BRB No. 00-0907 BLA

WILLIE CRUSENBERRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ABM COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Willie Crusenberry, Pennington Gap, Virginia, *pro se*.[1]

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

Mary Forest-Doyle (Judith E. Kramer, Acting 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: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

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[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the decision of Administrative Law Judge Pamela Lakes Wood. In a letter dated June 14, 2000, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-0288) of Administrative Law Judge Pamela Lakes Wood denying benefits on a duplicate claim[2] 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).[3] The administrative law judge credited claimant with fifteen and one-quarter years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Consequently, the administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] The administrative law judge also found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) (2000) and 718.203(b) (2000). Further, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).[5] However, the administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge denied benefits. On appeal,

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[2]Claimant's initial claim was filed on December 16, 1993. Director's Exhibit 49. On June 16, 1995, Administrative Law Judge Edward J. Murty, Jr. issued a Decision and Order denying benefits, *id*., which the Board affirmed, *Crusenberry v. ABM Coal Co.*, BRB No. 95-1849 BLA (Jan. 31, 1996)(unpub.). The basis of Judge Murty's denial was claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 49. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed on March 18, 1997. Director's Exhibit 1.

[3]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.

[4]The revisions to the regulations at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001.

[5]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).

claimant generally challenges the administrative law judge's denial of benefits. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has declined to respond to claimant's appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which employer and the Director have responded.[6]

In a brief dated March 19, 2001, employer indicates that the revisions to the regulations which are the subject of litigation would not affect the outcome of the case.[7] In a brief dated March 29, 2001, the Director indicates that it is his position that the instant case would not be affected by application of the litigated regulations. The Director, therefore, indicates that the Board can decide the instant case. Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.[8]

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[6]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[7]Employer notes that it contests the retroactive application of the revised regulations to affect the outcome of this case.

[8]In regard to disability causation, we note that 20 C.F.R. §718.204(c) is not among the challenged regulations.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that a miner must affirmatively establish that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis under 20 C.F.R. §718.204(b) (2000). Further, in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997), the Sixth Circuit explained that the term "due to" requires a miner to prove more than a *de minimis* or infinitesimal contribution by pneumoconiosis to his total disability. The Sixth Circuit also explained that the miner's pneumoconiosis must be more than merely a speculative cause of his disability. *Id*. Rather, the Sixth Circuit held that a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory impairment. *Id*.

In finding the evidence insufficient to establish total disability due to pneumoconiosis, the administrative law judge considered the opinions of Drs. Castle, Clarke, Dahhan, Fino, Hippensteel, Irvin, Jarboe, Lane, Paranthaman and Smiddy. Whereas Drs. Clarke, Irvin and Smiddy opined that claimant suffers from a totally disabling respiratory impairment due to pneumoconiosis, Director's Exhibits 43, 49; Claimant's Exhibits 1, 3, Drs. Castle, Dahhan, Fino, Hippensteel, Lane and Paranthaman opined that claimant does not suffer from a totally disabling respiratory impairment due to pneumoconiosis, Director's Exhibits 13, 33, 34, 40, 49; Employer's Exhibits 1, 2, 4, 5. Dr. Jarboe diagnosed chronic bronchitis and severe airway obstruction related to cigarette smoking. Director's Exhibit 49. The administrative law judge properly accorded greater weight to the opinions of Drs. Castle, Dahhan, Fino and Hippensteel than to the contrary opinions of Drs. Clarke, Irvin and Smiddy because of the superior qualifications of the former physicians.[9] *See Martinez v. Clayton Coal Co.*, 10

[9]The administrative law judge observed that "[a]side from Drs. Smiddy and Lane, who are both [B]oard certified in internal medicine alone; Dr. Irvin, who is [B]oard certified in family practice and geriatric medicine; and Dr. Clarke, who apparently lacks [B]oard certification; all of the remaining physicians are [B]oard certified in internal medicine with a subspecialty in pulmonary disease." Decision and Order at 15.

BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also properly accorded greater weight to the opinions of Drs. Castle, Dahhan, Fino and Hippensteel than to the contrary opinions of Drs. Irvin and Smiddy because he found the former opinions to be better reasoned.[10] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[10]The administrative law judge stated, "[w]hile Drs. Smiddy and Irvin, as treating physicians, may be entitled to have their opinions assigned additional weight, and as their opinions are corroborated somewhat by Dr. Clarke, I do not find any of these physicians to have articulated a sufficient basis for their conclusions on the issue of the etiology of the [c]laimant's disability for their opinions to be controlling." Decision and Order at 15. In contrast, the administrative law judge stated that "Drs. Dahhan, Fino, Castle, and Hippensteel pointed to specific clinical data that tended to support their conclusion that the [c]laimant's respiratory disability was due to his history of cigarette smoking as opposed to coal mine dust or pneumoconiosis." *Id*.

Further, the administrative law judge properly found that the opinions of Drs. Castle, Dahhan, Fino and Hippensteel are corroborated by the opinions of Drs. Jarboe and Lane. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). In addition, the administrative law judge permissibly discredited Dr. Paranthaman's opined because he found it to be equivocal.[11] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Inasmuch as it is supported by substantial evidence,[12] we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis.[13] *See* 20 C.F.R. §718.204(c).

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[11]In a report dated April 18, 1994, Dr. Paranthaman diagnosed asthmatic bronchitis due to a combination of bronchospasm and cigarette smoking and opined that claimant was disabled due to his respiratory problem. Director's Exhibit 49. In a subsequent report dated May 20, 1997, Dr. Paranthaman diagnosed reactive airway disease and opined that claimant was totally disabled due to his respiratory problem. Director's Exhibit 13. Dr. Paranthaman opined that "[r]eactive airway disease is not related to coal dust exposure, but coal dust exposure for 15 years, if documented, could have aggravated the condition significantly." *Id*. The administrative law judge stated that "[Dr. Paranthaman's] most recent examination report suggested that the [c]laimant's respiratory condition could have been aggravated by his coal mine dust exposure." Decision and Order at 15. The administrative law judge also stated that "[t]he suggestion of aggravation by Dr. Paranthaman is only that, and as a suggestion it is too speculative for me to rely upon it." *Id*.

[12]Although the United States Court of Appeals for the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of nontreating physicians, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the Sixth Circuit has also indicated that this principle does not alter the administrative law judge's duty, as trier of fact, to evaluate the credibility of the treating physician's opinion, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the instant case, the administrative law judge observed that Drs. Irvin and Smiddy are treating physicians. Decision and Order at 15. Nonetheless, the administrative law judge stated, "[w]hile Drs. Smiddy and Irvin, as treating physicians, may be entitled to have their opinions assigned additional weight, as their opinions are corroborated somewhat by Dr. Clarke, I do not find any of these physicians to have articulated a sufficient basis for their conclusions on the issue of the etiology of the [c]laimant's disability for their opinions to be controlling." *Id*.; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[13]The administrative law judge stated, "[o]n the record before me, it is possible that the [c]laimant's total disability was due at least in part to his pneumoconiosis, either directly

Since claimant failed to establish total disability due to pneumoconiosis, *see* 20 C.F.R. §718.204(c), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

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or as an aggravating factor, but the medical evidence provides stronger support for the possibility that it was not." Decision and Order at 15. Hence, the administrative law judge stated, "[c]onsidering all of the medical evidence together, I find that the evidence is, at best, in equipoise on the issue of the causation of the [c]laimant's disability, and specifically whether it is attributable in part to the [c]laimant's pneumoconiosis or exposure to coal mine dust." *Id.*; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge