BRB No. 05-0978 BLA

EARL EVANS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIXIE PINE COAL COMPANY	)	DATE ISSUED: 06/12/2006
	)	
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 on Remand Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, and Rutherford), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, 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 CURIUM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2001-BLA-00269) of Administrative Law Judge Daniel F. Solomon 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] This case has been before the Board previously. In a decision dated December 12, 2002, the administrative law judge credited claimant with nineteen years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] On the merits, the administrative law judge 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) and 718.203(b). The administrative law judge further found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[4] In addition, the administrative law judge found the evidence sufficient to establish that claimant's total disability was due to

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant's first claim was filed with the Social Security Administration on July 24, 1970. Director's Exhibit 31. After several administrative denials by the Social Security Administration and the Department of Labor, this claim was dismissed with prejudice by Administrative Law Judge Giles J. McCarthy on September 28, 1987. *Id*. Claimant's second claim was filed on October 26, 1992. Director's Exhibit 32. This claim was denied by the Department of Labor on May 7, 1993. *Id*. On February 28, 1994, claimant filed a third claim, which the Department of Labor construed as a request for modification. *Id*. However, the Department of Labor denied claimant's request for modification on April 28, 1994. *Id*. On April 16, 1996, claimant filed another request for modification, which the Department of Labor denied as untimely filed. *Id*. Claimant's fourth claim was filed on November 24, 1997. Director's Exhibit 33. This claim was denied by the Department of Labor on February 11, 1998. *Id*. In a letter dated March 24, 1999, claimant advised the Department of Labor that he was submitting a medical report. Although the Department of Labor construed claimant's March 24, 1999 letter as a request for modification, it denied this request as untimely filed. *Id*. Claimant's most recent claim was filed on May 17, 1999. Director's Exhibit 1.

[3] The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

[4] Although the administrative law judge cited 20 C.F.R. §718.204(c)(2) (2000), the revised regulation at 20 C.F.R. §718.204(b)(2)(ii) applies to this claim, which was pending on January 19, 2001.

pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, the Board vacated the award of benefits. Specifically, the Board held that the administrative law judge failed to determine, pursuant to *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BRB 2-288 (6th Cir. 2001), whether the evidence is sufficient to establish rebuttal of the presumption that the instant claim was timely filed. The Board, therefore, vacated the administrative law judge's award of benefits and remanded this case to the administrative law judge to address whether claimant's 1999 duplicate claim was timely filed, consistent with *Kirk*. *Evans v. Dixie Pine Coal Co.*, BRB No. 03-0303 BLA (Feb. 25, 2004)(Hall, J., concurring and dissenting)(unpub.) The Board further held that the administrative law judge did not consider all of the newly submitted evidence, as required by *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994), in determining whether the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Thus, the Board vacated the administrative law judge's finding that the evidence was sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000) and remanded the case for further consideration thereunder in accordance with *Ross*, if reached. On the merits, the Board held that the administrative law judge erred in his consideration of the x-ray and medical opinion evidence pursuant to Section 718.202(a)(1) and (4), further erred in his evaluation of the blood gas study evidence pursuant Section 718.204(b)(2)(ii), erred in failing to weigh together all of the contrary evidence at Section 718.204(b)(2)(i)-(iv), and also erred in his evaluation of the medical opinion evidence pursuant to total disability causation at Section 718.204(c). Thus, the Board vacated the administrative law judge's findings, and instructed the administrative law judge to reconsider this evidence, if reached, on remand. Finally, the Board held that, if reached on remand, the administrative law judge must consider claimant's entitlement to the payment of augmented benefits on behalf of his grandchild in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *Evans v. Dixie Pine Coal Co.*, BRB No. 03-0303 BLA (Feb. 25, 2004)(Hall, J., concurring and dissenting)(unpub.).

In a Decision and Order on Remand dated June 23, 2005, the administrative law judge found that the instant claim was timely filed and also found that the medical evidence submitted since the prior denial of benefits established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order on Remand at 14. Consequently, the administrative law judge determined that claimant met his burden to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000); *Ross*, 42 F.3d at 993, 19 BLR at 2-10; *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004); Decision and Order on Remand at 14. Considering the merits of the claim, however, the administrative law judge found that the evidence of

record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits.[5] The Director, Office of Workers' Compensation Programs, has filed a limited response to claimant's appeal, contending that the administrative law judge properly determined that claimant's duplicate claim was timely filed.[6]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is 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 a finding of 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).

Claimant challenges the administrative law judge's evaluation of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), specifically asserting that the administrative law judge erred in failing to accord greater weight to the opinions of Dr. Kabir, claimant's treating physician, and Dr. Rasmussen. We disagree.

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[5] Employer preserves its objections to the administrative law judge's findings that claimant's duplicate claim was timely filed, and that the evidence was sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Employer's Brief at 3-5, n. 1-2.

[6] The administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In finding the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge accorded the greater weight to the opinion of Dr. Castle, who reviewed all of the medical evidence of record, as supported by the opinions of Drs. Seargeant, Dahhan, Fino and Branscomb, that claimant does not have pneumoconiosis, than to the contrary opinions of Drs. Kabir, Rasmussen and Robinette, whose opinions the administrative law judge found insufficiently rationalized. Decision and Order on Remand at 21-23. Claimant contends that the opinion of Dr. Kabir established that claimant has pneumoconiosis and that the administrative law judge erred in failing to accord greatest weight to the opinion of Dr. Kabir, claimant's treating physician. Claimant's Brief at 2-3.

Contrary to claimant's argument, the administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003). Consequently, we reject claimant's argument that the administrative law judge improperly failed to accord greater weight to the opinion of Dr. Kabir solely because he was claimant's treating physician. *See* 20 C.F.R. §718.104(d)(5). Reviewing the medical opinion evidence, the administrative law judge properly noted that Dr. Kabir was claimant's treating physician between May 1997 and June 2002, and listed pneumoconiosis as a diagnosis in his numerous progress notes. Director's Exhibits 11-12; Decision and Order on Remand at 5. The administrative law judge accorded diminished probative value to Dr. Kabir's opinion, however, because the physician appeared to have reviewed only a single x-ray, taken in 1997, and further failed to provide adequate analysis to support his conclusion. Claimant's Exhibit 2, entry dated November 18, 1999; Decision and Order on Remand at 4, 23. This was rational. An administrative law judge may accord less weight to an opinion he finds inadequately documented and reasoned. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Claimant further contends that the administrative law judge erred in discrediting the opinion of Dr. Rasmussen simply because the x-ray performed in conjunction with Dr. Rasmussen's September 2, 2004 examination was negative for the existence of pneumoconiosis. We disagree. In evaluating Dr. Rasmussen's opinion, the administrative law judge properly summarized the physician's findings on physical examination and objective testing, including the September 2, 2004 chest x-ray which was read as showing no classifiable pneumoconiosis, and the pulmonary function and blood gas studies which the physician interpreted as showing marked loss of lung function and marked impairment in gas exchange with light exercise. The administrative law judge further properly noted Dr. Rasmussen's statement that claimant had three

apparent risk factors for his disabling lung disease, including his "significant cigarette smoking" history, his coal mine dust exposure, and asthma, as well as his statements, and accompanying medical literature citations, that "[a]sthma is not known to be caused by coal mine dust exposure," that "[c]igarette smoke and coal mine dust exposure both cause chronic obstructive lung disease," that "[c]oal mine dust also causes diffuse interstitial fibrosis and coal miners often exhibit impairment in oxygen transfer absent or exceeding the degree of airways obstruction," that "[c]oal mine dust can cause loss of lung function absent x-ray changes of pneumoconiosis," and that "the x-ray may fail to reveal significant pneumoconiosis when present." Decision and Order on Remand at 8. Finally, the administrative law judge noted Dr. Rasmussen's conclusion that claimant's "coal mine dust exposure is a major contributing factor to his disabling chronic lung disease." Decision and Order on Remand at 8. Contrary to claimant's arguments, the administrative law judge permissibly accorded diminished probative value to Dr. Rasmussen's opinion because the physician failed to adequately explain his conclusion that claimant has pneumoconiosis, in light of the fact that he found claimant's recent x-ray to be negative for the disease. *Clark*, 12 BLR at 1-149. The administrative law judge exercises broad discretion in assessing the persuasiveness and reasoning of a medical opinion. *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6. Thus, contrary to claimant's contention, the administrative law judge permissibly found that because Dr. Rasmussen simply cited to medical literature he believed supported his conclusions, but did not expound upon the relevancy of those references with respect to the specific facts of this case, his opinion was entitled to lesser weight. Decision and Order on Remand at 23. As a medical opinion that is based on generalities rather than specifically focused on the miner may be rejected, *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985), we reject claimant's argument that the administrative law judge erred in is evaluation of Dr. Rasmussen's report.

By contrast, the administrative law judge permissibly found the opinion of Dr. Castle, that claimant does not have pneumoconiosis, to be of greater probative value than the opinions of Drs. Kabir, Rasmussen and Robinette, because Dr. Castle's conclusions are well reasoned and more consistent with the objective evidence of record, including the preponderance of the negative x-ray readings and the supporting opinions of Drs. Seargeant, Fino, Dahhan and Branscomb.[7] *Martin v. Ligon Preparation Co.*, 400 F.3d

[7] The administrative law judge found, pursuant to Section 718.202(a)(1), that of the forty-nine readings of the eleven x-ray films of record, only four readings were positive for the existence of pneumoconiosis. Decision and Order on Remand at 20. The administrative law judge further found that each of the positive readings was outweighed by the preponderance of negative readings by more highly qualified readers. Decision and Order at 20-21.

302, 23 BLR 2-261 (6th Cir. 2005); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6 (6th Cir. 1983); *Clark*, 12 BLR at 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Claimant's Exhibit 2; Director's Exhibits 9, 23, 26; Employer's Exhibit 8; Decision and Order on Remand at 22-23.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Consequently, as we have affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge