BRB No. 06-0441 BLA

JIM SENTERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLSTON MINING COMPANY	)	
	)	DATE ISSUED: 01/31/2007
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 Janice K. Bullard, Administrative Law Judge, United States Department Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

BEFORE: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-6489) of Administrative Law Judge Janice K. Bullard 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). After crediting claimant with at least thirty 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)(1) and

(a)(4).[1] The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). However, the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Moreover, even assuming *arguendo* that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the evidence was insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[2] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not participate in this appeal.

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

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[1]Citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the administrative law judge noted that she was required to weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence was sufficient to establish the existence of pneumoconiosis. Decision and Order at 15; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Weighing all of the relevant medical evidence together, the administrative law judge found that it was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* However, because the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge erred in applying the standard set forth in *Williams*. The Board has held that Section 718.202(a) provides four alternative methods by which a claimant may establish the existence of pneumoconiosis, *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Because this case does not arise within the jurisdiction of the United States Court of Appeals for the Third or Fourth Circuits, the administrative law judge was not required to weigh all of the relevant evidence together at 20 C.F.R. §718.202(a).

[2]Claimant also argues that the administrative law judge erred in finding that the CT scan evidence was "in equipoise" and, therefore, insufficient to establish the existence of pneumoconiosis. In light of the fact that the administrative law judge found the x-ray and medical opinion evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge's error, if any, in his consideration of the CT scan evidence is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge committed numerous errors in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] In her consideration of whether the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Hussain, Baker, Broudy and Dahhan. Dr. Hussain opined that claimant was "disabled from pneumoconiosis" and was "unable to do work comparable to his original occupation." Claimant's Exhibit 8. Dr. Baker opined that claimant suffered from a moderate pulmonary impairment. Director's Exhibit 12; Claimant's Exhibit 7. Dr. Baker further indicated that claimant did not retain the respiratory capacity to perform the work of a coal miner. *Id.* Dr. Broudy opined that claimant was not totally disabled from a respiratory standpoint. Employer's Exhibit 2 at 9. Although Dr. Dahhan opined that claimant suffered from a mild respiratory impairment due to obesity, he opined that from a respiratory standpoint, claimant retained the physiological capacity to perform his previous coal mine work. Employer's Exhibit 3, 4.

The administrative law judge discredited Dr. Hussain's opinion because he found that it was not sufficiently reasoned. Decision and Order at 20. The administrative law judge discredited Dr. Baker's opinion because it was "based largely on irreproducible pulmonary function results." *Id.* The administrative law judge also found that Dr. Baker's opinion regarding the extent of claimant's disability was equivocal. *Id.* at 21. The administrative law judge noted that while Dr. Broudy opined that claimant was not totally disabled from a respiratory impairment, the doctor never addressed whether claimant could return to his previous coal mine employment. *Id.* at 20. The administrative law judge, therefore, found that Dr. Broudy's opinion was "speculative." *Id.* at 20-21. The administrative law judge finally found that Dr. Dahhan's opinion, that claimant was not totally disabled from a respiratory standpoint, was supported by the objective evidence and entitled to "significant weight." *Id.* at 21. The administrative law judge, therefore, found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant initially contends that the administrative law judge erred in finding that Dr. Hussain's opinion was not sufficiently reasoned. Although Dr. Hussain opined that claimant was disabled and "unable to do work comparable to his original occupation," the

[3]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

doctor provided no basis for his conclusions. Consequently, the administrative law judge properly discredited his opinion because he found that it was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 20; Claimant's Exhibit 8.

Claimant characterizes Dr. Hussain as his "treating pulmonologist." Claimant's Brief at 12. To the extent that claimant contends that administrative law judge erred in failing to accord greater weight to Dr. Hussain's opinion based upon his status as claimant's treating physician, his contention has no merit. The United States Court of Appeals for the Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[4] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that an administrative law judge must evaluate the opinions of treating physicians just as they consider the opinions of other experts. *Id.* As discussed *supra*, the administrative law judge properly accorded less weight to Dr. Hussain's opinion because she found that it was not sufficiently reasoned.

Claimant also argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant notes that the administrative law judge, in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), relied upon Dr. Baker's opinion. Because the administrative law judge found that Dr. Baker's opinion was sufficient to support a finding of pneumoconiosis, claimant argues that the administrative law judge erred in finding that Dr. Baker's opinion regarding the extent of claimant's pulmonary disability was not sufficiently reasoned. We disagree. The existence of pneumoconiosis and the presence of total disability are separate elements of entitlement. *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*). Consequently, the fact that a physician provides a reasoned opinion regarding the existence of pneumoconiosis does not require an administrative law judge to find that all other opinions offered by that physician are also well reasoned.

[4]Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The Sixth Circuit has recognized this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

The administrative law judge discredited Dr. Baker's opinion because it was "based largely on irreproducible pulmonary function results." Decision and Order at 20. The administrative law judge also found that Dr. Baker's opinion regarding the extent of claimant's disability was equivocal. *Id.* at 21. Because claimant does not specifically challenge the administrative law judge's bases for discrediting Dr. Baker's opinion, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Because claimant does not raise any other allegations of error in regard to the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv),[5] this finding is affirmed. In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).

Moreover, because claimant doesn't challenge the administrative law judge's finding, on the merits, that the evidence is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), this finding is also affirmed. *Skrack*, *supra*.

In light of our affirmance of the administrative law judge's findings that the evidence is (1) insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and (2) insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), each an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

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[5]Claimant contends that Dr. Dahhan's opinion does not "constitute a credible opinion as to the existence of total disability." Claimant's Brief at 11. Claimant, therefore, argues that the administrative law judge erred in according Dr. Dahhan's diagnosis of a mild pulmonary impairment "controlling weight" since the doctor failed to address how claimant's mild pulmonary impairment would affect his ability to perform his usual coal mine employment. *Id.* Because claimant does not assert that Dr. Dahhan's opinion is supportive of a finding of total disability, the administrative law judge's error, if any, in his consideration of Dr. Dahhan's opinion, is harmless. *See Larioni*, *supra*.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge