BRB No. 98-1509 BLA

CILLIS GENE LANKFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTOVER COAL COMPANY	)	DATE ISSUED:
	)	
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 of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Robert M. Estep (Estep & Estep), Tazewell, Tennessee, for claimant.

W. William Prochot (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (90-BLA-2405) of Administrative Law Judge Clement J. Kichuk (the administrative law judge) denying benefits on a duplicate claim[1] filed pursuant to the provisions of Title IV of the

[1]Claimant filed his initial claim on July 29, 1981. Director's Exhibit 16. This claim was denied by the Department of Labor on February 18, 1983 because claimant failed to establish the existence of pneumoconiosis and total disability. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on October 27, 1987. Director's Exhibits 1, 2.

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 third time. In the original Decision and Order, Administrative Law Judge Thomas Schneider found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. Judge Schneider also found that claimant established a totally disabling respiratory impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.203(c) and 718.204. Accordingly, Judge Schneider awarded benefits. In response to employer's appeal, the Board affirmed Judge Schneider's finding that claimant established a material change in conditions at 20 C.F.R. §725.309. However, the Board vacated Judge Schneider's award of benefits since Judge Schneider did not consider all of the evidence on the merits pursuant to 20 C.F.R. Part 718. Hence, the Board remanded the case to Judge Schneider for further consideration of all of the evidence at 20 C.F.R. §718.202(a)(4), and, if reached, at 20 C.F.R. §§718.203, 718.204(c) and 718.204(b). Also, the Board instructed Judge Schneider to render a specific length of coal mine employment finding. *Lankford v. Eastover Mining Co.*, BRB No. 92-1271 BLA (Nov. 17, 1993)(unpub.).

On remand, Judge Schneider credited claimant with eight years of coal mine employment and found that claimant established total disability at 20 C.F.R. §718.204(c). However, Judge Schneider found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(2). In addition, although Judge Schneider rendered findings supportive of entitlement to benefits at 20 C.F.R. §§718.202(a)(4) and 718.203(c), he nonetheless denied benefits based on his belief that the Board foreclosed a finding that claimant's pulmonary condition was caused by coal mine employment. In disposing of claimant's appeal, the Board affirmed Judge Schneider's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(1), (a)(2) and 718.204(c). Further, the Board held that Judge Schneider's failure to render a finding at 20 C.F.R. §718.202(a)(3) was harmless error since none of the presumptions thereunder applies. However, the Board reversed Judge Schneider's denial of benefits since Judge Schneider made findings of fact supportive of entitlement to benefits at 20 C.F.R. §§718.202(a)(4) and 718.203 and denied benefits solely because he considered the Board's instructions on remand to mandate foreclosing causation. Lastly, the Board held that Judge Schneider's decision substantially complies with the material change in conditions standard adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994). *Lankford v. Eastover Coal Co.*, BRB No. 94-2479 BLA (June 5, 1995)(unpub.).

In a subsequent Order, the Board granted employer's Motion for Reconsideration and affirmed Judge Schneider's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). However, the Board

vacated Judge Schneider's finding that claimant established a material change in conditions at 20 C.F.R. §725.309 in light of the holding of the Sixth Circuit in *Ross*. Further, the Board vacated Judge Schneider's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c),[2] and remanded the case for further consideration of all of the relevant evidence at 20 C.F.R. §718.204(b), (c). *Lankford v. Eastover Coal Co.*, BRB No. 94-2479 BLA (Order)(Sept. 30, 1997)(unpub.).

On the most recent remand, the case was transferred to the administrative law judge, who found that claimant established a material change in conditions at 20 C.F.R. §725.309. The administrative law judge also found the evidence insufficient to establish total disability on the merits at 20 C.F.R. §718.204(c)(1)-(4). Further, the administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis on the merits at 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

[2]The Board noted that "[t]he administrative law judge based his finding of total disability on claimant's lay testimony regarding his condition as supported by the reports of Dr. Hayes (sic), his treating physician." *Lankford v. Eastover Coal Co.*, BRB No. 94-2479 BLA, slip op. at 2 (Order)(Sept. 30, 1997)(unpub.). However, the Board noted that "Dr. Hayes (sic) did not address the issue of total disability, and lay testimony is insufficient to establish this required element of entitlement in the absence of supporting evidence." *Id*.

On appeal, claimant contends that the transfer of the case from Judge Schneider to the administrative law judge without a *de novo* hearing was unfair and unjust. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish total disability on the merits at 20 C.F.R. §718.204(c)(4). Claimant further contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis on the merits at 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. Alternatively, employer contends that the administrative law judge erred in failing to reopen the record to allow the parties to submit proof responsive to the change in the material change in conditions standard adopted by the Sixth Circuit in *Ross*, and in failing to properly determine whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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).

[3]Inasmuch as the administrative law judge's finding that the evidence is insufficient to establish total disability on the merits at 20 C.F.R. §718.204(c)(1)-(3) is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

Initially, we will address claimant's contention that the administrative law judge erred in finding the evidence insufficient to establish total disability on the merits at 20 C.F.R. §718.204(c)(4).[4] Whereas Drs. Clarke and Reinoso[5] opined that claimant suffers from a disabling respiratory impairment, Director's Exhibit 3; Claimant's Exhibit 2, Drs. Baker and Dahhan opined that claimant does not suffer from a disabling respiratory impairment, Director's Exhibit 3; Employer's Exhibits 1, 3. Drs. Anderson,[6] Bushey, Hays and Wright did not render an opinion with regard to whether claimant suffers from a disabling respiratory impairment. Director's Exhibits 3, 16; Claimant's Exhibits 1, 4. The administrative law judge properly accorded greater weight to the opinions of Drs. Baker and Dahhan than to the contrary opinions of Drs. Clarke and Reinoso because he found their opinions to be better supported by the underlying objective evidence.[7] *See Minnich v. Pagnotti*

[4]Claimant asserts that the administrative law judge should not have considered the issue of total disability on remand since Judge Schneider's finding that claimant established total disability at 20 C.F.R. §718.204(c) was final. Contrary to claimant's assertion, the administrative law judge properly complied with the Board's instructions to consider whether the evidence is sufficient to establish total disability on the merits at 20 C.F.R. §718.204(c) since Judge Schneider did not consider all of the evidence of record thereunder. *See generally Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

[5]The administrative law judge stated that because "Dr. Reinoso relied upon the opinion of Dr. Clarke in this finding..., the record actually contains one opinion of total disability, namely the opinion of Dr. Clarke." Decision and Order on Remand at 13. Dr. Reinoso found that "[i]n spite of the negative biopsies, I still agree with Dr. Clark (sic) that [claimant] suffers from [a] ventilatory impairment producted (sic) by the breathing of irritants associated with coal mining employment." Claimant's Exhibit 2.

[6]Dr. Anderson diagnosed an "[o]rthopedic injury resulting in [claimant having to] stop working," and noted "[n]ormal pulmonary function studies and arterial blood gases." Director's Exhibit 16.

[7]The administrative law judge stated that "the medical opinion evidence of Drs. Baker and Dahhan...[is] supported by [the] objective medical evidence." Decision and Order on Remand at 14. The administrative law judge observed that Dr. Baker's "finding is supported by the pulmonary function studies and arterial blood gas tests, performed by Dr. Baker, which produced normal, non-qualifying results." *Id*. The administrative law judge also observed that "Dr. Dahhan found 'no objective evidence of any pulmonary impairment and/or disability based on the pulmonary function studies, [and] blood gases.'" *Id*. In contrast, the administrative

Enterprises, Inc., 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the opinions of Drs. Clarke and Reinoso.[8] Moreover, inasmuch as the administrative law judge properly discredited the only medical opinions of record which could support a finding of total disability,[9] we reject claimant's assertion that the administrative law judge erred in failing to consider the testimony of claimant since it is supported by Dr. Hays, his treating physician.[10] *See* 20 C.F.R. §718.204(d)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Matteo v.*

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law judge stated that "Dr. Clarke's pulmonary function studies failed to produce qualifying results, and he did not perform any arterial blood gas tests." *Id*. at 13. The administrative law judge also stated that "Dr. Reinoso found total disability, despite the fact that he neither performed, nor reviewed pulmonary function studies or arterial blood gas studies." *Id*.

[8]Claimant asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Dahhan than to the contrary opinion of Dr. Clarke since Dr. Dahhan did not examine him. In *Collins v. Secretary of Health and Human Services*, 734 F.2d 1177, 6 BLR 2-54 (6th Cir. 1984), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the opinion of a non-examining physician, with respect to matters not addressed by an examining physician, was insufficient to defeat entitlement to benefits. In the instant case, Dr. Baker, who examined claimant, addressed the issue of total disability and opined that claimant does not suffer from a disabling respiratory impairment. Director's Exhibit 3. Thus, inasmuch as an examining physician has found that claimant does not suffer from a disabling respiratory impairment, we reject claimant's assertion that the administrative law judge erred in according greater weight to the opinion of Dr. Dahhan than to the contrary opinion of Dr. Clarke since Dr. Dahhan did not examine him. *See Collins, supra*; *see also Newland v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984).

[9]The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

[10]Further, inasmuch as Dr. Hays did not render an opinion with regard to the issue of total disability, we reject claimant's assertion that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Hays based on his status as claimant's treating physician. *See* 20 C.F.R. §718.204(c)(4); *see also Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

Director, OWCP, 8 BLR 1-200 (1985). Thus, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability on the merits at 20 C.F.R. §718.204(c)(4).

Next, we address claimant's contention that since Judge Schneider observed his testimony and found it to be credible, the transfer of the case from Judge Schneider to the administrative law judge without a *de novo* hearing was unfair and unjust. In an order dated March 20, 1998, Administrative Law Judge Thomas M. Burke notified the parties that the case would be transferred to another administrative law judge because Judge Schneider was no longer with the Office of Administrative Law Judges. On April 17, 1998, claimant filed an Objection to Substitution of Administrative Law Judge. In an order dated May 21, 1998, the administrative law judge acknowledged that claimant filed an objection to the appointment of another administrative law judge for a decision on the record in this case. However, the administrative law judge did not render an express finding with respect to claimant's objection. Nonetheless, the administrative law judge correctly stated that "[i]n the case of a living miner's claim, a finding of total disability may not be made solely on the miner's statements or testimony." Decision and Order on Remand at 7 n.3; 20 C.F.R. §718.204(d)(2). The administrative law judge observed that "Judge Schneider's previous finding of total disability was based upon Claimant's subjective complaints and actions, together with the medical opinion of Dr. Hays." Decision and Order on Remand at 12. The administrative law judge also observed that "[t]he Board, however, has clearly noted that Dr. Hays failed to express an opinion regarding total disability, and that Claimant's testimony alone is insufficient to support a finding under Section 718.204." *Id*. Further, as previously noted, the administrative law judge weighed the conflicting medical opinion evidence and found it to be insufficient to establish total disability on the merits at 20 C.F.R. §718.204(c)(4). Thus, inasmuch as the credibility of claimant's testimony is not at issue with respect to the administrative law judge's finding on the merits at 20 C.F.R. §718.204(c), *see* 20 C.F.R. §718.204(d)(2); *Fields, supra*; *Matteo, supra*, we reject claimant's assertion that the administrative law judge erred in transferring the case from Judge Schneider to the administrative law judge without a *de novo* hearing. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985); *White v. Director, OWCP*, 7 BLR 1-348 (1984).

Since claimant failed to establish total disability on the merits at 20 C.F.R. §718.204(c), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[11] *See Trent v. Director,*

[11]In view of our disposition of this case on the merits at 20 C.F.R. §718.204(c),

OWCP, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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we decline to address the administrative law judge's findings at 20 C.F.R. §§725.309 and 718.204(b). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge