BRB No. 98-1186 BLA

PARIS R. VARNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	DATE ISSUED: 7/6/99
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Pamela Lakes Wood, 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.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification (97-BLA-0198) of Administrative Law Judge Pamela Lakes Wood 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). Claimant filed a duplicate claim on August 7, 1990.[1] In the initial Decision and Order, Administrative Law

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on July 26, 1979. Director's Exhibit 21. The district director denied the claim on November 9, 1979. *Id.* This denial became final when

Judge Thomas M. Burke found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. In addressing the merits of the claim, Judge Burke, after crediting claimant with nine years and nine months of coal mine employment, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Judge Burke further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, Judge Burke found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Burke denied benefits. By Decision and Order dated September 29, 1994, the Board, *inter alia*, affirmed Judge Burke's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Varney v. Eastern Coal Corp.*, BRB No. 93-1721 BLA (Sept. 29, 1994) (unpublished). The Board, therefore, affirmed Judge Burke's denial of benefits.[2] *Id.*

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claimant neither sought a hearing nor submitted new evidence within the prescribed 60 day period, 20 C.F.R. §725.410(c), nor requested modification within the prescribed one year period. 20 C.F.R. §725.310(a). Although claimant subsequently attempted to reopen his 1979 claim, Administrative Law Judge Robert J. Feldman, in a "Memorandum Decision and Final Order of Dismissal" dated November 28, 1986, granted employer's motion to dismiss the claim. *Id*.

Claimant filed a second claim on August 7, 1990. Director's Exhibit 1.

[2]The Board recognized that Judge Burke, in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20

C.F.R. §718.202(a)(4), erred in relying upon the "true doubt" rule. *Varney v. Eastern Coal Corp.*, BRB No. 93-1721 BLA (Sept. 29, 1994) (unpublished). However, in light of its affirmance of Judge Burke's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), the Board held that Judge Burke's error at 20 C.F.R. §718.202(a)(4) was harmless. *Id.*

Claimant subsequently requested modification of his denied claim. Administrative Law Judge Pamela Lake Woods (the administrative law judge) found that the newly submitted evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge, therefore, considered the merits of claimant's 1990 duplicate claim. The administrative law judge found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge also found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence was sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge finally found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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 finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Inasmuch as claimant's treating physician, Dr. Hussain, and a majority of the remaining examining physicians opined that claimant suffered from pneumoconiosis,[4] the administrative law judge found that the

[3]Inasmuch as no party challenges the administrative law judge's findings that the evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 and a material change in conditions pursuant to 20 C.F.R. §725.309, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Among the remaining examining physicians, Drs. Clarke, Fritzhand and

medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 11.

Employer contends that the administrative law judge improperly based her finding on Judge's Burke's finding of pneumoconiosis which was based upon his application of the discredited "true doubt" rule. We disagree. The administrative law judge recognized that Judge Burke's opinion suggested that he applied the invalidated "true doubt" rule in finding the existence of pneumoconiosis. *See* Decision and Order at 10 n.12. The administrative law judge, however, noted that her own finding was "premised upon a preponderance of the evidence and was not based upon the "true doubt" rule." *Id.* We also reject employer's contention that the administrative law judge did not review the medical opinion evidence in its entirety. The administrative law judge indicated that she reviewed all of the medical opinion evidence. *See* Decision and Order at 10.

Employer also contends that the administrative law judge erred in discrediting Dr. Branscomb's opinion because he did not examine claimant. In determining the weight to be accorded a physician's opinion, an administrative law judge may properly take into consideration the fact that the physician had not personally examined the miner. *See Collins v. Secretary of Health and Human Services*, 734 F.2d 1177, 6 BLR 2-54 (6th Cir. 1984); *Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984). In the instant case, the administrative law judge acted within her discretion in crediting the examining physicians of record over Dr. Branscomb's opinion. Decision and Order at 11.

Sundaram opined that claimant suffered from pneumoconiosis, Director's Exhibits 64, 67, 69, 74, 78; Claimant's Exhibit 1, while Drs. Broudy and Fino opined that claimant did not suffer from pneumoconiosis. Director's Exhibit 87; Employer's Exhibits 1, 5.

In the instant case, the administrative law judge properly accorded the greatest weight to Dr. Hussain's opinion based upon his status as claimant's treating physician.[5] *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *W ilson*, *supra;* Decision and Order at 10-11. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer generally contends that the administrative law judge erred in finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge initially found that the newly submitted medical evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *See* Decision and Order at 6-10. Although the administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3), the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Decision and Order at 7-9. While Dr. Branscomb opined that claimant was capable, from a pulmonary standpoint, of performing his previous coal mine employment, Employer's Exhibit 2, Drs. Clarke, Fritzhand, Hussain, Sundaram, Broudy and Fino opined that claimant suffered from a totally disabling respiratory impairment. Director's Exhibits 64, 67, 69, 74, 78, 87; Employer's Exhibit 1; Claimant's Exhibit 2. Inasmuch as a preponderance of the medical opinion evidence supported a finding of total respiratory disability, the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Decision and Order at 8-9. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

Upon considering all of the newly submitted evidence, including consideration of the newly submitted pulmonary function and arterial blood gas studies, the administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Decision and Order at 8-

[5]The administrative law judge also noted that Dr. Hussain is Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 10-11.

9. Inasmuch as this finding is unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge further found that the most recent evidence was the most probative evidence of claimant's condition. Decision and Order at 11. Thus, after weighing all of the evidence together, the administrative law judge found that the medical evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Id.* Inasmuch as it is based upon substantial evidence, we also affirm the administrative law judge's finding that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c).

Employer also challenges the administrative law judge's finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).[6] The administrative law judge initially found that Dr. Branscomb's opinion was not probative on the issue of the etiology of claimant's pulmonary disability because he did not examine claimant; because he did not find that claimant suffered from a totally disabling respiratory impairment; and because he based his opinion on a belief that pneumoconiosis does not cause obstructive impairments. Decision and Order at 12; Employer's Exhibit 2. Inasmuch as employer does not challenge the administrative law judge's reasons for discrediting Dr. Branscomb's opinion, we affirm the administrative law judge's discrediting of his opinion. *Skrack*, *supra*.

While Drs. Broudy and Fino opined that claimant's total disability was not due to pneumoconiosis, Director's Exhibit 87; Employer's Exhibit 1, Dr. Hussain opined that claimant's total disability was due to pneumoconiosis. Director's Exhibits 69, 78; Claimant's Exhibits 1, 2, Although the administrative law judge noted that each of these physicians possessed excellent qualifications, each being Board-certified in Internal Medicine and Pulmonary Disease, the administrative law judge permissibly accorded greater weight to Dr. Hussain's opinion based upon his status as claimant's treating physician. *See Tussey*, *supra*; Decision and Order at 12. The

[6]The United States Court of Appeals for the Sixth Circuit has held that a claimant must establish that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

administrative law judge further noted that Dr. Hussain's opinion that claimant's total disability was due to pneumoconiosis was supported by the opinions of Drs. Clarke, Fritzhand and Sundaram. Decision and Order at 13; Director's Exhibits 64, 67, 74. 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 was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge