BRB No. 01-0544 BLA

WILLIAM P. MAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McCOY ELKHORN COAL CORPORATION	)	
	)	DATE ISSUED:
and	)	
	)	
JAMES RIVER COAL 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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Mary Forrest-Doyle (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (00-BLA-0607) of Administrative Law Judge Thomas F. Phalen, Jr. 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] After crediting claimant with thirty-seven years of coal mine employment, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(4). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[2] Accordingly, the

[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). Employer objects to the retroactive application of the amended regulations. 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*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[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).

administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the pathology slides sufficient to establish the existence of pneumoconiosis. Employer also contends that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, noting his position that the instant case is not affected by any of the revisions to the regulations.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer contends that the administrative law judge "erred in evaluating the pathology slides as evidence of microscopic pneumoconiosis." Employer's Brief at 7. Employer's brief, however, neither raises any substantive issues nor identifies any specific error on the part of the administrative law judge in determining that the biopsy evidence was sufficient to establish the existence of pneumoconiosis. We, therefore, affirm the administrative law judge's finding that the biopsy evidence is sufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2); *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis. In finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis, the administrative law judge credited the opinions of Drs. Maynard and Younes that claimant's total disability was due to his pneumoconiosis[4] over the contrary opinions of Drs.

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[3]Because no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(b), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Dr. Maynard, the miner's treating physician, diagnosed "COPD, severe obstructive defect" which she attributed to tobacco abuse, coal dust exposure and a lung resection. Claimant's Exhibit 1. Dr. Maynard opined that claimant was "100% disabled and permanently disabled." *Id.* Although Dr. Younes opined that the primary cause of claimant's pulmonary impairment was cigarette smoking, he opined that occupational dust exposure was a "contributing factor." Director's Exhibit 8.

Caffrey, Broudy and Fino. Decision and Order at 19-20; Director's Exhibits 8, 23, 28; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 4, 6, 9, 10. Employer's sole contention regarding the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) is that the administrative law judge failed to consider the respective qualification of the physicians. Employer's Brief at 10.

After noting the respective qualifications of the physicians,[5] the administrative law judge accorded less weight to Dr. Caffrey's opinion because he found that his statements were "vague and equivocal." Decision and Order at 20; Director's Exhibit 28; Employer's Exhibit 6. The administrative law judge rejected Dr. Fino's opinion because the evidence was insufficient to justify his statements regarding claimant's condition. Decision and Order at 20; Employer's Exhibits 3, 10. Inasmuch as no party challenges these findings, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After noting that Drs. Younes and Broudy are equally qualified, the administrative law judge found that their opinions were "equally well reasoned and documented." Decision and Order at 20; Director's Exhibits 8, 23; Employer's Exhibit 4. The administrative law judge, however, accorded additional weight to Dr. Maynard's opinion based upon her status as

[5] The administrative law judge noted that Dr. Maynard was Board-certified in Internal Medicine and that Dr. Younes was Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 8. The alj further noted that Drs. Broudy and Fino were Board-certified in Internal Medicine and Pulmonary Disease and that Dr. Caffrey was Board-certified in Anatomic and Clinical Pathology. *Id.* at 9-10.

The record also contains Dr. Branscomb's July 3, 2000 medical report and August 21, 2000 deposition testimony. Employer's Exhibits 1, 9. The administrative law judge, however, found that Dr. Branscomb's opinions were not entitled to any weight because they were hostile to the Act. Decision and Order at 17. Inasmuch as no party challenges this finding, it is affirmed. *Skrack, supra*.

claimant's treating physician. Decision and Order at 20; Claimant's Exhibit 1. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that the opinions of treating physicians may be entitled to greater weight than those of non-treating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis. *See* 20 C.F.R. §718.204(c).

In challenging an administrative law judge's decision on appeal, a party must do more than recite evidence favorable to its case. An employer must demonstrate with some degree of specificity the manner in which substantial evidence precludes an award of benefits or explain why the administrative law judge's decision is contrary to law. *Cox*, *supra*; *Sarf*, *supra*. A general contention that the evidence precludes an award of benefits, without raising specific contentions of error by the administrative law judge, is equivalent to a request to reweigh the evidence of record, a request beyond the Board's scope of review. *Koch v. Director, OWCP*, 6 BLR 1-909 (1983). The Board's scope of review in the instant case was necessarily limited to those specific allegations of error set out by employer.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge