BRB No. 00-0600 BLA

FRED MORGAN Claimant-Petitioner v. SHAMROCK COAL COMPANY, INCORPORATED and EMPLOYER'S SERVICE CORPORATION Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Harold Rader, Manchester, Kentucky, for employer.

Before: SMITH, McGRANERY and McATEER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (97-BLA-0329) of Administrative Law Judge Daniel J. Roketenetz 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).[1] Claimant filed a claim for benefits on October 15, 1992. In a Decision and Order dated July 31, 1995, Administrative Law Judge George P. Morin credited claimant with eighteen years of coal mine employment, and determined that claimant established that he suffers from pneumoconiosis arising out of coal mine employment. Judge Morin further found, however, that claimant failed to establish total disability. Accordingly, Judge Morin denied benefits. Claimant appealed, challenging Judge Morin's finding that the medical opinion evidence was insufficient to establish total disability. The Board affirmed Judge Morin's finding at 20 C.F.R. §718.204(c)(4) (2000), and affirmed, as unchallenged on appeal, Judge Morin's length of coal mine employment finding, and findings under 20 C.F.R. §§718.202(a)(1)-(4) (2000), 718.203(b) (2000) and 718.204(c)(1)-(3) (2000). *Morgan v. Shamrock Coal Co.*, BRB No. 95-1962 BLA (Feb. 29, 1996)(unpublished).

On May 8, 1996, claimant filed a request for modification with the district director, submitting a medical report from Dr. Clarke. In a Decision and Order dated July 28, 1997, Judge Morin found that the new and old evidence together was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, but found the new and old evidence insufficient to establish total disability. Judge Morin thus found that claimant failed to establish modification and, accordingly, denied benefits. Claimant appealed. The Board vacated Judge Morin's Decision and Order, remanding the case for Judge Morin to conduct a full evidentiary hearing on modification. *Morgan v. Shamrock Coal Co.*, BRB No. 97-1555 BLA (July 28, 1998) (unpublished).

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

The case was reassigned to Administrative Law Judge Daniel J. Roketenetz (the administrative law judge), who conducted a hearing on June 10, 1999.[2] In his Decision and Order dated February 22, 2000, the administrative law judge adopted Judge Morin's previous length of coal mine employment finding, and findings at Sections 718.202(a) (2000) and 718.203(b) (2000). The administrative law judge then found the new evidence and the previously submitted evidence of record insufficient to establish total disability under Section 718.204(c)(1)-(4) (2000). The administrative law judge thus found that claimant failed to establish modification under 20 C.F.R. §725.310 (2000), and denied benefits. On appeal, claimant contends that the administrative law judge improperly discounted Dr. Clarke's medical opinion supporting a finding of total disability, and claimant otherwise generally challenges the administrative law judge's finding that he failed to establish total disability. Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating she does not presently intend to participate in this appeal.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule in an Order issued on February 21, 2001, to which the Director and employer have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[4] Based upon the briefs submitted by the Director and

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[2]The case was reassigned to Judge Roketenetz as Judge Morin was no longer available to the Office of Administrative Law Judges.

[3]Inasmuch as claimant does not challenge the administrative law judge's adoption of the previous findings of Judge Morin with respect to the issues of length of coal mine employment and pneumoconiosis arising out of coal mine employment, the administrative law judge's adoption of these findings is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5-6.

[4]Claimant has not responded to the Board's Order issued on February 21, 2001. Pursuant to the Board's instructions, the failure of a party to submit a brief within twenty days following receipt of the Board's Order issued on February 21, 20001 would be construed as a position that the challenged regulations will not affect the outcome of this case.

employer, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

On appeal, claimant argues that his case must be remanded for reconsideration because the administrative law judge erred in discounting Dr. Clarke's medical opinion, the only opinion of record which indicates that claimant is totally disabled from a respiratory standpoint. We disagree. Dr. Clarke examined claimant on April 23, 1996, diagnosed him with pneumoconiosis, and opined that he is totally disabled in light of his pulmonary function study results.[5] Director's Exhibit 53. The administrative law judge discounted Dr. Clarke's opinion of total disability partly because Dr. Clarke relied upon his own positive x-ray reading which conflicted with the administrative law judge's determination that the weight of the x-ray evidence was negative. Decision and Order at 9; Director's Exhibit 53. The administrative law judge also discounted Dr. Clarke's opinion because Dr. Clarke relied upon non-qualifying pulmonary function study results, and did not administer an arterial blood gas study. *Id*. Claimant contends that it was impermissible for the administrative law judge to discount Dr. Clarke's opinion of total disability on these grounds, and further contends that the administrative law judge should have credited Dr. Clarke's opinion in view of the fact that the doctor based his opinion upon a physical examination, and medical and work histories in addition to the objective test results.

While, in focusing on Dr. Clarke's positive x-ray interpretation and non-qualifying pulmonary function study, the administrative law judge provided improper reasons for discounting Dr. Clarke's opinion that claimant is totally disabled, the administrative law judge's error was harmless since the administrative law judge provided otherwise proper reasons for crediting the contrary opinions of Drs. Broudy and Dahhan. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 9; Employer's Exhibits 1, 3. The administrative law judge properly credited the opinions of these two physicians as well-reasoned and documented.[6] *See Clark v. Karst-Robbins Coal*

[5]Dr. Clarke indicated that claimant's pulmonary function study results showed that claimant has moderate restrictive pulmonary disease and moderate chronic obstructive airways disease. Director's Exhibit 53.

[6]Drs. Broudy examined claimant on April 11, 1997, and Dr. Dahhan examined claimant on November 5, 1998. Employer's Exhibits 1, 3. Both doctors indicated that claimant is not totally disabled, but retains the respiratory capacity for coal mine employment

Co., 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 9; Employer's Exhibits 1, 3. Moreover, the administrative law judge properly credited the opinions of Drs. Broudy and Dahhan over Dr. Clarke's opinion because Drs. Broudy and Dahhan are Board-certified in internal medicine and pulmonary diseases, while the record does not indicate that Dr. Clarke is similarly qualified. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9; Employer's Exhibits 1, 3. We affirm, therefore, the administrative law judge's finding that the opinions of Drs. Broudy and Dahhan were entitled to greater weight than Dr. Clarke's opinion with regard to total disability.

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or similarly arduous manual labor. *Id.* Drs. Broudy and Dahhan each administered an arterial blood gas test, as well as a pulmonary function study, and interpreted their respective results as normal. *Id.*

Claimant also asserts that the administrative law judge erred in failing to discuss the exertional requirements of claimant's last usual coal mine employment as a belt man, coal loader and truck driver before making his determination that claimant is not totally disabled. This contention lacks merit. The administrative law judge properly found that, aside from Dr. Clarke's opinion, the evidence of record does not include medical opinion evidence which could, if credited, support a finding of total disability. Decision and Order at 9. The medical opinions of Drs. Wright, Anderson and Baker comprise the previously submitted medical opinion evidence relevant to total disability. As Judge Morin found in his previous, 1995 Decision and Order, Drs. Wright, Anderson and Baker all opined that, from a pulmonary standpoint, claimant was capable of returning to his usual coal mine employment or similarly arduous, manual labor.[7] Judge Morin 1995 Decision and Order at 9-10; Director's Exhibits 15-19. Such opinions need not be discussed in terms of claimant's former job duties. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We thus affirm the administrative law judge's finding that claimant failed to establish total disability with medical opinion evidence pursuant to Section 718.204(c)(4) (2000). *See* 20 C.F.R. §718.204(b)(2)(iv).[8] We also affirm, as unchallenged on appeal, the administrative law judge's finding that the new and previously submitted evidence was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(3) (2000).[9] *See* 20 C.F.R. §718.204(b)(2)(i)-

[7]The United States Court of Appeals for the Sixth Circuit has held that an administrative law judge should consider whether a physician who finds that a claimant is not totally disabled had any knowledge of the exertional requirements of the claimant's last coal mine employment before crediting that physician's opinion. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, BLR 2- (6th Cir. 2000). While the administrative law judge did not specifically address whether the doctors who found that claimant retains the respiratory capacity for coal mine employment had any knowledge of the exertional requirements of the claimant's last coal mine employment, the administrative law judge's decision to credit the opinions of these physicians does not run afoul of the Sixth Circuit's decision in *Cornett*, inasmuch as the physicians indicated an awareness of the nature of claimant's underground coal mining work. The physicians who opined that claimant retains the respiratory capacity for his last usual coal mine work – Drs. Wright, Anderson, Baker, Broudy and Dahhan – indicated that they were aware that claimant last worked as a beltline operator. Director's Exhibits 15-19; Employer's Exhibits 1, 3.

[8]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[9]While claimant contends that the administrative law judge erred in failing to consider claimant's age, education and work experience in determining that he was

(iii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 13. Consequently, we affirm the administrative law judge's finding that claimant failed to establish modification, and thus affirm the denial of benefits. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

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not totally disabled, those factors are not relevant to establishing total disability pursuant to 20 C.F.R. §718.204. *See* 20 C.F.R. §718.204; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge