BRB No. 00-0935 BLA

ANDREW COLLETT Claimant-Respondent v. DEBRA LYNN COALS, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Tab R. Turano (Greenberg Traurig LLP), Washington, DC, for employer/carrier.

Rita Roppolo (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (99-BLA-1348) of Administrative Law Judge Donald W. Mosser 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).[1] After crediting claimant with twelve years of coal mine employment, the administrative law judge considered the instant claim, filed on December 14, 1998, under the applicable regulations at 20 C.F.R. Part 718 (2000). The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) (2000), but sufficient to establish the presence of the disease under 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). The administrative law judge further found claimant entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was not rebutted. The administrative law judge determined that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3) (2000), but sufficient to establish total disability under 20 C.F.R. §718.204(c)(1) and (c)(4) (2000). Finally, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(b) (2000). Consequently, he awarded benefits. On appeal, employer challenges the administrative law judge's findings under Sections 718.202(a)(1) and (a)(4) (2000), 718.204(c)(1) and (c)(4) (2000), and 718.204(b) (2000). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating he does not presently intend to respond to employer's arguments on appeal.[2]

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[1]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.

[2]We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twelve years of coal mine employment, as well as the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2) and (a)(3) (2000), 718.203(b) (2000) and

718.204(c)(3) (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3-4, 10-14.

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 in an Order issued on March 16, 2001, to which employer and the Director have responded. Employer and the Director are in agreement that the new regulations at issue in the lawsuit will not affect the outcome of this claim. Based upon the positions of the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will adjudicate the merits of this appeal.[3]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[3]Claimant has not responded to the Board's Order issued on March 16, 2001. Pursuant to the Board's instructions, the failure of a party to submit a brief within twenty days following receipt of the Board's Order issued on March 16, 2001 would be construed as a position that the challenged regulations will not affect the outcome of this case.

On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis by failing to consider, under Section 718.202(a)(1), the CT scan evidence (consisting of CT scan interpretations from Drs. Wheeler and Scott), deposition testimony of Dr. Wheeler indicating that CT scans are superior to x-rays for diagnosing pneumoconiosis, and Dr. Wheeler's deposition testimony explaining why he read the April 5, 1999 x-ray as negative. Employer's contentions lack merit. The administrative law judge properly found the x-ray evidence sufficient to establish the existence of pneumoconiosis based upon the quantity of positive and negative x-ray readings in the record, as well as the qualifications of physicians interpreting the films.[4] *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 9-10. In discussing the six interpretations of the two films of record, the administrative law judge properly found that the January 7, 1999 x-ray was read, unanimously, as positive, by Drs. Barrett and Sargent, B reader/ Board-certified radiologists, and Dr. Baker, a B reader. Decision and Order at 10; Director's Exhibit 11. The administrative law judge also properly found that the April 5, 1999 film, while read as negative for pneumoconiosis by Drs. Wheeler and Scott, who are B reader/ Board-certified radiologists, was read as positive for the disease by Dr. Dahhan, a B reader.[5] Contrary to employer's contentions, the administrative law judge duly considered Dr. Wheeler's reading of the April 5, 1999 film, and did not err by not weighing the CT scan evidence under Section 718.202(a)(1) (2000), as x-rays, and not CT scans, are the means by which the existence of pneumoconiosis is established thereunder. *See* 20 C.F.R. §718.202(a)(1). Accordingly, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(1) (2000). Moreover, we need not address employer's contention that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000). Inasmuch as the administrative law judge properly found the existence of pneumoconiosis established by the alternative method at Section

[4]Because the miner's coal mine employment occurred in Kentucky, the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5]The administrative law judge properly declined to accord determinative weight to the negative readings of Drs. Wheeler and Scott simply because they were readings of the most recently taken film. Decision and Order at 10. In light of the progressive nature of pneumoconiosis, it is irrational for an administrative law judge to apply a "later evidence is better" rationale where the later evidence is *negative* for pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

718.202(a)(1) (2000), any error the administrative law judge may have made in his weighing of the evidence under §718.202(a)(4) (2000) would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1278 (1984).

Employer next contends that the administrative law judge failed to provide an adequate explanation for finding the pulmonary function study evidence sufficient to establish total disability under Section 718.204(c)(1) (2000). We disagree. The record contains two pulmonary function studies: a non-qualifying study which was administered on January 7, 1999, and a qualifying study administered on April 5, 1999. Director's Exhibits 11, 20. The administrative law judge properly gave greater weight to the April 5, 1999 pulmonary function study on the basis that claimant exhibited "enhanced" cooperation during testing. *See generally Runco v. Director, OWCP*, 6 BLR 1-945 (1984); Decision and Order at 13.[6] The administrative law judge also properly gave greater weight to the April 5, 1999 study on the ground that it was the most recent study of record. *See Woodward, supra*; Decision and Order at 13; Director's Exhibit 20. In light of the progressive nature of pneumoconiosis, it is rational for an administrative law judge to apply a "later evidence is better" rationale where the later evidence indicates that a claimant's condition has worsened. *See generally Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). We affirm, therefore, the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(c)(1) (2000).

Employer also argues that the administrative law judge erred in finding that the two opinions of record addressing the issue of total disability, *i.e.*, the opinions of Drs. Baker and Dahhan, were sufficient to establish total disability under §718.204(c)(4) (2000). Dr. Baker examined claimant on January 7, 1999, and found that claimant is totally disabled in view of his pulmonary function study which showed a moderate obstructive defect with a decreased FEV1. Director's Exhibit 11. Dr. Baker noted that claimant worked for fifteen to eighteen years for employer on the surface, operating a drill, cleaning coal and working at the tipple. *Id.* Dr. Dahhan examined claimant on April 5, 1999, and likewise indicated that claimant does not have the respiratory capacity for performing his usual coal mine employment or a job of comparable physical demand because of his obstructive ventilatory defect. Director's Exhibit 20. Dr. Dahhan indicated that claimant's pulmonary function study showed a mild, partially reversible obstructive ventilatory defect. Dr. Dahhan noted that claimant stated that he worked in the mining industry for eighteen years ending

[6] Claimant exhibited "fair" cooperation during the January 7, 1999 pulmonary function study, and "good" cooperation during the April 5, 1999 pulmonary function study. Decision and Order at 13.

in August, 1997, all on a strip mine job as a truck driver, drill operator and coal cleaner. Like Dr. Baker, Dr. Dahhan did not specifically note the exertional requirements of these jobs, however.

Employer contends that the two doctors' opinions are insufficient to support a finding of total disability because the doctors did not address the specific physical requirements of claimant's usual coal mine employment or even indicate that they had any familiarity with claimant's job requirements in finding claimant totally disabled. Employer also argues that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine employment with the doctors' opinions. Employer's contentions lack merit. The administrative law judge credited the opinions of Drs. Baker and Dahhan on the ground that the doctors based their findings of total disability on their respective pulmonary function study results.[7] Decision and Order at 14; Director's Exhibits 11, 20. The administrative law judge further correctly noted that the opinions with regard to total disability were uncontradicted in the record. *Id.* The administrative law judge effectively found the doctors' opinions to be well-reasoned and documented, and properly credited them on this basis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Director, OWCP,* 10 BLR 1-19 (1987); *id.* Contrary to employer's contention, the administrative law judge was not required to compare the exertional requirements of claimant's job to the doctors' opinions. Had the doctors indicated only that there was, for example, moderate impairment, or mild impairment, without specifically stating that claimant is totally disabled, then the administrative law judge would have had to make the comparison in order to infer whether the opinions supported a finding of total disability. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). In the instant case, however, the opinions of Drs. Baker and Dahhan specifically and unequivocally indicate that claimant is totally disabled. Director's Exhibits 11, 20. Furthermore, the administrative law judge did not err in crediting the opinions of Drs. Baker and Dahhan as well-reasoned and documented even though the doctors did not address the specific physical requirements of claimant's usual coal mine employment.[8] *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-

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[7]As the administrative law judge noted, Drs. Baker and Dahhan each conducted a pulmonary examination of claimant, which included an x-ray evaluation, pulmonary function and arterial blood gas testing, and consideration of claimant's coal mine employment and smoking histories, as well as claimant's subjective complaints. Decision and Order at 7-8; Director's Exhibits 11, 20.

[8]In *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-135 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit held that an administrative law judge should consider whether a physician who finds that a claimant is not totally disabled had any

135 (6th Cir. 2000); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1990); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1990). We affirm, therefore, the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(c)(4) (2000).

Employer further argues that the administrative law judge failed to provide a reason for rejecting the two blood gas studies of record, both of which were non-qualifying, when weighing this evidence against the other, unlike evidence relevant to total disability at Section 718.204(c)(1)-(4) (2000). This contention lacks merit. In stating that he "reject[ed]" the non-qualifying arterial blood gas tests, the administrative law judge explicitly indicated that he had weighed all of the like and unlike evidence together after having considered whether claimant established total disability under each subsection at Section 718.204(c) (2000). Decision and Order at 14; Director's Exhibits 11, 20. The administrative law judge clearly found that the non-qualifying blood gas studies were outweighed by the qualifying pulmonary function study and uncontradicted medical opinions of Drs. Baker and Dahhan, which indicate that claimant is totally disabled, as discussed *supra*. Decision and Order at 14. Employer's contention that the administrative law judge failed to

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knowledge of the exertional requirements of the claimant's last coal mine employment before crediting that physician's opinion. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-135 (6th Cir. 2000); *see also Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1990); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1990). The administrative law judge's decision in the instant case to credit the opinions of Drs. Baker and Dahhan does not run afoul of the court's holding in *Cornett* inasmuch as Drs. Baker and Dahhan found total disability, whereas in *Cornett*, the doctors' opinions which the court held were improperly credited, diagnosed a mild impairment but did not find total disability. *See Cornett, supra*; Director's Exhibits 11, 20.

properly weigh the blood gas studies against the other evidence relevant to total disability thus amounts to a request to reweigh the evidence, which the Board is not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We, therefore, affirm the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(c) (2000). *See* 20 C.F.R. §718.204(b).

Finally, employer argues that the administrative law judge erred in according determinative weight to Dr. Baker's opinion, and in discounting Dr. Dahhan's opinion, on the issue of total disability causation under Section 718.204(b) (2000). Employer argues that Dr. Baker's opinion is not well-reasoned and documented, but rather "wholly equivocal." Employer's Petition for Review and Brief at 19. Employer points to Dr. Baker's form report in which Dr. Baker indicates that the three diagnoses listed on the report, *i.e.*, coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis, contributed "fully" to claimant's totally disabling respiratory impairment. Director's Exhibit 11. Employer's contention with regard to Dr. Baker's opinion lacks merit. Whether an opinion is well-reasoned and documented is for the administrative law judge to decide. *See Clark, supra; Tackett, supra*. Likewise, it is within the administrative law judge's discretion to determine whether a medical opinion is equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Contrary to employer's contention, Dr. Baker's opinion could, if properly credited support a finding that pneumoconiosis was a substantially contributing cause of claimant's totally disabling respiratory impairment, and it was rational for the administrative law judge to credit Dr. Baker's opinion. In arguing that Dr. Baker failed to indicate that claimant's coal workers' pneumoconiosis was sufficient to result in total disability, employer ignores the fact that, in a questionnaire attached to his form report, Dr. Baker clearly stated that he based his finding that claimant does not have the respiratory capacity for coal mine employment or comparable work on the fact that claimant has pneumoconiosis. Director's Exhibit 11. We affirm the administrative law judge's crediting of Dr. Baker's opinion as sufficient to establish total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(c).

In arguing that the administrative law judge erred in effectively discounting Dr. Dahhan's opinion as hostile to the Act, employer contends that the administrative law judge improperly discounted Dr. Dahhan's opinion on the basis that the opinion was premised on a conclusion that any obstructive ventilatory defect must be due to cigarette smoking, which is inconsistent with the statutory definition of pneumoconiosis. Decision and Order at 15. Employer's contention that the administrative law judge appears to have mischaracterized Dr. Dahhan's opinion has merit. As employer contends, Dr. Dahhan did not indicate that obstructive impairments are *never* related to pneumoconiosis. Director's Exhibit 20. Rather, Dr.

Dahhan stated that a disabling obstructive impairment like claimant's was not usually seen secondary to coal workers' pneumoconiosis. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).[9] Thus, we vacate the administrative law judge's finding under Section 718.204(b) (2000), and remand the case for the administrative law judge to reconsider Dr. Dahhan's opinion under Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is 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

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[9]In *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit held that an opinion in which the physician relies upon the erroneous assumption that coal dust inhalation cannot cause an obstructive lung disorder is entitled to little, if any, weight. In *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the court held that the central holding in *Warth* does not apply when a physician states that a restrictive component would be seen if the impairment were related to coal dust exposure, rather than stating that chronic obstructive pulmonary disease can never result from dust exposure in coal mine employment.