BRB No. 99-0587 BLA

SAMUEL M. SHORT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHORT TRUCKING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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-Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Richard A. Counts (Weinberg, Campbell & Slone, P.S.C.), Hindman, Kentucky, for claimant.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (96-BLA-1326) of Administrative Law Judge Thomas F. Phalen, Jr. 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 is before the Board for a second time. Initially, the administrative law judge credited claimant with thirty years of qualifying coal mine employment, found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §8.202(a)(4), and found that claimant was entitled to the presumption 20 C.F.R. §718.203(b) that the pneumoconiosis arose out of coal mine employment. The administrative law judge further found that claimant established the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b).

Subsequent to an appeal by employer, the Board vacated the administrative law judge's award of benefits and remanded the claim for further consideration. *Short v. Short Trucking Company*, BRB No. 98-0105 BLA (Oct. 14, 1998)(unpub.). While the Board rejected several of employer's assertions pursuant to the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4), ultimately, the Board agreed with employer's contention that the administrative law judge failed to consider all relevant evidence at Section 718.202(a)(4). *Short*, slip op. at 5. The Board also agreed with employer that the administrative law judge impermissibly substituted his own opinion for that of medical experts. *Short*, slip op. at 5 Accordingly, the Board vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4) and, also vacated the administrative law judge's finding at Section 718.203(b). *Short*, slip op. at 5. The Board further

vacated the administrative law judge's determination of total disability at Section 718.204(c) inasmuch as the administrative law judge's finding regarding the medical opinions failed to satisfy the Administrative Procedure Act which requires "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented...." 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 U.S.C. §932(a). *Short*, slip op. at 5-7. The Board, thus, instructed the administrative law judge, on remand, to weigh all relevant evidence at Section 718.204(c). *Short*, slip op. at 7. Finally, the Board vacated the findings at Section 718.204(b) as the administrative law judge failed to consider relevant opinions and instructed the administrative law judge, if reached on remand, to reconsider all relevant evidence at that subsection. *Short*, slip op. at 8.

On remand, the administrative law judge again found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and further found that claimant was entitled to the presumption found at Section 718.203(b). Decision and Order on Remand at 4-10. The administrative law judge also found that claimant was totally disabled pursuant to Section 718.204(c) and that such disability was due at least in part to pneumoconiosis pursuant to Section 718.204(b). Decision and Order at 10-13. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the existence of pneumoconiosis was established at Section 718.202(a)(4). Employer further contends that the administrative law judge erred in

finding that claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204(c), (b). Claimant, in response, urges that the award of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

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).

Employer asserts that, in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), the administrative law judge erred in failing to address the relative qualifications of the physicians rendering opinions. Employer also contends that the administrative law judge erred in mechanically according greatest weight to the opinion of Dr. Gish, claimant's treating physician, who concluded that claimant suffered from pneumoconiosis, Director's Exhibit 60; Employer's Exhibit 2, and in crediting the opinions of Drs. Sundaram, Guberman, and Baker, all of whom diagnosed the presence of pneumoconiosis, Director's Exhibits 41, 58, 67, inasmuch as these physicians' opinions were not well-supported by underlying documentation. Finally, regarding Section 718.202(a)(4), employer contends that the administrative law judge erred in failing to give dispositive weight

to the opinions of Drs. Wicker, Broudy, Lockey, and Fino, Director's Exhibits 12, 32, , 53, 62; Employer's Exhibit 1, which did not diagnose pneumoconiosis and were credible, well-documented opinions. Employer further contends that the administrative law judge compounded this error by finding these opinions supportive of opinions which diagnosed the presence of pneumoconiosis.

In finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge concluded that the opinions of Drs. Sundaram, Guberman, Baker and Gish, were "substantiated" by claimant's coal mine employment history of thirty years and thus constituted well-documented and well-reasoned opinions of pneumoconiosis. Decision and Order on Remand at 9. The administrative law judge accorded greatest weight to the opinion of Dr. Gish, because her status as claimant's treating physician made her more familiar with the progression of claimant's disease. Decision and Order on Remand at 9. The administrative law judge also concluded that while the opinions of Drs. Wicker, Lockey, Fino and Broudy did not diagnose the presence of pneumoconiosis, the opinions provided support for those opinions diagnosing the presence of the disease, since all of the physicians diagnosed the presence of chronic obstructive pulmonary disease and a lengthy coal mine employment history. Decision and Order on Remand at 9. The administrative law judge further found that the opinion of Dr. Fino was entitled to less weight as the physician did not examine claimant. Decision and Order on Remand at 9-10.

Initially, we reject employer's assertions that the administrative law judge erred in relying on undocumented and poorly reasoned opinions to find the presence of pneumoconiosis. As we concluded in our earlier opinion, the opinions of Drs. Baker, Gish, Guberman and Sundaram are based on physical examinations, smoking and coal mine employment histories and x-ray evidence. As such they are sufficiently documented, and as the administrative law judge found them supported by underlying documentation, they are sufficiently reasoned. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

An administrative law judge must consider a medical report as a whole, *see Justice v. Island Creek Coal Co.*, B11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and may not discredit an opinion merely because it is based on an x-ray interpretation which is outweighed by other x-ray interpretations of record, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *cf*. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Nevertheless, we must vacate the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) and remand the claim for further consideration by the administrative law judge. The opinions of Drs. Wicker, Lockey, Broudy and Fino, all specifically conclude that claimant did not suffer from the existence of pneumoconiosis and/or any disease arising out of coal mine employment. Director's Exhibits 41, 58, 60, 67. To the

extent that the administrative law judge relied on these opinions as for support for opinions which diagnosed pneumoconiosis, the administrative law judge has erred. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see also Stomps v. Director, OWCP*, 816 F.2d 1533, 10 BLR 2-107 (11th Cir. 1987). We, thus, conclude that the administrative law judge's reliance on these opinions, which specifically diagnose the absence of pneumoconiosis, constitutes an impermissible substitution of his opinion for those of the physicians. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).[1]

Further, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held in *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995), that according greater weight to a miner's treating physician may not be a mechanical exercise. *See also Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In the instant case, the administrative law judge accorded the greatest weight to Dr. Grish's opinion because Dr. Gish's status as claimant's treating physician over a period of time made her more "familiar" with the progression of claimant's condition. The

[1] The administrative law judge has provided a valid basis, however, for according less weight to the opinion of non-examining physician, Dr. Fino. *See Tackett v.Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

administrative law judge, however, has failed to acknowledge that the examining physicians, Dr. Broudy, Lockey and Wicker, also provided thorough medical examinations, documented their awareness of claimant's medical history, and possess strong medical credentials. Director's Exhibits 12, 32, 53; Employer's Exhibit 1. Accordingly, we conclude that the administrative law judge's crediting of Dr. Gish, without taking into account relevant information contrary opinions, constitutes error. Accordingly, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and remand the claim for further consideration of the entirety of relevant evidence. Moreover, inasmuch as the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) cannot be affirmed, we vacate the administrative law judge's finding that the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). If reached on remand, the administrative law judge must consider whether the evidence is sufficient to establish that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.

Employer next contends that the administrative law judge erred in finding that claimant established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c). Specifically, employer contends that the administrative law judge erred by failing to consider the medical opinions of the physicians in light of the exertional demands of claimant's job as a coal truck driver.

Employer also contends that the administrative law judge erred in failing to address physicians' opinions which call into question the validity of qualifying pulmonary function studies pursuant to Section 718.204(c)(1),[2] and failed to engage in the requisite weighing of all relevant evidence, like and unlike, at Section 718.204(c).

In finding that claimant established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c), the administrative law judge concluded that the entirety of pulmonary function studies of record produced qualifying values pursuant to Section 718.204(c)(1). Decision and Order on Remand at 11. The administrative law judge further concluded that all of the physicians' opinions support a finding of total disability at Section 718.204(c)(4).

Regarding the administrative law judge's determination at Section 718.204(c), we initially reject employer's assertion that the administrative law judge has erred in failing to comply with the Board's instruction to consider claimant's exertional requirements in conjunction with the medical evidence of record. The administrative law judge considered the relevant evidence and concluded that claimant established the exertional requirements of his usual coal mine employment as a coal truck driver.

[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

See Onderko v. Director, OWCP, 14 BLR 1-2 (1989); *see also Cregger v. United States Steel Corp.*, 6 BLR 1-1219 (1984). The administrative law judge, in a permissible exercise of his discretion, concluded that the medical opinions of record supported a finding of total disability pursuant to Section 718.204(c)(4) in light of these exertional requirements. *See Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

Nevertheless, we must vacate the administrative law judge's finding that claimant established the existence of total disability pursuant to Section 718.204(c). In considering the pulmonary function study of evidence at Section 718.204(c)(1), the administrative law judge noted, correctly, that all of these studies were qualifying. Director's Exhibits 11, 39, 42, 44, 61; Employer's Exhibit 1. The administrative law judge, however, failed to address medical opinions rendered by Dr. Kramen, Director's Exhibit 44, and Dr. Broudy, Employer's Exhibit 3, which called into question the validity of the pulmonary function studies found at Director's Exhibits 42 and 44. Such evidence is relevant to an assessment of total disability and must be addressed by the administrative law judge. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979); *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Accordingly, we vacate the administrative law judge's determination that

total disability was demonstrated pursuant to Section 718.204(c)(1) and remand the claim for consideration of all the relevant evidence at that subsection.

We further hold that the administrative law judge has failed to engage in a proper weighing of the evidence. The administrative law judge must assign the contrary probative evidence of record, if any, appropriate weight and determine whether such evidence outweighs the evidence supportive of a finding of total respiratory disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). In the instant case, the administrative law judge failed to weigh blood gas studies of record, Director's Exhibits 13, 38, 41, 58; Employer's Exhibit 1, all of which produced non-qualifying values in his consideration of the evidence at Section 718.204(c). Accordingly, if reached, the administrative law judge must consider and weigh all of the relevant evidence of record, including the contrary probative evidence, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c). *See Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*.

Employer further contends that the administrative law judge erred in finding that claimant carried his burden of demonstrating that claimant's totally disabling respiratory impairment was due to pneumoconiosis at Section 718.204(b) by mechanically according greater weight to the opinion of claimant's treating physician, Dr. Gish, who concluded that claimant's totally disabling respiratory impairment was due at least in part to pneumoconiosis, Director's Exhibit 60; Employer's Exhibit 2. Employer contends that the administrative law judge

impermissibly rejected the opinions of Drs. Wicker, Lockey, Fino and Broudy on the basis of their failure to diagnosis pneumoconiosis.

In finding that claimant demonstrated that his totally disabling respiratory impairment was due at least in part to pneumoconiosis, *see Adams v. Director, OWCP*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1989), the administrative law judge found that the conclusions of Drs. Sundaram, Guberman, Gish and Baker, all of whom attributed claimant's total disability to pneumoconiosis, were entitled to greater weight as they were well supported by underlying documentation. Decision and Order on Remand at 12. The administrative law judge accorded less weight to the opinions of Drs. Wicker, Lockey, Fino and Broudy, all of whom attributed claimant's impairment to a lengthy cigarette smoking history. Decision and Order on Remand at 12-13.

Since we vacated the administrative law judge's finding at Section 718.202(a)(4), however, we must necessarily vacate the administrative law judge's finding at Section 718.204(b). Further, in concluding that claimant has carried his burden at Section 718.204(b) pursuant to *Adams*, *supra*, the administrative law judge has again failed to address relevant information in the contrary opinions, *i.e.*, the physicians' relative qualifications. *See generally Griffith*, *Tussey*. Moreover, while a physician may, at Section 718.204(b), accord less weight to an opinion which fails to diagnose the presence of pneumoconiosis, as such an opinion would present a less complete picture of the miner's health, *see Onderko*, *supra*; *Stark v. Director,*

OWCP, 9 BLR 1-36 (1989), a review of the evidence of record demonstrates that both Dr. Lockey and Dr. Broudy opined that even if claimant had suffered from pneumoconiosis, it would not contribute to claimant's totally disabling respiratory impairment. Accordingly, the administrative law judge has mischaracterized these opinions, an error requiring remand. *See Tackett*, *supra*; *Arnold*, *supra*; *Branham*, *supra*. We, therefore, vacate the administrative law judge's determination that claimant has established that his totally disabling respiratory impairment was due, at least in part, to pneumoconiosis and hold that, if reached on remand, the administrative law judge must again address all relevant evidence pursuant to the standard enunciated in *Adams*, *supra*.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge