BRB No. 97-1354 BLA

TRUMAN HURT, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADENA FUELS, INCORPORATED/ KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (94-BLA-0572) of Administrative Law Judge J. Michael O'Neill awarding benefits on a miner's 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). This case is before the Board for the second time. Initially, the administrative law judge, applying the regulations at 20 C.F.R. Part 718, credited the miner with eighteen years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.203(b) and

718.202(a)(4). Decision and Order at 4, 9. The administrative law judge also found total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order at 9. Accordingly, benefits were awarded, commencing November of 1992. Decision and Order at 10.

In response to employer's appeal, the Board affirmed as unchallenged the administrative law judge's findings regarding the exclusion of employer's exhibits, smoking history, length of coal mine employment, and pursuant to Sections 718.202(a)(1)-(3), 718.203(b), and 718.204(c). *See Hurt v. Adena Fuels, Inc.*, BRB No. 96-0756 BLA (Sept. 27, 1996)(unpub.). However, the Board vacated the administrative law judge's findings pursuant to Section 718.202(a)(4) and 718.204(b). *See Hurt, supra*.

On remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.204(b). Decision and Order on Remand at 7-10. Accordingly, benefits were again awarded, commencing November of 1992. Decision and Order on Remand at 10.

On appeal, employer contends that the administrative law judge erred in weighing the medical opinions pursuant to Sections 718.202(a)(4) and 718.204(b). Employer's Brief at 3-12. Claimant[1] has not responded, and the Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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

[1] Claimant is Truman Hurt, Sr., the miner, who filed his claim for benefits on November 11, 1992. Director's Exhibit 1.

[2] We affirm the administrative law judge's finding regarding the onset date of total disability as it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In reviewing the medical opinion evidence, the administrative law judge did not credit the diagnoses of clinical pneumoconiosis by Drs. Anderson and Lane because they were based on their positive x-ray readings. Decision and Order on Remand at 7; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *cf. Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996). The administrative law judge stated that because Drs. Anderson and Lane did not provide an etiology for claimant's pulmonary emphysema and chronic obstructive pulmonary disease, Director's Exhibit 26, their opinions have limited probative value at Section 718.202(a)(4). Decision and Order on Remand at 7. The administrative law judge noted that even though these opinions are insufficient to establish the existence of pneumoconiosis, they do not refute that claimant's lung disease could be due to coal dust as defined by the Act and regulations. Decision and Order on Remand at 7; *see* 20 C.F.R. §718.201; *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987); *see also Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

The administrative law judge credited the opinions of Drs. Baker and Sandlin, both finding a respiratory impairment arising out of coal mine employment, because he found them to be "thorough, well-reasoned, documented, and persuasive." Decision and Order on Remand at 7, 9; *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); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge gave added weight to the opinion of Dr. Sandlin because he is claimant's treating physician. Decision and Order on Remand at 9; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993)(it is clearly established that opinions of treating physicians are entitled to greater weight than those of non-treating physicians), citing *Sexton v. Director, OWCP*, 752 F.2d 213, 7 BLR 2-102 (6th Cir. 1985) and *Collins v. Sec'y of HHS*, 734 F.2d 1177, 6 BLR 2-54 (6th Cir. 1984); *cf. Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Contrary to employer's contention, the administrative law judge did acknowledge that Dr. Wicker also treated claimant, but rationally, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), chose not to accord his opinion greater weight on this basis because he only saw claimant for six months whereas Dr. Sandlin has been treating claimant since May, 1993. *See* Decision and Order on Remand at 4-5, 9; *Tussey, supra; Griffith, supra*.

In considering the contrary opinions of Drs. Wicker and Dahhan, the administrative law judge gave "no weight" to the opinion of Dr. Dahhan. Decision and Order on Remand at 8-9. The administrative law judge permissibly found Dr. Dahhan's opinion to be unreasoned because he did not provide a basis for countering the persuasive opinions of Drs. Baker and Sandlin. Decision and Order on Remand at 9; *see Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). The administrative law judge accorded "no weight" to Dr. Wicker's opinion because he found it to be "hostile-to-the-Act,[3]" citing *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), and *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). Decision and Order on Remand at 6, 8 n.1. As employer asserts, the administrative law judge erred in doing so inasmuch as Dr. Wicker did not testify that pneumoconiosis cannot cause an obstructive impairment,[4] Claimant's Exhibits 11 at 8, 24-29. Employer's Brief at 9-10; *see Stiltner, supra; Warth, supra*. However, we deem such error harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as the administrative law judge permissibly accorded determinative weight to the opinions of Drs. Baker and Sandlin, *see* discussion, *supra,* and noted that Dr. Wicker concedes in his deposition that it is possible that claimant's pulmonary problems are caused by both cigarette smoke and coal dust exposure, Claimant's Exhibit 11 at 26-27.

The administrative law judge did not specifically discuss the medical opinion evidence at Section 718.204(b). Instead, the administrative law judge referred to his previous finding that claimant established statutory pneumoconiosis, *i.e.*, a respiratory impairment related to coal mine employment, and, accordingly, permissibly found that claimant fulfilled his burden of establishing total disability due to pneumoconiosis pursuant to Section 718.204(b), citing *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Decision and Order on Remand at 9-10.

An administrative law judge, as trier-of-fact, has broad discretion to evaluate

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[3] The administrative law judge interpreted the statements made by Dr. Wicker during his deposition as requiring claimant to present irrefutable and conclusive evidence that coal dust causes obstruction before he could attribute the obstruction to coal dust. Decision and Order on Remand at 8.

[4] We also note that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit and the cases cited by the administrative law judge are from the Fourth and Seventh Circuits.

the evidence of record and determine whether claimant has met his burden of proof, *Maddaleni v. Director, OWCP*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and in this case, the administrative law judge, within a proper exercise of his discretion, chose to accord determinative weight to the opinions of Drs. Baker and Sandlin, *see Tussey, supra; Clark, supra; Fields, supra; Lucostic, supra*. Therefore, we affirm the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge