

BRB No. 06-0931 BLA

M.G. on behalf of)	
J.G., deceased miner)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 07/16/2007
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on the Record of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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:

Claimant¹ appeals the Decision and Order on the Record (05-BLA-5483) of Administrative Law Judge Janice K. Bullard rendered 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 the medical opinion evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). The

¹ This case is a living miner's claim. Due to the miner's death, the claim is being pursued by his widow.

administrative law judge also found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), but did not establish that pneumoconiosis was a substantially contributing cause of the miner's disability pursuant to 20 C.F.R. §718.204(c). Accordingly, she denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that the evidence does not establish that the miner's disability was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand. The Director maintains that the administrative law judge erred in finding that the evidence established total respiratory disability. The Director also asserts that the administrative law judge erred in weighing the evidence on the issue of disability causation.²

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

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The Director asserts that the administrative law judge erred in crediting Dr. Baker's opinion regarding total disability because Dr. Baker examined and treated the miner and reviewed his medical records. In addition, the Director contends that the administrative law judge erred by failing to fully consider that Dr. Baker relied upon a qualifying³ pulmonary function study that was "significantly out of sync" with all the

² We affirm the administrative law judge's findings that claimant established the existence of legal pneumoconiosis that arose out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, the Director, Office of Workers' Compensation Programs, concedes on appeal that the miner also had clinical pneumoconiosis. Director's Motion to Remand at 2, n.1.

³ A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

other studies, including the subsequent, non-qualifying pulmonary function studies that Dr. Baker administered. Director's Brief at 6. The Director's contentions have merit.

The record contains medical opinions from Drs. Baker and Dahhan. Dr. Baker opined that the miner suffered a "moderate" pulmonary impairment based on the reduced FEV1 results of a July 28, 2001 pulmonary function study, and lacked the respiratory capacity to perform the work of a coal miner in a dust-free environment. Director's Exhibit 11. Subsequently, in a 2004 letter report to the district director, Dr. Baker stated that the miner had a Class Three impairment under the American Medical Association impairment guidelines. Director's Exhibit 34. Dr. Dahhan examined the miner and reviewed his medical records. Dr. Dahhan noted a "variable obstructive ventilatory defect," and stated that the miner had "no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. . . ." ⁴ Director's Exhibit 12.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge stated:

Both Dr. Baker and Dr. Dahhan diagnosed the Miner with an obstructive ventilatory defect. Dr. Baker opined that due to that defect, the Miner could not return to coal mine employment. Dr. Dahhan did not offer an opinion on the issue of whether or not the Miner could return to coal mine employment in consideration of his obstructive ventilatory impairment. Therefore, his opinion is not entitled to weight on this issue. Dr. Baker's opinion is undermined by his reliance upon a pulmonary function study that I have found to be of unreliable validity. However, the doctor's opinion is entitled to some weight because Dr. Baker had treated the Miner, and formed his opinion based upon his examination of the Miner, and the Miner's medical records. I find that the medical opinion evidence establishes that the Miner [was] totally disabled

⁴ The administrative law judge also considered that four pulmonary function studies were performed by these doctors. Dr. Baker administered a pulmonary function study on July 28, 2001 that yielded qualifying values, and administered pulmonary function studies on November 1, 2001 and February 22, 2002, both of which yielded non-qualifying values. Director's Exhibits 7, 9. Dr. Dahhan administered a pulmonary function study on October 11, 2001 that yielded non-qualifying values. Director's Exhibit 12. In light of the three subsequent, non-qualifying studies, the administrative law judge found that the validity of Dr. Baker's July 28, 2001, qualifying study was compromised. Decision and Order at 10. No party has challenged this finding on appeal. *See Skrack*, 6 BLR at 1-711.

Decision and Order at 11.

We agree with the Director that the administrative law judge did not adequately consider the documentation underlying Dr. Baker's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). At the time Dr. Baker wrote his 2001 opinion, he had administered only the July 28, 2001 pulmonary function study that yielded qualifying values. Director's Exhibits 10, 11. However, prior to writing his 2004 report, Dr. Baker had administered two additional pulmonary function studies, in November 2001 and February 2002, both of which yielded non-qualifying values. Director's Exhibits 7, 9, 34. Dr. Baker did not address the results of the non-qualifying pulmonary function studies that he administered, and the administrative law judge did not consider their impact, if any, on Dr. Baker's disability assessment.⁵ *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge must determine whether Dr. Baker's opinion is sufficiently documented and reasoned. *See Clark*, 12 BLR at 1-155.

We further agree with the Director that the administrative law judge mechanically credited Dr. Baker's opinion based on his status as the miner's treating physician. The regulations do not require that the opinion of a treating physician be accorded determinative weight. *See* 20 C.F.R. §718.104(d). Rather, Section 718.104(d) sets out the factors to be considered by the adjudicator in evaluating the opinion of a treating physician. In addition, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the opinion of a treating physician is not automatically entitled to deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003). Therefore, on remand the administrative law judge should reconsider the weight to be accorded to Dr. Baker's opinion, consistent with 20 C.F.R. §718.104(d) and *Williams*.

If, on remand, the administrative law judge determines that claimant has demonstrated total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must then weigh all of the contrary probative evidence to determine whether claimant has established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2).⁶ *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Shedlock v.*

⁵ As the Director notes, Dr. Dahhan opined that the later pulmonary function studies were normal. Director's Exhibit 12.

⁶ Claimant asserts that because pneumoconiosis is a progressive disease, it can be concluded that the miner's pneumoconiosis worsened and thus, adversely affected his ability to perform his usual coal mine work. Claimant's Brief at 4. We reject claimant's

Bethlehem Mines Corp., 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*).

In light of the foregoing, we also vacate the administrative law judge's disability causation finding pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge must consider whether claimant has established that pneumoconiosis was a substantially contributing cause of the miner's disability. The regulations specify that this standard is met if the miner's pneumoconiosis had a "material adverse effect on the miner's respiratory or pulmonary condition," or if the miner's pneumoconiosis "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i),(ii). As the Director notes, contrary to the administrative law judge's finding that the miner's disability was primarily due to smoking, there is no requirement that pneumoconiosis be the primary cause of the miner's disability. *See* 20 C.F.R. §718.204(c)(1); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 2-203 (6th Cir. 2001).

argument, "as an administrative law judge's findings must be based solely on the medical evidence contained in the record." *White v. New White Coal Co.*, 23 BLR 1-1, 1-7, n.8 (2004).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge