BRB No. 98-1493 BLA

WALTER SHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN HILLS MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
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 on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-0814) of Administrative Law Judge Donald W. Mosser denying benefits 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). This case, involving a 1994 claim, is before the Board for the second time. In a Decision and Order dated December 17, 1996, the administrative law judge, after crediting claimant with twenty-eight years of coal mine employment, found the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Finally, the administrative law judge determined that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated January 6, 1998, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F. R. §§718.202(a)(1) and 718.203(b) as unchallenged on appeal. *Shell v. Southern Hills Mining Co.,* BRB No. 97-0539 BLA (Jan. 6, 1998)(unpublished). The Board also affirmed the administrative law judge's findings that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4). *Id.* The Board, however, vacated the administrative law judge's finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 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 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons,* 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). In his reconsideration of the evidence, the administrative law judge considered the opinions of Drs. Baker, Dahhan and Caudill.[1] The administrative law judge discredited Dr. Baker's opinion, finding that his opinion regarding the etiology of claimant's pulmonary disability was "too equivocal."[2] Decision and Order on Remand at 3. The administrative law judge accorded less weight to Dr. Dahhan's opinion that claimant's pursuant disability was entirely due to cigarette smoking because Dr. Dahhan "rejected outright the possibility that an obstructive disease could be caused by coal mine employment." *Id.* The administrative law judge found that the opinion of claimant's treating physician, Dr. Caudill, supported a finding that claimant's coal mine employment was "more than a *de minimus*" cause of his disability. *Id.* at 2. The administrative law judge further found that Dr. Caudill's opinion was "sufficiently documented and reasonable." *Id.* The administrative law judge, therefore, found

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[1]The administrative law judge accurately noted that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a claimant must establish that his totally disabling respiratory impairment is due "at least in part" to his pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

[2]Inasmuch as claimant raises no assertions of error on the part of the administrative law judge in finding Dr. Baker's opinion too equivocal to establish the cause of claimant's impairment pursuant to 20 C.F.R. §718.204(b), that finding is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

that the evidence was sufficient to establish that claimant's total disability was due pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

Employer argues that administrative law judge erred in finding that Dr. Caudill's opinion was sufficient to support a finding that claimant's total disability pursuant to 20 C.F.R. §718.204(b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. *See Tussey v. Island Creek Coal Co.,* 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, a medical opinion must be reasoned and documented before an administrative law judge may accord it determinative weight based on the physician's status/expertise. *See Griffith v. Director, OWCP,* 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the instant case, the Board remanded the case to the administrative law judge with instructions to determine whether Dr. Caudill's opinion was sufficiently documented and reasoned to establish that claimant's respiratory disability was due at least in part to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Shell, supra.*

On remand, the administrative law judge noted that Dr. Caudill's opinion regarding total disability was based not only on his examinations and knowledge of claimant, but also on his review of claimant's pulmonary function studies. Decision and Order on Remand at 2. The administrative law judge, therefore, found that Dr. Caudill's opinion was "sufficiently documented and reasonable." Id. While the administrative law judge provided a basis for finding Dr. Caudill's opinion sufficiently documented, the administrative law judge failed to provide a sufficient explanation for his finding that Dr. Caudill's opinion was sufficiently reasoned. We, therefore, must remand the case to the administrative law judge to reconsider whether Dr. Caudill's opinion regarding the etiology of claimant's total disability is sufficiently reasoned.

Employer also contends that the administrative law judge erred in discrediting Dr. Dahhan's opinion. The administrative law judge accorded less weight to Dr. Dahhan's opinion that claimant's pulmonary disability was entirely due to cigarette smoking because Dr. Dahhan "rejected outright the possibility that an obstructive disease could be caused by coal mine employment." Decision and Order on Remand at 3. Although the administrative law judge does not provide any support for his rationale in discrediting Dr. Dahhan's opinion, we note the administrative law

judge's reasoning is similar to that expressed by the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.,* 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). In *Warth*, the Fourth Circuit held that an administrative law judge should not rely on a physician's opinion that a miner does not suffer from pneumoconiosis when it is based on an assumption that obstructive disorders cannot be caused by coal mine employment. However, the Fourth Circuit subsequently clarified its holding in *Warth*. Specifically, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit explained that administrative law judges are not precluded from relying on physicians' opinions that are not based upon the erroneous assumption that coal mine employment can never cause chronic obstructive pulmonary disease.

Because the instant case arises with the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge is not bound by Fourth Circuit precedent. Moreover, the administrative law judge did not provide any support for his finding that Dr. Dahhan "rejected outright the possibility that an obstructive disease could
be caused by coal mine employment." Decision and Order on Remand at 3. Consequently, we remand the case to the administrative law judge for reconsideration of Dr. Dahhan's opinion.

In light of the need to reconsider the opinions of Drs. Caudill and Dahhan, we vacate the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis and remand the case for further consideration.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge