BRB No. 05-0790 BLA

JAMES C. COCHRAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED STATES STEEL MINING COMPANY	)	DATE ISSUED: 03/29/2006
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-5331) of Administrative Law Judge Daniel F. Solomon awarding 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). The parties stipulated, and the administrative law judge found, that employer was the responsible operator. Decision and Order at 2; Hearing Transcript at 27. Based on the date of filing, the administrative law judge considered entitlement

pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 2, 4; Director's Exhibit 2. The administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. The administrative law judge further determined that although claimant had nine years and two months of actual coal mine employment, he was required to apply 20 C.F.R. §725.101(a)(32), which resulted in claimant being credited with at least ten years of qualifying coal mine employment. The administrative law judge found, therefore, that claimant was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment. Decision and Order at 9-13. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the evidence of record was sufficient to establish entitlement. Claimant responds, urging affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[1] Claimant filed his claim for benefits on September 27, 2002. Director's Exhibit 2. Benefits were awarded by the district director on September 26, 2003. Director's Exhibit 24. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 26, 30-32.

[2] The administrative law judge's responsible operator determination as well as his findings pursuant to 20 C.F.R. §718.204(b)(2)(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer initially contends that the administrative law judge erred in finding the existence of pneumoconiosis established under Section 718.202(a)(1), as the negative x-ray interpretations constitute the preponderance of the evidence. We disagree. The administrative law judge noted that the April 28, 2003 and the November 8, 2002 x-rays were read as negative by Drs. Hippensteel and Forehand and that the May 24, 2004 x-ray was read as positive by a Dr. Patel. Decision and Order at 9; Director's Exhibit 16; Employer's Exhibit 1; Claimant's Exhibit 1. The administrative law judge permissibly accorded greatest weight to the positive reading of the May 24, 2004 film, based upon Dr. Patel's superior qualifications as both a B reader and Board-certified radiologist and the recency of the x-ray.[3] *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002); *Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); Decision and Order at 9; Director's Exhibit 16; Employer's Exhibit 1; Claimant's Exhibit 1.

Thus, we affirm the administrative law judge's rational determination that the x-ray evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). We also affirm the administrative law judge's determination that the medical opinions of record support a finding of pneumoconiosis pursuant to Section 718.202(a)(4) and that the evidence of record, as a whole, is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), as these findings have not been challenged on appeal. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9-10.

Employer also contends that in light of the nonqualifying studies and the medical opinions of record, the administrative law judge erred in finding that the miner was totally disabled pursuant to Section 718.204(b). Employer's allegations of error are without merit. In considering whether the evidence of record was sufficient to establish total disability under Section 718.204(b)(2), the administrative law judge acted within his discretion as fact-finder in relying upon the qualifying exercise blood gas studies[4] and the fact that the physicians who provided well reasoned opinions on the issue of total

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[3] The record indicates that Drs. Hippensteel and Forehand are B readers. Director's Exhibit 16; Employer's Exhibit 1.

[4] 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. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

disability -- Drs. Forehand, Hippensteel and Rasmussen -- agreed that claimant is disabled from performing his last coal mine employment due to the deficiency in oxygen transfer revealed on the exercise blood gas studies.[5] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order at 12; Director's Exhibit 16; Employer's Exhibit 2; Claimant's Exhibit 1.

Employer also argues that, pursuant to Section 718.204(c), the administrative law judge erred in failing to accord greater weight to the opinion in which Dr. Hippensteel attributed claimant's totally disabling condition to cardiac disease, in light of his qualifications as a Board-certified pulmonologist and because his opinion is better supported by the evidence of record.[6] We disagree. Although an administrative law judge may assign more weight to a physician's opinion based upon his qualifications, the administrative law judge is not obligated to do so. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985). Rather, the administrative law judge must consider the reliability and credibility of the relevant evidence in rendering his findings. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo*, 17 BLR 1-85; *Worley*, 12 BLR 1-20. In this regard, the administrative law judge acted within his discretion as fact-finder in according less weight to Dr. Hippensteel's opinion, as his opinion was based on premises contrary to the administrative law judge's findings as to the existence of pneumoconiosis under Section 718.202(a). *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g*

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[5] Dr. Forehand opined that claimant was totally and permanently disabled as insufficient residual oxygen-transport capacity remains to continue in his last coal mining job. Director's Exhibit 16. Dr. Hippensteel initially stated that claimant had the pulmonary capacity to return to his previous job in the mines but in a supplemental report, in which the physician discussed additional medical evidence, Dr. Hippensteel agreed with Dr. Forehand that claimant's gas exchange impairment with exercise is indicative of enough impairment to keep him from going back to his job in the mines. Employer's Exhibits 1, 2. Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job. Claimant's Exhibit 1.

[6] The administrative law judge's credibility determination with respect to the opinion of Dr. Forehand is unchallenged on appeal and is therefore affirmed. *Skrack*, 6 BLR 1-710.

14 BLR 1-37 (1990)(*en banc*); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Compton*, 211 F.3d at 213-14, 22 BLR at 2-179.

In addition, the administrative law judge rationally found that the opinion in which Dr. Rasmussen stated that coal dust exposure was a contributing cause of claimant's totally disabling impairment, was entitled to greater weight than Dr. Hippensteel's opinion, as he permissibly found that Dr. Rasmussen considered the most recent, probative evidence, his diagnoses were explained in detail and were well supported by the objective evidence of record, and he persuasively challenged Dr. Hippensteel's etiology. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; Decision and Order at 12-13. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).

Finally, employer contends that the administrative law judge erred in finding claimant entitled to the presumption, set forth in Section 718.203(b), that his pneumoconiosis arose out of coal mine employment. Employer argues specifically that the administrative law judge erred in crediting claimant with at least ten years of coal mine employment based upon his application of 20 C.F.R. §725.101(a)(32). We agree. The administrative law judge found, based upon the documentary evidence and the testimony of record, that the "actual" time that claimant spent as a coal miner totaled nine years and two months; the figure conceded by employer. Decision and Order at 4; Hearing Transcript at 7, 26-27. The administrative law judge concluded that because the amended regulations are applicable to this claim, he was required to calculate claimant's coal mine employment based upon the method described in Section 725.101(a)(32). The administrative law judge then credited claimant with "at least" ten years of coal mine employment based upon his finding that claimant worked as a coal miner for at least 125 days during ten separate calendar years.[7] Decision and Order at 4; Director's Exhibit 5.

An examination of the relevant provision reveals that the administrative law judge did not properly apply the definition of "year" that is set forth in Section 725.101(a)(32). Under this provision, for purposes of computing the length of coal mine employment, the

[7] The administrative law judge stated correctly that the documentary evidence establishes that claimant began his coal mine employment on May 5, 1975 and completed his last stint as a miner on July 23, 1986. Decision and Order at 4; Director's Exhibit 5. During this period, claimant did not work as a miner from April 8, 1982 through January 4, 1984, and from September 28, 1984 through January 13, 1985. *Id*.

term "year" refers to an employment relationship totaling 365 days, within which at least 125 days were spent working in or around a coal mine.[8] 20 C.F.R. §725.101(a)(32). If a miner has had an employment relationship for distinct periods of less than one year, these periods must be aggregated until they amount to 365 days. The fact-finder must then determine whether the miner spent at least 125 working days as a coal miner during that year. *See Croucher v. Director, OWCP*, 20 BLR 1-67 (1996).

Applying Section 725.101(a)(32) to the evidence credited by the administrative law judge, claimant cannot establish that he worked for at least ten years as a coal miner. When claimant's discrete periods of coal mine work are aggregated to meet the 365 day requirement, they total nine years and two months, a figure identical to the history conceded by employer and to the length of "actual" coal mine employment calculated by the administrative law judge. Decision and Order at 4; Director's Exhibit 5; Hearing Transcript at 7, 26-27. Because claimant cannot establish at least ten years of coal mine employment, we must reverse the administrative law judge's finding that claimant was entitled to the presumption set forth in Section 718.203(b) and remand this case to the administrative law judge for consideration of whether claimant has established, by a preponderance of the evidence, that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). *Croucher*, 20 BLR 1-67.

[8] The term "year" designates a period of 366 days if one of the days is February 29. 20 C.F.R. §725.101(a)(32).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge