BRB No. 02-0444 BLA

HARLIS I. MUSICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD 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 Third Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Third Remand - Denying Benefits (96-BLA-1008) of Administrative Law Judge Clement J. Kichuk on a duplicate 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] This case is before the Board for the fourth time.[2] Most recently, the

[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 20 C.F.R.

Board, in *Musick v. Clinchfield Coal Co.,* BRB No. 98-1581 BLA (Mar. 29, 2000)(unpublished), vacated the findings of Administrative Law Judge Joan Huddy Rosenzweig at 20 C.F.R. §718.204(c)(2) and (c)(4) (2000) relevant to the issue of total respiratory or pulmonary disability.[3] The Board thus remanded the case for the administrative law judge to reweigh the blood gas study evidence and certain medical opinions. On remand, the case was assigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge), who issued a Decision and Order dated March 12, 2002. The administrative law judge found that total disability was not established under 20 C.F.R. §718.204(c)(2) or (c)(4) (2000) and thus, that claimant failed to establish total disability under 20 C.F.R. §718.204(c) (2000). Therefore, the administrative law judge denied benefits.[4]

Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] A comprehensive procedural history of this case is found in the Board's 2000 Decision and Order. *Musick v. Clinchfield Coal Co.*, BRB No. 98-1581 BLA (Mar. 29, 2000)(unpublished).

[3] The Board affirmed Administrative Law Judge Joan Huddy Rosenzweig's finding that claimant's last and usual coal mine employment, as a roof bolter and miner operator helper, constituted heavy labor. *Musick*, slip op. at 5.

[4] Contrary to claimant's assertion, the administrative law judge did not reconsider the issue of the presence of pneumoconiosis. In fact, the administrative law judge noted specifically that the Board in *Musick* affirmed Judge Rosenzweig's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1) (2000). Decision and Order on Remand at 2; *see Musick*, slip op. at 4. Subsequent to the issuance of the Board's March 29, 2000 Decision and Order in *Musick*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, issued its decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), holding that the administrative law judge must consider all relevant evidence together under 20 C.F.R. §718.202 rather than merely within the discrete subsections of the regulation. Inasmuch as we herein affirm the denial of benefits based on the administrative law judge's finding that the evidence fails to establish total disability under 20 C.F.R. §718.204(c) (2000), *see* 20 C.F.R. §718.204(b), we need not remand the case for the administrative law judge to determine the sufficiency of the evidence at 20 C.F.R. §718.202 under *Compton*, as a finding of entitlement is

precluded in this case. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *see* discussion, *infra*.

On appeal, claimant challenges the administrative law judge's assessment of the blood gas study and medical opinion evidence, asserting that the administrative law judge improperly discredited the medical evidence of record that establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4) (2000).[5] Employer responds, urging affirmance of the decision below, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a statement that he will not file a brief in this appeal.

The Board must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish total respiratory or pulmonary disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement.

Claimant asserts that the administrative law judge erred in his analysis of the blood gas study evidence at 20 C.F.R. §718.204(c)(2) (2000), *see* 20 C.F.R. §718.204(b)(2)(ii), by placing undue significance on the blood gas study of August 1994, while ignoring studies conducted between January 1979 and July 1981.

In its Decision and Order issued on March 29, 2000, the Board held that Judge Rosenzweig "impermissibly found the most recent blood gas study evidence sufficient to establish a totally disabling respiratory impairment at

[5] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c)(2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b)(2000), is now found at 20 C.F.R. §718.204(c).

Section 718.204(c)(2)… as she based her conclusion solely on the August 1994 qualifying blood gas study without considering the other relevant blood gas studies and without providing an explanation for her finding." *Musick*, slip op. at 6-7. Therefore, in remanding the case, the Board ordered the administrative law judge to reconsider the blood gas study evidence.

On remand, the administrative law judge noted that, in finding total disability established at Section 718.204(c)(2) (2000), Judge Rosenzweig gave "determinative supportive weight" to the blood gas study of August 1994. Decision and Order on Remand at 7. The administrative law judge stated, however, that the validity of this blood gas study was "significantly questionable as it was administered to [claimant] at the time of his severe pulmonary and cardiac illness." *Id.* The administrative law judge found that crediting such a blood gas study ignored the regulatory provision at Appendix C to Part 718, which states that "tests shall not be performed during or after respiratory or cardiac illness." *Id.* The administrative law judge also noted that subsequent blood gas studies, administered by Drs. Sargent and Smiddy in 1996,[6] "demonstrated no disabling respiratory condition." *Id.* The administrative law judge concluded that, considering all of the blood gas study evidence of record, total disability was not established pursuant to Section 718.204(c)(2) (2000). *Id*.

On appeal, claimant asserts that the administrative law judge misinterpreted the blood gas studies obtained by Drs. Smiddy and Sargent. Claimant maintains that the administrative law judge erroneously found that the "non-qualifying scores on [the] tests showed improvement." Claimant's Brief at 3. However, under the regulations, non-qualifying blood gas studies cannot establish total disability. *See* 20 C.F.R. §718.204(b)(2)(ii). Therefore, we affirm the administrative law judge's finding that the blood gas study evidence of record fails to establish total disability. *Id.*

At 20 C.F.R. §718.204(c)(4) (2000), *see* 20 C.F.R. §718.204(b)(2)(iv), claimant asserts that the administrative law judge erred in finding that the medical credentials of Dr. Sargent, who found that claimant is not totally disabled, are superior to those of Dr. Smiddy, who opined that claimant suffers from a totally disabling respiratory disease, and, therefore, erred in crediting Dr. Sargent's opinion on this basis. We disagree. The record

[6] Dr. Smiddy's test was conducted on October 3, 1996; Dr. Sargent's test was conducted on August 19, 1996.

reflects that Dr. Sargent is Board-certified in internal medicine and pulmonary diseases. Employer's Exhibit 4. The record further reflects that Dr. Smiddy is Board-certified only in internal medicine. Claimant's Exhibit 1. Although an administrative law judge is not required to credit a physician with superior credentials, *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(en banc); *Worley v. Blue Diamond Coal Co.,* 12 BLR 1-20 (1988); *McMath v. Director, OWCP,* 12 BLR 1-6 (1988), in the exercise of his discretion, he may do so. *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988). Therefore, we affirm the administrative law judge's decision to credit Dr. Sargent's opinion over that of Dr. Smiddy on the basis of credentials.

Claimant next asserts that the administrative law judge erred in according any weight to the opinion of Dr. Sargent at 20 C.F.R. §718.204(c)(4) (2000), *see* 20 C.F.R. §718.204(b)(2)(iv), inasmuch as the doctor concluded that claimant does not have pneumoconiosis when claimant has established pneumoconiosis in this case. We disagree. The existence of pneumoconiosis and total respiratory disability are separate and distinct elements of entitlement. *Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996). Moreover, as fact-finder, the administrative law judge has the discretion to decide the credibility of the medical reports of record, *see Clark, supra*; *Kuchwara v. Director, OWCP,* 7 BLR 1-167 (1984), and 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 (1988)(*en banc)*; *Calfee v. Director, OWCP,* 8 BLR 1-7 (1985). Therefore, we affirm the administrative law judge's crediting of Dr. Sargent's medical report as a reasonable exercise of his discretion.

Next, claimant argues that the administrative law judge erred in failing to accord controlling weight to the medical report of Dr. Rupke, the miner's treating physician, pursuant to 20 C.F.R. §718.104(d), and erred in finding that Dr. Rupke failed to provide a rationale for his diagnosis that claimant is totally disabled due to pneumoconiosis. Contrary to claimant's suggestion, the new regulation found at Section 718.104(d) is applicable only to evidence developed after January 19, 2001, and thus is inapplicable to this case. 20 C.F.R. §718.101(b). Moreover, the administrative law judge did not discredit Dr. Rupke's report on the basis that the doctor failed to provide a rationale for his diagnosis. Instead, the administrative law judge found:

> Dr. Rupke's opinion of disability is not well reasoned, and is discredited by substantial contrary probative evidence. Dr.

> Rupke specializes in Family Practice. His opinion on the issue of disability is outweighed by the superior qualifications of Drs. Fino and Sargent [,who] found [that] no disabling lung condition could be established by the medical evidence.

Decision and Order on Remand at 15-16. Thus, in essence, the administrative law judge declined to credit Dr. Rupke's report because he found the record to contain more credible opinions that present a contrary conclusion. Moreover, while the opinion of a treating physician may be accorded deference in the weighing of medical opinion evidence, *see Onderko v. Director, OWCP,* 14 BLR 1-2 (1989); *Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that treating physicians are not to be automatically accorded controlling weight. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Therefore, we affirm the administrative law judge's decision not to credit Dr. Rupke's opinion.

Further, claimant asserts that the administrative law judge erred by ignoring the fact that the Board had affirmed Judge Rosenzweig's previous crediting of Dr. Smiddy's opinion that claimant is totally disabled due to pneumoconiosis. In its review of Judge Rosenzweig's 1998 Decision and Order, the Board affirmed Judge Rosenzweig's decision to credit the medical opinion of Dr. Smiddy, holding that it was rational and supported by substantial evidence. *Musick,* slip op. at 8. On remand, however, the administrative law judge found that "Dr. Fino's report demonstrates substantial, reliable, probative evidence which discredits the opinions of Drs. Rupke and [] Smiddy relating to total disability." Decision and Order on Remand at 13. The administrative law judge on remand, reconsidering Dr. Smiddy's opinion in relation to Dr. Fino's opinion, permissibly accorded less weight to Dr. Smiddy's opinion based on his finding that Dr. Fino's opinion discredits it. *See Worley, supra*. We thus are not persuaded by claimant's assertion that the administrative law judge attempted to supersede the holding of the Board by according less weight to Dr. Smiddy's opinion on remand.

Additionally, claimant argues that the administrative law judge failed to recognize the progressive nature of pneumoconiosis by weighing "medical evidence from the 1980's as equal to that of the mid 1990's." Claimant's Brief at 8. In considering the medical evidence with respect to the issue of total disability, the administrative law judge paid particular attention to the

most recently developed medical evidence of record. Decision and Order on Remand at 13-15. This evidence consists of the blood gas studies and medical reports rendered between 1993 and 1996. The administrative law judge did not rely on any report submitted in the 1980s to reach the conclusion that claimant failed to establish that he is totally disabled. Although an administrative law judge may not rely solely upon the recency of medical evidence in assigning probative value to that evidence, *Consolidation Coal Co. v. Held*, 314 F.3d 184, BLR (4th Cir. 2002); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), in the exercise of his discretion, he may find that, based on the record as a whole, the most recently developed evidence is most reflective of the miner's current physical condition. *See Adkins, supra*; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Therefore, we reject claimant's argument and hold that the administrative law judge properly relied on the most recent relevant evidence in reaching his conclusion that claimant failed to establish total disability under 20 C.F.R. §718.204(c), *see* 20 C.F.R. §718.204(b).

Finally, claimant asserts that the administrative law judge erred in failing to apply the amended regulations at 20 C.F.R. §§718.104(d), 718.201(a)(2) and 718.204(a). We disagree. The regulation at 20 C.F.R. §718.104(d), referring to an administrative law judge's weighing of the medical opinion rendered by a miner's treating physician, applies to evidence developed after January 19, 2001. 20 C.F.R. §718.101(b). Because this record contains no medical evidence developed after January 19, 2001, it is not applicable to any evidence herein. Further, the regulation at 20 C.F.R. §718.204(a), referring to cases in which a nonpulmonary or nonrespiratory disease is at issue, has no relevance in the instant case. Because we herein affirm the administrative law judge's denial of benefits based on his finding that the evidence fails to establish total disability under 20 C.F.R. §718.204(c), *see* 20 C.F.R. §718.204(b), this case does not implicate the regulation at 20 C.F.R. §718.201(a)(2), referring to the definition of legal pneumoconiosis.

Inasmuch as the administrative law judge properly determined that the evidence fails to establish total disability at 20 C.F.R. §718.204(c) (2000), *see* 20 C.F.R. §718.204(b), an essential element of entitlement, a finding of entitlement is precluded. *Trent, supra*; *Perry, supra*.

In light of the foregoing, we need not address claimant's challenges to the administrative law judge's findings regarding disability causation at 20 C.F.R. §718.204(b) (2000), *see* 20 C.F.R. §718.204(c), and regarding onset at

20 C.F.R. §725.503 (2000).

Accordingly, the administrative law judge's Decision and Order on Third Remand - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge