BRB No. 01-0606 BLA

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| REAFORD SMITH | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| EASTERN COAL CORPORATION | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| THE PITTSTON COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0642) of Administrative Law Judge Joseph E. Kane 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).[1] The instant case involves a duplicate claim filed on October 15, 1993.[2] In the initial decision, Administrative Law Judge Frederick D. Neusner noted that claimant's initial claim was abandoned because claimant had not submitted any medical evidence. Judge Neusner, therefore, dismissed the material change in conditions issue under 20 C.F.R. §725.309 (2000) and proceeded to the merits of claimant's 1993 claim. Although Judge Neusner found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000), he found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20

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[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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on August 2, 1976. Director's Exhibit 29. Claimant, however, did not submit any medical evidence in support of his claim. *Id.* By letter dated June 12, 1980, the district director informed claimant that if he did not write or call within thirty days, his claim would be declared abandoned. *Id.* In that event, the district director informed claimant that the June 12, 1980 letter would serve as notice of the denial of his claim for failure to provide evidence necessary to decide the claim. *Id.* There is no indication that claimant took any further action in regard to his 1976 claim.

Claimant filed a second claim on October 15, 1993. Director's Exhibit 1.

C.F.R. §718.202(a)(4) (2000). Judge Neusner also found that although the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). Judge Neusner further 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) (2000). Accordingly, Judge Neusner awarded benefits. By Decision and Order dated September 27, 1996, the Board affirmed Judge Neusner's findings pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000) and 718.204(c)(1)-(3) (2000) as unchallenged on appeal. *Smith v. Eastern Coal Corp.*, BRB No. 96-0132 BLA (Sept. 27, 1996) (unpublished). The Board, however, vacated Judge Neusner's findings pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and 718.204(b) and (c) (2000) and remanded the case for further consideration. *Id.* The Board further instructed Judge Neusner, on remand, to determine the length of claimant's coal mine employment and to render a finding pursuant to 20 C.F.R. §718.203 (2000). *Id.* The Board also instructed Judge Neusner to reweigh all of the medical evidence to determine if claimant was totally disabled due to pneumoconiosis.[3] *Id.*

On remand, Judge Neusner considered all of the evidence of record and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Judge Neusner further found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, Judge Neusner denied benefits. By Decision and Order dated July 21, 1998, the Board affirmed Judge Neusner's denial of benefits. *Smith v. Eastern Coal Corp.*, BRB No. 97-1741 BLA (July 21, 1998) (unpublished).

[3]The Board noted that if claimant, on remand, was able to establish any element of entitlement, he would necessarily establish a material change in conditions. *Smith v. Eastern Coal Corp.*, BRB No. 96-0132 BLA (Sept. 27, 1996) (unpublished); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Claimant subsequently requested modification of his denied claim. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), Administrative Law Judge Joseph E. Kane (the administrative law judge) denied claimant's request for modification. In denying claimant's request for modification, the administrative law judge considered all of the evidence of record and found that it was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). On appeal, claimant contends that the administrative law judge erred in failing to find the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). Claimant also contends that the administrative law judge erred in failing to find the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000).[4] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that the revised regulations do not affect the disposition of the instant case.[5]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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[4]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).

[5]Inasmuch as no party challenges the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see* 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 21-22.

Claimant argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). Claimant specifically contends that the administrative law judge erred in not according greater weight to Dr. Hussain's opinion based upon his status as claimant's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant 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, in the instant case, the administrative law judge properly discredited Dr. Hussain's opinion because he failed to reconcile his finding of total disability with the non-qualifying objective evidence.[6] Decision

[6]The administrative law judge noted that all of the valid pulmonary function studies of record are non-qualifying. Decision and Order at 21. The administrative law judge similarly noted that all of the arterial blood gas studies of record are non-qualifying. *Id.* at 22.

In a letter dated May 29, 1997, Dr. Hussain stated that:

> Pulmonary Function Tests obtained on [May 6, 1997] showed [claimant's] FEV1/FVC ratio to be low at 63.4% indicating he has Obstructive Ventilatory Defect and is also suggestive to Pneumoconiosis.
>
> ABG report obtained on [May 6, 1997] showed a low PO2 of 75 which is also suggestive of Pneumoconiosis and COPD.

Director's Exhibit 71.

Claimant's May 6, 1997 pulmonary function and arterial blood gas studies are non-qualifying. Director's Exhibit 71. Dr. Hussain failed to explain how the results of these studies supported his finding of a totally disabling pulmonary impairment.

While hospitalized under Dr. Hussain's care in August of 1999, claimant underwent objective testing. Director's Exhibit 92. An arterial blood gas study conducted on August 23, 1999 produced non-qualifying values. *Id.* Despite noting claimant's poor effort during the administration of an August 25, 1999 pulmonary function study, Dr. Hussain interpreted the study as revealing severe airway obstruction. *Id.* In a Discharge Summary dated August 27, 1999, Dr. Hussain indicated, again without mentioning claimant's poor effort, that claimant's pulmonary function study revealed evidence of "severe airway obstruction." *Id.* Dr. Burki subsequently invalidated the results of claimant's August 25, 1999 pulmonary function study due to poor effort. Director's Exhibit 92.

In his most recent report dated June 2, 2000, Dr. Hussain indicated, without explanation, that claimant's pulmonary function studies from 1998 to 2000 revealed a low

and Order at 22. An administrative law judge may properly find that a physician's opinion is not well reasoned where he does not adequately explain how he arrived at his conclusion that the miner suffered from a totally disabling respiratory or pulmonary impairment. *See Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also found that Dr. Hussain's finding of total disability was called into question by the contrary opinions of Drs. Broudy, Dahhan, Fino, Wise, and Rosenberg. Decision and Order at 22; Director's Exhibit 92; Employer's Exhibits 1-6. Because the administrative law judge properly discredited Dr. Hussain's opinion, he was not required to accord greater weight to his opinion based upon his status as claimant's treating physician. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). We find no error in the administrative law judge's consideration of Dr. Hussain's opinion. Because claimant fails to raise any other contention of error regarding the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability, this finding is affirmed. *See* 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See 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*). Consequently, we need not address claimant's challenge to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) (2000). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

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FEV1/FEV ratio suggestive of black lung. Claimant's Exhibit 1. Dr. Hussain similarly indicated that claimant's arterial blood gas studies from 1998 to 2000 revealed a low PO2 suggestive of chronic obstructive pulmonary disease secondary to black lung. *Id.* Dr. Hussain, however, failed to explain how the results of claimant's objective studies supported his finding of a totally disabling respiratory impairment.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge