BRB No. 01-0928 BLA

MERLE T. TINKER Claimant-Petitioner v. LLOYD COAL COMPANY Employer-Respondent 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 - Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Dorothy B. Stulberg (Mostoller, Stulberg & Whitfield), Oak Ridge, Tennessee, for claimant.

Lenore S. Ostrowsky (Greenberg Traurig LLP), Washington, D.C., for employer.

Mary Forrest-Doyle (Eugene Scalia, Solicitor of Labor; Donald S. Shire, 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: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2000-BLA-0198) of Administrative Law Judge Mollie W. Neal 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] The administrative law judge credited claimant with twenty-one years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's February 18, 1999 filing date. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record sufficient to establish the existence of pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4) and 718.203(b). The administrative law judge further found the evidence insufficient to establish that claimant is suffering from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Additionally, the administrative law judge found the evidence of record insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence of record insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. Claimant contends that the administrative law judge erred in crediting the opinions of the non-examining physicians over the opinion of claimant's treating physician. Additionally, claimant contends that the administrative law judge erred in finding that the lay testimony of claimant's co-workers was insufficient to establish the existence of total respiratory disability. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief on the merits in this appeal.[2]

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-one years of coal mine employment or her findings

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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 order to establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that the evidence of record was insufficient to establish a totally disabling respiratory or pulmonary impairment. Initially, we reject claimant's contention that the medical opinion of Dr. Hughes, which the administrative law judge found to be a diagnosis of total respiratory disability, is entitled to greater weight based on Dr. Hughes's status as a treating physician. Contrary to claimant's contention, the administrative law judge did not find that Dr. Hughes was claimant's treating physician. Rather, she stated that Dr. Hughes examined claimant on May 3, 1999 and found that Dr. Hughes was the only examining physician. Decision and Order at 7, 10. Moreover, there is no evidence in the record to establish that Dr. Hughes was claimant's treating physician. Therefore, contrary to claimant's contention, the administrative law judge was not required to mechanistically give greater weight to Dr. Hughes's opinion. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, BLR (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

Furthermore, we reject claimant's contention that the administrative law judge erred in crediting the opinions of the non-examining physicians. In determining the weight to be accorded a physician's opinion, an administrative

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pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), 718.304, 718.204(b)(2)(i), (ii) and (iii). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law judge may properly take into consideration the fact that a physician has not personally examined the miner, but is not required to discredit the opinion on that basis. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984); *Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984). Rather, the administrative law judge must consider and discuss all of the relevant evidence of record, determine which reports are reasoned and documented and provide the rationale for his findings. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

The administrative law judge set forth the relevant medical opinions of record, finding that the lone medical opinion supportive of claimant's burden, that of Dr. Hughes, was outweighed by the contrary opinions of Drs. Naeye, Fino, Branscomb and Tomashefski, wherein the physicians reviewed the evidence of record and opined that claimant's pulmonary impairment would not prevent him from performing his last coal mine employment. Decision and Order at 7-9, 11; *compare* Director's Exhibit 10 with Employer's Exhibits 1, 4-7, 9. In addition, the administrative law judge rationally found that Dr. Perper did not render an opinion regarding a respiratory or pulmonary impairment, but stated that further testing was necessary to determine the extent of any impairment. Decision and Order at 11; Director's Exhibit 16. Consequently, the administrative law judge reasonably exercised her discretion in determining that the medical opinions of record were insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). Decision and Order at 12; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *see also Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Regarding the lay testimony offered by claimant in his living miner's claim, *see* Claimant's Exhibit 1, the Board has held that "lay testimony is generally insufficient to establish total respiratory disability unless it is corroborated by at least a quantum of medical evidence." *Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999); *see also Trent, supra*; *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985). Because we affirm the administrative law judge's credibility determinations and her finding that the weight of the medical evidence is insufficient to support a finding of total respiratory disability, the lay testimony is insufficient to carry claimant's burden of proof in establishing total respiratory disability as it is not corroborated by the medical evidence. 20 C.F.R. §718.204(d)(5); *Madden*, *supra*; *Trent*, *supra*.

Lastly, we find no merit in claimant's contention that the administrative law

judge erred in relying on the multiple medical opinions submitted by employer in this case. While the new regulations contain provisions for limiting the amount of evidence which a party may submit in a case, *see* 20 C.F.R. §725.414, these provisions are not applicable in this case because Section 725.414 has been explicitly excepted from application in cases pending on January 19, 2001, the date the new regulations became effective. 20 C.F.R. §725.2(c). Consequently, the administrative law judge rationally admitted into the record all of the evidence submitted by employer and also by claimant, implicitly finding the evidence probative and not unduly repetitious. Section 413(b) of the Act, 30 U.S.C. §923(b); *see Rowe, supra*.

Since claimant has not established the existence of a totally disabling respiratory or pulmonary impairment, a necessary element of entitlement under Part 718, an award of benefits is precluded. *Trent, supra; Perry, supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge