary function study Dr. Kabani administered supports his total disability conclusion. *See* Director's Exhibit 7. Our decision to vacate the administrative law judge's findings at both Sections 718.202(a)(4) and 718.204(c)(4) obviates the need to address these arguments.

[6] The record contains ample evidence with respect to the exertional requirements of claimant's usual coal mine work. *See* Dec. 1997 Hearing Transcript at 10-22; Director's Exhibit 5 (Department of Labor Description of Coal Mine Work and Other Employment Form).

with a physician's assessment regarding claimant's physical abilities, *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469, 1-471 (1984); *Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309, 1-313 (1984); *see Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991).[7] Hence, we vacate the administrative law judge's Section 718.204(c)(4) determination. Consequently, we remand the case for the administrative law judge to reconsider the medical opinions, to explain his weighing of the evidence, and to render factual findings and conclusions of law, in accordance with the APA, pursuant to Sections 718.202(a)(4), 718.204(c)(4), and if reached, 718.204(b).[8] *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-186 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part and vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[7] In this regard, Dr. Kabani's opinion that claimant suffers from a "moderate degree of impairment due to chronic obstructive pulmonary disease," if fully credited, may be sufficient to establish total disability at Section 718.204(c)(4) when compared to claimant's usual coal mine employment duties. However, Dr. Kabani's opinion, that claimant's "symptoms would be aggravated by exposure to coal dust, smoke, and prevent him from working in the mines," could be construed as a recommendation against further exposure to coal mine dust, which is not tantamount to a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Bentley v. Director, OWCP*, 7 BLR 1-612, 1-614 (1984); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1-1216 (1984); Director's Exhibit 7.

[8] Dr. Kabani's opinion that claimant has a moderate degree of respiratory impairment due to his chronic obstructive pulmonary disease which arose out of coal mine employment would be sufficient, if fully credited, to establish total disability causation pursuant to Section 718.204(b). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-186 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge