BRB No. 00-0859 BLA

IRA C. WRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Timothy S. Williams (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-00886) of Administrative Law Judge Lawrence P. Donnelly 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).[1] Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718 (2000),[2] the administrative law judge found 17.23 years of coal mine employment and concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and 718.203(b) (2000). Decision and Order at 3-8. The administrative law judge further determined that claimant established that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). Decision and Order at 8-11. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) (2000), in finding that total disability was established pursuant to 20 C.F.R. §718.204(c)(1), (4) (2000) and that the disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Claimant has not responded in the instant appeal. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the award of benefits.[3]

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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.

[2]Claimant filed his claim for benefits on October 16, 1997. Director's Exhibit 1.

[3]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b) and

718.204(c)(2)-(3) (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 by order issued on March 9, 2001, to which employer and the Director have responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's order.[4] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 the 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.*, 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 (2000); *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*).

Employer initially contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) (2000) as he failed to consider the additional opinions of Drs. Cox and Henry.[5] Employer's Brief at 4. We

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[5]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material

disagree. The administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence. Decision and Order at 6; Employer's Exhibits 8, 11.

Employer also asserts that the administrative law judge erred in finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) (2000) as he failed to specifically discuss the basis for the physicians' conclusions. We agree. In addressing the medical opinions of record pursuant to 20 C.F.R. §718.202(a)(4) (2000), the administrative law judge gave less weight to Dr. Fino's opinion as he found that the CT scan the physician interpreted was of poor quality due to motion artifact and Dr. Fino's opinion that claimant has a normal pulmonary system was outweighed by the other evidence of record which indicated that claimant had a severe respiratory impairment. Decision and Order at 8. The administrative law judge concluded that based upon the hospital records, the pulmonary function studies, the opinion of claimant's treating physician and the opinion of Dr. Paranthaman, who holds three board-certifications, including one in pulmonary medicine, Dr. Fino's opinion was not persuasive and clearly outweighed. Decision and Order at 8. The administrative law judge then concluded that the weight of the medical opinion evidence establishes the existence of pneumoconiosis. Decision and Order at 8.

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issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

The factors to which the administrative law judge referred are relevant in determining the weight to be assigned a particular medical opinion, but the administrative law judge must first specifically determine if the opinions of record are reasoned and documented and therefore credible.[6] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In the instant case, the administrative law judge did not determine if the opinions were reasoned and documented but only compared the physicians' findings on physical examination. Decision and Order at 8. The administrative law judge did not review the medical opinions in the context of their objective evidence which may provide a basis for determining the credibility of the opinions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 8. In determining if a party has met its burden of proof, the United States Court of Appeals for the Fourth Circuit has held that an administrative law judge should consider the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions.[7] *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). Moreover, a physician's opinion based upon the review of other opinions and objective test results, may be substantial evidence in support of an administrative law judge's findings. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). In evaluating the medical opinion evidence, the administrative law judge should assess "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgements and the sophistication and bases of their diagnosis." *Akers, supra*; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). In this case, as the administrative law judge did not specifically consider and discuss the weight he accorded the various medical opinions of record, in view of the case law from the Fourth Circuit, we vacate the administrative law judge's findings that the existence of pneumoconiosis was established by the medical opinion evidence and remand this case to the administrative law judge for a full review of the record

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[6]Contrary to employer's contention, Dr. Paranthaman's mistaken assumption as to the years of claimant's coal mine employment does not affect, in the absence of evidence to the contrary, the physician's reading of the x-ray film. *Auxier v. Director, OWCP*, 8 BLR 1-109 (1985). However, this is a factor which may affect the overall credibility of the physician's opinion. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

[7]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

as a whole in light of these authorities.[8] Furthermore, the administrative law judge, in determining if claimant has met his burden of proof, must consider all factors relevant to the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo, supra*; *Fields, supra*; *Lucostic, supra*.

Further, we note that subsequent to the issuance of the administrative law judge's Decision and Order, the Fourth Circuit held that although Section 718.202(a) (2000) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000). Consequently, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), (4) (2000), then the administrative law judge, on remand, must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) (2000) together in determining whether claimant suffers from pneumoconiosis. *Compton, supra*.

[8]The record indicates that Dr. Paranthaman, as the administrative law judge indicated, is a B reader and board-certified in internal, pulmonary and critical care medicine. Director's Exhibit 16. The record further indicates that Dr. Fino is as well credentialed in respiratory disease as the physician is also a B reader and board-certified in internal and pulmonary medicine. Director's Exhibits 30, 32; Employer's Exhibit 23.

Employer further contends that the administrative law judge erred in finding total disability established based upon the pulmonary function study evidence of record. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's authority. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). In the instant case, the administrative law judge rationally found that total disability was established based on a thorough and accurate consideration of the pulmonary function study evidence of record. Decision and Order at 10; Director's Exhibits 14, 15, 28, 30, 32; Claimant's Exhibits 1, 3; Employer's Exhibits 18, 24. The administrative law judge properly noted that the studies conducted on July 29, 1997 and March 3, 1998 were non-qualifying and the studies conducted on November 10, 1997 and May 6, 1998 were qualifying.[9] Decision and Order at 10; Director's Exhibits 14, 30, 32; Employer's Exhibit 18; Claimant's Exhibits 1, 3. The administrative law judge rationally determined that the March 3, 1998 and May 6, 1998 studies were invalid based upon Dr. Fino's uncontradicted review and that the November 10, 1997 qualifying pulmonary function study of record was valid as the administering physician did not question the reliability of the study and as a reviewing physician, Dr. Michos, who is board-certified in internal medicine and pulmonary disease, concluded that the study was acceptable. *See* Decision and Order at 9-10; Director's Exhibits 14, 15, 28, 30, 32; Claimant's Exhibits 1, 3; Employer's Exhibit 24; *Trent, supra*; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). It was within the administrative law judge's discretion to credit the opinion of the administering physician as well as the opinion of Dr. Michos validating the November 10, 1997 qualifying study of record, as these physicians have equal or superior qualifications to the physicians that found this study invalid. *Dillon v. Director, OWCP*, 11 BLR 1-113 (1988); *Winchester, supra; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Piccin, supra*. We therefore affirm the administrative law judge's weighing of the pulmonary study evidence as it is supported by substantial evidence and is in accordance with law.

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established a totally disabling respiratory impairment. This

[9]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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2000).

contention has merit. In addressing whether the medical opinions established total disability, the administrative law judge initially accorded great weight to the opinion of Dr. Paranthaman based on his qualifications and as the hospital records and the opinion of the treating physician support his conclusions. Decision and Order at 10. The administrative law judge then accorded less weight to the opinion of Dr. Fino as the physician did not accept Dr. Paranthaman's pulmonary function study and his opinion goes against the great weight of the evidence. Decision and Order at 10. The administrative law judge then accorded greater weight to Dr. Paranthaman's opinion and concluded that claimant has established that he is totally disabled. Decision and Order at 10.

For the reasons previously addressed with respect to the administrative law judge's findings pursuant to Section 718.202(a)(4) (2000), we must also vacate the administrative law judge's findings that the medical opinion evidence is sufficient to establish total disability. On remand, the administrative law judge must specifically determine if the opinions of record are reasoned and documented and review the medical opinions in the context of their objective evidence which may provide a basis for determining the credibility of the opinions. *See Trumbo, supra*; *Fields, supra*; *Lucostic, supra*. Additionally, in determining if a party has met its burden of proof, the Fourth Circuit has held that an administrative law judge should not automatically credit the testimony of a treating or an examining physician merely because the physician treated or personally examined the miner; rather the administrative law judge should also consider all the relevant factors in accessing the credibility of the medical evidence. *See Hicks, supra*; *Akers, supra*. The administrative law judge, in this case, did not expressly state his findings regarding the credibility of all of the record evidence, including the opinions supportive of claimant's position. We therefore vacate the administrative law judge's finding that total disability was established by the medical opinion evidence and remand this case to the administrative law judge for further consideration. *See Hicks, supra*; *Akers, supra*; *Collins, supra*; *Trumbo, supra*; *Fields, supra*; *Lucostic, supra*. On remand, the administrative law judge is instructed to reconsider the medical opinion evidence of record with specific findings as to the credibility of each medical opinion. If the administrative law judge finds the medical opinion evidence demonstrative of a totally disabling respiratory impairment, it must be weighed against the "contrary probative evidence" pursuant to Section 718.204. *See* Black Lung Benefits Amendments, 65 Fed. Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(b); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock, supra*; *Gee, supra*.

In addition, employer challenges the administrative law judge's finding that the miner's total disability was due to coal mine employment. Employer argues that, contrary to the APA and *Akers*, the administrative law judge failed to explain his assessment or provide any rationale for finding the opinions supportive of claimant's burden to be well reasoned or supported by the evidence of record. We agree with employer that the administrative law

judge did not provide a thorough analysis of the medical opinion evidence in light of *Hicks* and *Akers* and vacate his finding regarding total disability due to pneumoconiosis. On remand, the administrative law judge is instructed to reconsider his findings on this issue, if reached, in accordance with the proper causation standard. *See* Black Lung Benefits Amendments, 65 Fed. Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(c); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225, (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Additionally, the administrative law judge should make a specific length of smoking determination in light of the conflicting histories provided by claimant in the record.

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge