BRB No. 95-0868 BLA

ROBERT J. PUGH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
UNITED STATES STEEL MINING COMPANY	)	
	)	
	)	DATE ISSUED:
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of George A. Fath, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Helen H. Cox (Thomas S. Williamson, Jr., 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order and Decision and

[1]Claimant is Robert J. Pugh whose first claim for benefits, filed on September 12, 1973, was denied on September 3, 1980. Director's Exhibit 24. Claimant's second claim, filed on November 15, 1983, was denied by a Decision and Order issued on September 23, 1987, which was affirmed by the Board on April 5, 1991. Director's Exhibit 25; *Pugh v. United States Steel Corp.*, BRB No. 87-3026 BLA (Apr. 5, 1991)(unpub.). The instant claim was filed on October 2, 1992. Director's Exhibit 1.

Order on Reconsideration (93-BLA-1477) of Administrative Law Judge George A. Fath 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). In his Decision and Order, the administrative law judge credited claimant with more than thirty years of qualifying coal mine employment, accepted employer's stipulation that claimant has pneumoconiosis, and found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 but failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. On reconsideration, the administrative law judge again denied benefits.

On appeal, claimant contends that the administrative law judge erred in weighing the opinions of Drs. Rasmussen, Qazi, and Daniel pursuant to Section 718.204(c)(4).[2] The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, urging the Board to vacate the denial of benefits and remand the case for reconsideration of Dr. Rasmussen's opinion. Employer has not responded to this 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends, and the Director agrees, that the administrative law judge erred in finding that Dr. Rasmussen's opinion that claimant is totally disabled due to pneumoconiosis, Claimant's Exhibits 2, 3, is unreasoned because it is based on non-qualifying objective tests. Claimant's Brief at 6; Director's Motion to Remand at 8. In reconsidering his decision, the administrative law judge found that Dr. Rasmussen based his "diagnosis on the results of two medically accepted techniques," the results of which "do not meet the necessary standards by which a diagnosis of total disability may be made." Decision and Order on Reconsideration at 2. He added that a "positive medical judgment, based on negative laboratory test results cannot be considered reasoned and, thus, cannot be persuasive in establishing total

[2]We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, responsible operator status, and pursuant to Section 718.204(c)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disability." *Id*.

Although an administrative law judge may reject a physician's opinion that he finds unsupported by its underlying documentation, *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), the Board has held that an administrative law judge may not discredit a medical opinion solely on the ground that the physician's objective testing produced non-qualifying results. *Christian v. Monsanto Corp.*, 12 BLR 1-56 (1988); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, a physician can determine that a claimant has a totally disabling respiratory impairment even though his clinical studies are not qualifying under Appendices B and C, 20 C.F.R. Part 718, *Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985), inasmuch as the interpretation of medical data is the function of the physician, *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Fuller*, *supra*.

In this case, Dr. Rasmussen interpreted the results of claimant's ventilatory and exercise testing as showing minimal to moderate impairment and based his conclusion that claimant was totally disabled on those results and his physical examination of claimant. Claimant's Exhibits 2, 3. Thus, the administrative law judge erred in finding that Dr. Rasmussen's medical opinion was unreasoned. Decision and Order on Reconsideration at 2; *see Fields*, *supra*; *Fuller*, *supra*. Further, while the administrative law judge noted the testimony of Dr. Rasmussen and claimant regarding the heavy lifting duties of claimant's job supervising maintenance crews, Decision and Order at 2-3; Decision and Order on Reconsideration at 1; Claimant's Exhibit 3 at 9-10, he failed to compare the exertional requirements of claimant's usual coal mine employment with Dr. Rasmussen's opinion and substituted his judgment for that of Dr. Rasmussen in interpreting the medical evidence. *See Christian*, *supra*; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 104 (1986)(*en banc*); *Fuller*, *supra*. Therefore, we vacate the administrative law judge's findings and remand this case for reconsideration of Dr. Rasmussen's opinion pursuant to Section 718.204(c)(4). *See Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Marcum*, *supra*; *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Prater v. Harris*, 620 F.2d 1074 (4th Cir. 1980).

Claimant next contends that the administrative law judge ignored the follow-up report of Dr. Qazi and his status as claimant's treating physician. Claimant's Brief at 6-7. Dr. Qazi, who treated claimant for ten to twelve years, found claimant to be totally disabled due to pneumoconiosis. Claimant's Exhibit 2. The administrative law judge stated that Dr. Qazi's report contains no medical findings on which to base

his conclusion and that, when given the pulmonary function study results, Dr. Qazi did not make independent findings but simply agreed with Dr. Rasmussen. Decision and Order at 7.

Contrary to the administrative law judge's findings, Dr. Qazi did not state that he agreed with Dr. Rasmussen, but instead stated that he reviewed the pulmonary function studies and based his opinion upon them. *See* Claimant's Exhibit 2. Because Dr. Qazi's findings in his supplemental report, along with the findings of his initial report, which is based on claimant's history, a physical examination, and an x-ray, are sufficient to support his opinion that claimant has a totally disabling respiratory impairment, Claimant's Exhibit 2; *see Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985), we hold that the administrative law judge mischaracterized Dr. Qazi's opinion. *See Christian*, *supra*; *Goode v. Eastern Associated Coal Co.*, 6 BLR 1-1064 (1984). Further, the administrative law judge states that Dr. Qazi based his opinion on one examination of claimant, Decision and Order at 5, and does not consider the fact that Dr. Qazi treated claimant for ten to twelve years. Claimant's Exhibit 2; *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Thus, we vacate the administrative law judge's findings and remand the case for reconsideration of Dr. Qazi's opinions pursuant to Section 718.204(c)(4).

Claimant next contends that the administrative law judge erred in relying on Dr. Daniel's report to find that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4). Dr. Daniel diagnosed claimant as suffering from pneumoconiosis, but opined that claimant "appeared to have no disability secondary to that problem." Employer's Exhibit 1; Decision and Order at 6.

The administrative law judge noted Dr. Daniel's findings of moderate restrictive and obstructive defects on ventilatory testing but normal results on blood gas studies and stated that:

> Dr. Daniel's opinion falls short of what is required: he should have related his findings to whether claimant's physical condition would permit him to do the work required of a maintenance foreman. On the other hand, his opinion that claimant has no disability is broad enough to cover the question. If [claimant] has no disability, it follows that he could do the job he described to Doctor Daniel as a maintenance foreman.

Decision and Order at 7-8. The administrative law judge did not explicitly credit Dr. Daniel's opinion but instead stated that he was not persuaded by Dr. Rasmussen's opinion, noting that claimant bears the burden of proving that he is totally disabled by

coal workers' pneumoconiosis. Decision and Order at 8; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub. nom.*, *Greenwich v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Because the administrative law judge acted within his discretion as fact-finder in weighing the opinion of Dr. Daniel pursuant to Section 718.204(c)(4), we reject claimant's contention of error. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Eagle*, *supra*; *Walker*, *supra*.

Regarding Dr. Ranavaya's opinion, the administrative law judge found that Dr. Ranavaya gave no evaluation of claimant's ability to do his regular coal work. Decision and Order at 5. However, a medical opinion need not be phrased in terms of total disability; rather, the opinion need only describe either the severity of the impairment or the physical limitations imposed by claimant's respiratory condition sufficiently to permit the administrative law judge to infer that claimant is totally disabled. *See Budash*, *supra*. Because Dr. Ranavaya stated that claimant has a mild impairment and listed physical limitations, the administrative law judge erred in failing to compare Dr. Ranavaya's opinion with the exertional requirements of claimant's usual coal mine employment. Director's Exhibit 10; *see Budash*, *supra*. Thus, we vacate the administrative law judge's findings and remand this case for reconsideration of Dr. Ranavaya's opinion pursuant to Section 718.204(c)(4).

Additionally, pursuant to Section 725.309, the administrative law judge stated that employer stipulated that claimant has pneumoconiosis. Decision and Order at 2. The administrative law judge then found that a material change in conditions was established because claimant developed pneumoconiosis since the last claim. *Id*. However, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, issued *Lisa Lee Mines v. Director, OWCP* [*Rutter*], F.3d , No. 94-2523 (4th Cir. June 16, 1995), in which it held that in order to satisfy the "material change in condition" requirement of Section 725.309(d), claimant must establish either that he did not have pneumoconiosis at the time of the first application but has since contracted it and become totally disabled by it, or that his pneumoconiosis has progressed to the point of becoming totally disabling although it was not at the time of the first application. *See Rutter*, slip op. at 5-7; *see also Sahara Coal Co. v. Director, OWCP* [*McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). Thus, we vacate the administrative law judge's finding pursuant to Section 725.309(d) and remand the case for the administrative law judge to reconsider whether claimant has established a material change in conditions pursuant to Section 725.309(d) under the standard as established in *Rutter*.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration denying benefits are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge