BRB No. 01-0679 BLA

ONSBY C. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Joel K. Stein (Tiede, Metz, Downs, Lynn & Schlitt, P.C.), Wabash, Indiana, for claimant.

Barry H. Joyner (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0962) of Administrative Law Judge Rudolf L. Jansen 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] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law

[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.

judge found that seven and one-quarter years of coal mine employment were established, that the existence of pneumoconiosis was not contested by the Director, Office of Workers' Compensation Programs (the Director), *see* 20 C.F.R. §718.202(a), and that pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §718.203(c). The administrative law judge further found, however, that total disability was not demonstrated by the pulmonary function study and blood gas study evidence of record pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii), that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record, *see* 20 C.F.R. §718.204(b)(2)(iii), and that total disability was not was not demonstrated by the medical opinion evidence of record pursuant to 20 C.F.R. §718.204(b)(2)(iv). Accordingly benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the relevant medical opinion evidence and lay testimony did not establish total disability pursuant to Section 718.204(b)(2)(iv).[2] The Director responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed. Alternatively, the Director contends that the administrative law judge erred in finding pneumoconiosis arising out of coal mine employment established pursuant to Section 718.203(c). In reply, claimant contends that the administrative law judge erred in determining the length of claimant's coal mine employment and, therefore, in not finding pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b).

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.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 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). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204, the administrative law judge must

[2] Inasmuch as the administrative law judge's findings pursuant to Sections 718.202(a) and 718.204(b)(2)(i)-(iii) are not challenged by any party on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Initially, the administrative law judge accorded little weight to the opinions of Drs. Mathew and Ardeshna on the issue of total disability because he found the January, 1997, opinion of Dr. Mathew, that claimant was totally disabled due to his multiple medical problems and pneumoconiosis, Director's Exhibit 18; Claimant's Exhibit 3, unreasoned and undocumented because Dr. Mathew provided no documentation, medical data or rationale for his opinion, and because Dr. Ardeshna opined that claimant did not have any "significant" pulmonary impairment, Director's Exhibit 16. Inasmuch as the administrative law judge's findings in regard to the opinions of Drs. Mathew and Ardeshna are not challenged by claimant on appeal, they are affirmed, *see Skrack, supra*.

The administrative law judge next considered the opinion of claimant's treating physician, Dr. Farnsworth, who was the only other physician of record who found that claimant was totally disabled due to pneumoconiosis. In a June, 2000, opinion, Dr. Farnsworth noted that claimant "complained of intermittent episodes of chest pain, lightheadedness, diaphoresis and a chronic cough, which at times has been completely disabling," that claimant's most recent pulmonary function study from August, 1999, was "normal" and that a previous pulmonary function study demonstrated "mild" restrictive lung disease, Director's Exhibit 16. Subsequently, in a November, 2000, opinion, Dr. Farnsworth diagnosed coal workers' pneumoconiosis, which had progressed to the point that it was totally disabling, Claimant's Exhibit 2. Although the administrative law judge found that Dr. Farnsworth's opinion was based on his examinations and knowledge of the progress of claimant's condition as claimant's treating physician, the administrative law judge declined to give his opinion increased weight as it lacked adequate documentation.

Claimant contends, however, that Dr. Farnsworth's opinion as a whole is adequately documented, as it is supported by his accompanying medical treatment and progress records, x-ray, test and examination results, and claimant's work and medical histories. Claimant further contends that Dr. Farnsworth's opinion is supported by the lay testimony of claimant and his wife regarding claimant's condition.

Although the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,[3] has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians on the basis of their familiarity with a miner's condition when he was living, *see Tussey, supra*, the facts in the instant case are distinguishable from those in *Tussey*, where the claimant initially consulted a family physician and was then treated by a pulmonary specialist over a period of three years. *See Tussey*, 982 F.2d at 1038, 17 BLR at 2-17. In this case, as the qualifications of Dr. Farnsworth are not indicated in the record, claimant has not demonstrated that Dr. Farnsworth was a "treating" physician as contemplated in *Tussey*. Moreover, the principle that a treating physician's opinion may be accorded greater weight should not be applied mechanically without regard to the other evidence of record, *see Halsey v. Richardson*, 441 F.2d 1230 (6th Cir. 1971), and does not extend to opinions by treating physicians which are not well-reasoned, are undocumented, or are otherwise flawed, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Accordingly, we affirm the administrative law judge's accordance of less weight to Dr. Farnsworth's opinion because it did not indicate the documentation that was relied on to conclude that claimant was totally disabled due to his pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Additionally, although claimant contends that the lay testimony of claimant and his wife also support a finding of total disability, lay testimony of record, without credible, corroborating medical evidence, is insufficient to establish a totally disabling respiratory or pulmonary impairment in a living miner's case, *see* 20 C.F.R. §718.204(d)(5); *Trent, supra*; *Fields, supra*; *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984).

[3] The administrative law judge properly noted that because the miner's most recent coal mine employment was performed in Kentucky, the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, Decision and Order at 4 n. 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The administrative law judge also found that the contrary opinions of Drs. Ahuja, Combs, and Williams, that claimant had no pulmonary impairment, were well-documented and reasoned as they were supported by the objective evidence of record which that referenced. Director's Exhibits 5, 18. As claimant contends, the administrative law judge misidentified the physician who authored the September, 1998, examination report at Director's Exhibit 5 as Dr. Williams, when in fact the report was authored by Dr. Acquaro, who merely noted that Dr. Williams was claimant's personal physician, *see* Director's Exhibit 5. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). While the record does contain treatment notes from Dr. Williams, the notes do not, as claimant contends, address disability, *see* Claimant's Exhibit 1. However, inasmuch as the administrative law judge properly determined that the opinion at Director's Exhibit 5, albeit from Dr. Acquaro, found that claimant's lung testing was normal, any error by the administrative law judge with regard to this medical opinion evidence is harmless, *see Larioni*, *supra*.[4]

Finally, contrary to claimant's contention that the administrative law judge erred in crediting the 1995 opinion of Dr. Ahuja and the 1996 opinion of Dr. Combs, Director's Exhibit 18, as they were rendered prior to the filing of the instant claim (at a time when claimant admits that he was not totally disabled) and prior to the date of hearing, which is the date upon which the extent of disability is assessed by the administrative law judge in a living miner's case, *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988), the administrative law judge permissibly found, within his discretion, that the medical opinion evidence dating from the date of hearing was also insufficient to demonstrate total disability, as the administrative law judge found that Dr. Farnsworth's opinion was undocumented, whereas the administrative law judge found the contrary, 1998 opinion at Director's Exhibit 5, from Dr. Acquaro, was better supported by the objective evidence, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and therefore better reasoned and documented than the contrary opinion of Dr. Farnsworth. In addition, the June, 2000, opinion of Dr. Ardeshna, Director's Exhibit 16, found that claimant did not have any significant impairment, as the administrative law judge noted, Decision and Order at 11. Finally, although the administrative law judge did not specifically consider the opinions of Dr. Rasp from 1998 through 2000, Dr. Rasp also found that claimant did not have any significant impairment, Director's Exhibit 4; Claimant's Exhibit 4.[5]

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[4] The administrative law judge also did not specifically consider the opinions of Dr. Rasp from 1998 through 2000, Director's Exhibit 4; Claimant's Exhibit 4, under Section 718.204(b)(2)(iv), *see Tackett*, *supra*. However, inasmuch as Dr. Rasp found that claimant had only a mild restrictive impairment and did not have any significant abnormalities of his pulmonary function, any error by the administrative law judge in not considering the opinions of Dr. Rasp under Section 718.204(b)(2)(iv) is harmless, *see Larioni*, *supra*.

[5] Although claimant contends that any doubt raised by the evidence should be resolved

in claimant's favor, the "true doubt rule" has been disapproved by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), which held that the reference to the "burden of proof" in §7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), refers to the burden of persuasion, and therefore held that when the evidence is evenly balanced, the claimant must lose pursuant to Section 7(c), *see Ondecko, supra*.

Consequently, the administrative law judge's finding that total disability was not demonstrated by the medical opinion evidence pursuant to Section 718.204(b)(2)(iv) and, therefore, that total disability was not established by the preponderance of the relevant evidence of record under Section 718.204(b)(2) is affirmed, *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Sheckler v. Director, OWCP*, 7 BLR 1-128 (1984); *see also Ondecko*, *supra*, as supported by substantial evidence, *see Tussey*, *supra*; *Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*.[6]

[6] Inasmuch as the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2) is affirmed and the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to this claim filed after January 1, 1982, *see* 20 C.F.R. §§718.202(a)(3); 718.305(a), (e); Director's Exhibit 1, we need not address the Director's contention that the administrative law judge erred in finding that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203(c) or claimant's contention that the administrative law judge erred in determining the length of claimant's coal mine employment and, therefore, erred in not finding that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §718.203(b), *see Trent*, *supra*.

Accordingly, the administrative law judge's Decision and Order 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