BRB No. 99-0604 BLA

EVERETT C. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING 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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Buttermore, Turner & Boggs PSC), Harlan, Kentucky, for claimant.

H. Kent Hendrickson (Rice & Hendrickson), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0867) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits on a request for modification of a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1]The pertinent procedural history of this case is as follows: Claimant filed his first claim on October 5, 1978. Director's Exhibit 31. On November 15, 1982, Administrative Law Judge Julius A. Johnson issued a Decision and Order denying benefits because claimant failed to establish the existence of pneumoconiosis and total disability. *Id*. Inasmuch as claimant did not pursue this claim any further, the

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with at least nineteen years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found that claimant failed to establish a mistake in a determination of fact, he nonetheless found that claimant established a change in conditions pursuant to 20 C.F.R. §725.310.[2] Hence, the administrative law judge considered all of the evidence of

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denial became final. Claimant filed his second claim on June 5, 1984. *Id*. This claim was finally denied by the Department of Labor (DOL) on June 5, 1985. *Id*. Because claimant did not pursue this claim any further, the denial became final. On March 14, 1988, claimant filed his third claim, which was denied by the DOL on November 1, 1988. *Id*. The denial became final because claimant did not pursue this claim any further. Claimant filed his fourth claim on July 23, 1990. Director's Exhibit 1. On March 21, 1996, Administrative Law Judge Ainsworth H. Brown issued a Decision and Order denying benefits. Director's Exhibit 58. The basis of Judge Brown's denial was claimant's failure to establish the existence of pneumoconiosis. *Id*. On March 30, 1996, claimant filed his most recent claim, which has been construed as a request for modification. Director's Exhibit 59.

[2]The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

record and found that claimant established the existence of pneumoconiosis arising out of coal mine employment on the merits pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). However, the administrative law judge found that claimant failed to establish total disability on the merits pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to render a finding that claimant established a material change in conditions at 20 C.F.R. §725.309. 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). Employer responds, urging affirmance of the administrative law judge's Decision and Order. 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 length of coal mine employment finding and his findings on the merits pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant 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). We disagree. Whereas Drs. Clarke and Miller opined that claimant suffers from a disabling respiratory impairment,[4] Director's Exhibits 31, 35, 67, 76, 79, Dr. Dahhan opined that claimant does not suffer from a disabling respiratory impairment,[5] Director's Exhibits 14, 31, 34. Dr. Baker opined that claimant suffers from a mild respiratory impairment. Director's Exhibit 13. The administrative law judge rationally found that Dr. Baker's opinion, that claimant suffers from a mild respiratory impairment, "weighs against a finding of total disability." Decision and Order at 15. The administrative law judge stated that "a mild impairment considered in conjunction with [claimant's] most previous coal mine employment, which did not involve heavy manual labor, weighs against a total disability finding."[6] *Id*.; *see Poole*

[4]Inasmuch as Dr. Martin's opinion, that claimant should not return to underground coal mining because of his silicosis, essentially recommends that claimant should avoid further coal dust exposure, it is not sufficient to establish total disability. *See* Director's Exhibit 31; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

[5]Dr. Williams opined that claimant did not suffer from a significant impairment of either the respiratory or cardiovascular system. Director's Exhibit 31.

[6]The administrative law judge observed that claimant "stated that he last worked as an underground miner, operating a machine ('continuous miner') which cuts the coal." Decision and Order at 15. Although the administrative law judge observed that claimant "also performed some manual labor," *id*., he did not indicate that claimant performed **heavy** manual labor.

v. Freeman United Coal Mining Co., 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 104 (1986); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983).

In addition, the administrative law judge properly accorded greater weight to the opinion of Dr. Dahhan than to the contrary opinions of Drs. Clarke and Miller because he found Dr. Dahhan's opinion to be better reasoned and documented.[7] *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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also properly accorded greater weight to the opinion of Dr. Dahhan than to the contrary opinions of Drs. Clarke and Miller because of Dr. Dahhan's superior qualifications.[8] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24

[7]The administrative law judge stated that Dr. Miller "did not perform any diagnostic tests when he opined on [claimant's] condition in the 1993 and 1997 reports." Decision and Order at 14. The administrative law judge also stated that although Dr. Miller "reviewed pulmonary function tests and arterial blood gas studies..., he did not clarify upon which tests he relied, and he failed to specify all the appropriate values." *Id*. Hence, the administrative law judge found that "Dr. Miller's conclusions are supported by extremely limited medical data." *Id*. In addition, the administrative law judge stated that Dr. Clarke "did not perform an arterial blood gas study, and as such, less objective medical data substantiates his total disability determination." *Id*. In contrast, the administrative law judge stated that Dr. Dahhan "recorded the relevant histories and performed diagnostic testing." *Id*. The administrative law judge also stated that "[t]he pulmonary function and arterial blood gas study tests neither produced qualifying results nor were interpreted to reveal even a minimal breathing impairment." *Id*. Hence, the administrative law judge found that "[s]uch test results corroborate Dr. Dahhan's conclusions." Further, the administrative law judge stated that "Dr. Dahhan's medical opinion is supported by more extensive medical evidence than Dr. Clarke's opinion." *Id*. at 15.

[8]The administrative law judge stated that "Dr. Dahhan possess[es] superior qualifications with respect to pulmonary diseases." Decision and Order at 14. Dr. Dahhan is Board-certified in internal medicine and pulmonary medicine. Director's Exhibit 79. Dr. Miller is Board-certified in internal medicine. Director's Exhibit 35. Although the record indicates that Dr. Clarke is an A-reader, Dr. Clarke's radiological competence is not a relevant factor in considering his evaluation of the medical evidence at 20 C.F.R. §718.204(c)(4).

(1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in discounting the opinions of Drs. Clarke and Miller.

Claimant also asserts that the administrative law judge should have accorded determinative weight to Dr. Miller's opinion due to his status as claimant's treating physician. 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 nontreating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The Sixth Circuit has also indicated, however, that this principle does not alter the administrative law judge's duty, as fact-finder, to evaluate the credibility of the treating physician's opinion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the present case, the administrative law judge rationally found that Dr. Miller's opinion is insufficient to establish total disability because he found it to be not well reasoned and documented.[9] *See Clark, supra*; *Fields, supra*; *Lucostic, supra*; *Fuller, supra*. Thus, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Miller's opinion because of Dr. Miller's status as claimant's treating physician.

[9]The administrative law judge stated, "[n]otwithstanding Dr. Miller's treating physician status, I find that his report is neither well-documented, nor well-reasoned." Decision and Order at 14.

Finally, since the administrative law judge properly considered the medical evidence at 20 C.F.R. §718.204(c)(4), we reject claimant's assertion that the administrative law judge erred in failing to consider claimant's age, education and work experience in his total disability analysis because these factors affect claimant's ability to obtain gainful employment. *See* 20 C.F.R. §718.204(c)(4). The fact that a miner would not be hired does not support a finding of total disability.[10] *See Ramey v. Kentland-Elkhorn*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Therefore, we hold that substantial evidence supports 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)(4).

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

[10]We reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(c)(4). Further, we reject claimant's assertion regarding the administrative law judge's treatment of the 1988 report of Dr. Williams, the 1990 report of Dr. Baker and the 1990 report of Dr. Dahhan in considering claimant's current condition with respect to the issue of total disability. Contrary to claimant's assertion, the administrative law judge properly considered all of the relevant medical opinion evidence of record and stated, "I place most weight, due to the later examination dates, on the medical opinions of Drs. Miller, Dahhan and Clarke." Decision and Order at 14 n.10. The administrative law judge observed that "this medical data is a better indicator of [claimant's] present condition." *Id*. at 11.

[11]In view of our disposition of the case on the merits at 20 C.F.R. §718.204(c), we decline to address claimant's contention with regard to 20 C.F.R. §725.309. *See Trent v. Director, 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 denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge