BRB No. 99-0804 BLA

DAVID BOYD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NICK'S COAL COMPANY, INCORPORATED	)	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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Arnold Turner, Jr. (Turner Law Office, PSC), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0215) of Administrative Law Judge Robert L. Hillyard 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 administrative law judge credited

[1]Claimant filed his first claim on October 17, 1973. Director's Exhibit 38. However, on July 7, 1983, Administrative Law Judge Roy J. Maurer issued an Order, granting claimant's request to withdraw his claim. *Id*. Claimant filed his most recent claim on October 2, 1996. Director's Exhibit 1. In his decision, Administrative Law

claimant with nineteen and one-quarter years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4)[2] and 718.203(b). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant 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)(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.*,

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Judge Robert L. Hillyard (the administrative law judge) correctly stated that "because [claimant] withdrew his first claim, the present claim must be treated as if the prior claim had not been filed." Decision and Order at 5; 20 C.F.R. §725.306(b).

[2]The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3).

[3]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(1)-(4), 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).

380 U.S. 359 (1965).

Claimant contends that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). We disagree. Whereas Drs. Baker, Gibson, Odom and Sundaram opined that claimant suffers from a disabling respiratory impairment, Director's Exhibits 14, 15, 17, 31, 38; Claimant's Exhibits 2, 3, Drs. Broudy, Fritzhand, Jarboe and Vuskovich opined that claimant does not suffer from a disabling respiratory impairment, Director's Exhibits 16, 18, 38; Employer's Exhibit 3. Dr. Myers opined that claimant "falls into Class I under AMA Guidelines insofar as respiratory impairment is concerned." Director's Exhibit 13. Dr. Myers also opined that although claimant's "silicosis is more advanced than one would expect with his degree of exposure...[h]e does not, however, show respiratory function impairment on that basis at this time." *Id*. In a report dated January 23, 1973, a physician, whose signature is illegible, opined that claimant suffers from a disabling respiratory impairment. Director's Exhibit 38. Dr. Varney did not render an opinion with regard to the issue of total disability. Director's Exhibit 38. The administrative law judge, as trier of fact, rationally accorded greater weight to Dr. Jarboe's opinion because of his superior qualifications.[4] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

[4]The administrative law judge stated that Dr. Jarboe is "Board certified in Internal [M]edicine and Pulmonary Disease." Decision and Order at 8. The record does not contain the credentials of the other physicians.

Claimant asserts that the administrative law judge should have accorded determinative weight to Dr. Gibson'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 trier of fact, 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. Gibson's opinion is insufficient to establish total disability because he found it to be not well reasoned and documented.[5] *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). Thus, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Gibson's opinion due to his status as claimant's treating physician.[6] Moreover, inasmuch as it is supported by

[5]The administrative law judge stated that "[a]lthough the Claimant testified that Dr. Gibson was his current treating physician, Dr. Gibson provided no bases in his most recent letter for his blanket statement that [claimant] is disabled from performing any gainful employment." Decision and Order at 13. The administrative law judge observed that "Dr. Gibson listed the ailments for which he was currently treating [claimant], but does not support his disability opinion with any particular findings, studies, or examination reports." *Id*.

[6]The administrative law judge observed that "[t]wo of the four older reports of record state that [claimant] is disabled from performing his usual coal mine work." Decision and Order at 13. The administrative law judge also observed that "[o]f the more recent reports, based on information obtained from 1995 to 1998, three physicians, Drs. Gibson, Baker, and Sundaram, reported that [claimant] was physically unable, from a respiratory standpoint, to perform his usual coal mine work." *Id*. Further, the administrative law judge observed that "Drs. Vuskovich, Fritzhand, and Jarboe believed that [claimant] was not totally disabled from a pulmonary standpoint and could, indeed, perform his last coal mine work." *Id*. The administrative law judge accorded "greater probative weight to the most recent medical examination reports, specifically those reports based upon exams performed in 1997 and 1998 by Drs. Gibson and Jarboe." *Id*. We hold that any error by the administrative law judge in according greater weight to the most recent medical opinions of record is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23

substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).[7]

Since claimant failed to establish total disability 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. *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.

(4th Cir. 1993), inasmuch as the administrative law judge provided a valid alternate basis for finding the evidence insufficient to establish total disability, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he rationally accorded greater weight to Dr. Jarboe's opinion, that claimant does not suffer from a disabling respiratory impairment, than to the contrary medical opinions of record because of his superior qualifications, *see Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, as to evidence of disability, the crucial inquiry is claimant's condition at the time of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1232-33, 17 BLR 2-97, 2-102 (6th Cir. 1993).

[7]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, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge