BRB No. 01-0771 BLA

GARY L. HOWARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARTIN COUNTY COAL CORPORATION	)	
	)	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 Remand of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (99-BLA-0400) of Administrative Law Judge Thomas F. Phalen, Jr. 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 instant case involves a duplicate claim filed

[1]The Department of Labor has amended the regulations implementing the Federal

on February 18, 1998.[2] In the initial Decision and Order, Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), after crediting claimant with twelve and one-half years of coal mine employment, found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge, therefore, considered the merits of claimant's 1998 claim. After finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000), the administrative law judge found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Although the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3) (2000), the administrative law judge found that the medical opinion evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c)(4) (2000). Weighing all of the evidence together, the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). The administrative law judge also found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[3] Accordingly, the administrative law judge awarded benefits. By Decision and Order dated November 29, 2000, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1) (2000), 718.203(b) (2000), 718.204(c) (2000) and 725.309 (2000) as

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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]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on December 19, 1991. Director's Exhibit 29. In a Decision and Order dated June 14, 1994, Administrative Law Judge Paul H. Teitler found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Judge Teitler also found that the evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge Teitler denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1991 claim.

Claimant filed a second claim on February 18, 1998. Director's Exhibit 1.

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

unchallenged on appeal. *Howard v. Martin County Coal Corp.*, BRB No. 99-1305 BLA (Nov. 29, 2000) (unpublished). The Board, however, vacated the administrative law judge's finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish that his total disability was due to pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge committed numerous errors in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis. 20 C.F.R. §718.204(c)(1).[4] In finding the evidence insufficient to establish that the miner's total disability was due to pneumoconiosis, the administrative law judge credited the opinions of Drs. Dahhan, Castle and Branscomb that claimant's total disability

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[4]Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
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> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

was not due to pneumoconiosis over the contrary opinions of Drs. Younes and Baker. Decision and Order on Remand at 4-5.

Claimant initially contends that the opinions of Drs. Dahhan, Castle and Branscomb are entitled to little weight concerning the cause of claimant's pulmonary impairment because these doctors did not find that claimant suffered from pneumoconiosis. In the instant case, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). However, because Drs. Dahhan, Castle and Branscomb each explained that radiographic evidence of pneumoconiosis would not have affected their respective opinions regarding the cause of claimant's pulmonary impairment,[5] the administrative law judge could properly credit their opinions. *See generally Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304, (4th Cir. 1995) (A medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis

[5]Dr. Dahhan opined that even if claimant was found to have radiological evidence of simple coal workers' pneumoconiosis, he would continue to conclude that his chronic bronchitis and emphysema with secondary pulmonary disability were not due to coal workers' pneumoconiosis. Director's Exhibit 24. Dr. Castle opined that even if claimant had a chest x-ray interpreted as positive for simple coal workers' pneumoconiosis, claimant would still not be disabled by that process. Employer's Exhibit 2. Dr. Castle explained that his opinion was not predicated upon claimant having a negative chest x-ray, but upon claimant having no physiologic impairment related to coal workers' pneumoconiosis. *Id.* Dr. Branscomb opined that even assuming that claimant suffered from early simple pneumoconiosis, he would still contend that any impairment would be due to cigarette smoking and neither caused nor aggravated by coal workers' pneumoconiosis or dust. Director's Exhibit 26.

contributed to his disability); *see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

Claimant also argues that the administrative law judge erred in crediting the opinions of the nonexamining physicians of record. While Drs. Younes, Baker and Dahhan examined claimant, Drs. Castle and Branscomb did not. The Board has held that an administrative law judge cannot reject the report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In determining the weight to be accorded a physician's opinion, an administrative law judge may, however, properly take into consideration the fact that the physician had not personally examined the miner. *See Tackett v. Cargo Mining* Co., 12 BLR 1-11 (1988) (*en banc*); *Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984). The United States Court of Appeals for the Sixth Circuit, with whose jurisdiction the instant case arises, has indicated that a treating physician's opinion may be entitled to more weight than the report of a non-treating or non-examining physician.[6] *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In the instant case, the administrative law judge acted within his discretion in relying upon the opinions of the non-examining physicians of record. Although the administrative law judge acknowledged that Drs. Castle and Branscomb did not examine claimant, he noted that they each reviewed the medical evidence, thus providing them with a "broad base of data from which to draw their conclusions." Decision and Order on Remand at 4.

Claimant next contends that the administrative law judge erred in relying upon Dr. Castle's opinion. Claimant argues that Dr. Castle's opinion, that coal workers' pneumoconiosis ordinarily does not progress after cessation of coal mine employment, is contrary to the revised regulations. Claimant similarly contends that Dr. Castle's opinion, that pneumoconiosis results in a mixed-irreversible obstructive and restrictive impairment, is inconsistent with the revised regulations.

In the instant case, the administrative law judge found that 20 C.F.R. §718.201(c) merely codifies existing law regarding the latency and progressivity of pneumoconiosis.[7]

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[6]We note that there is no indication that the examining physicians in the instant case, Drs. Younes, Baker, and Dahhan, examined claimant on more than one occasion.

[7]Section 718.201(c) recognizes pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). The Sixth Circuit has similarly recognized that pneumoconiosis is a progressive disease. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) (recognizing progressive nature of black lung disease); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993) (Pneumoconiosis is a progressive and

Decision and Order on Remand at 6. The administrative law judge similarly found that 20 C.F.R. §718.201(a)(2) merely codifies existing case law recognizing that if a physician relates chronic obstructive pulmonary disease to coal mine dust exposure, it is tantamount to a diagnosis of pneumoconiosis.[8] *See* Decision and Order on Remand at 6 (citing *Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209 (1984)).

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degenerative disease)*; see also 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) (recognizing that pneumoconiosis is a "serious and progressive pulmonary condition")*; Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76, 88-91 (3d Cir. 1995) (A latent condition such as pneumoconiosis may not become manifest until long after exposure to coal dust ceases).

[8]Section 718.201(a)(2) recognizes that "legal pneumoconiosis" includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

Contrary to claimant's contention, Dr. Castle's disability causation opinion is not based upon a belief that pneumoconiosis is not a progressive disease. Dr. Castle merely opined that claimant's worsening obstructive pulmonary impairment was consistent with his continuing smoking history.[9] He did not assume that coal dust exposure can never cause an obstructive lung disease when he concluded that the obstructive impairment in the instant case was not attributable to coal dust exposure.[10] *See generally Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Consequently, we reject claimant's contention that the administrative law judge erred in relying upon Dr. Castle's opinion.

[9]Dr. Castle explained that objective studies showed that claimant suffered from a mild to moderate airway obstruction at the time he ceased coal mine employment. Employer's Exhibit 2. The doctor observed that claimant's disease had subsequently progressed as he continued to smoke without any further exposure to coal dust. *Id.*

[10]Dr. Castle explained that claimant's pulmonary function studies showed evidence of moderate airway obstruction with a significant degree of reversibility, findings consistent with tobacco-smoke-induced chronic bronchitis and bronchial asthma. Employer's Exhibit 2. Dr. Castle further explained that when coal workers' pneumoconiosis causes impairment, it causes a mixed, irreversible obstructive and restrictive ventilatory impairment. *Id.* Dr. Castle also explained that claimant's arterial blood gas studies showed a normal response to exercise, a finding inconsistent with coal workers' pneumoconiosis. *Id.*

We similarly reject claimant's contention that Dr. Dahhan's opinion is not sufficiently reasoned. The administrative law judge found that Dr. Dahhan provided a very cogent explanation for his opinion regarding the cause of claimant's disability. Decision and Order on Remand at 4-5. Given Dr. Dahhan's extensive explanation for his finding,[11] the administrative law judge properly relied upon Dr. Dahhan's opinion as sufficiently reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Claimant next contends that the opinions of Drs. Younes and Baker should have been accorded the greatest weight because their opinions are "more consistent with the applicable case law and the current medical evidence concerning pneumoconiosis, as contained in the new regulations." Claimant's Brief at 17. Inasmuch as claimant has not asserted any specific

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[11]Dr. Dahhan explained that:

> [Claimant's] obstructive airway disease did not result from, nor did it contribute to [n]or was [it] aggravated by coal dust exposure or occupational pneumoconiosis. He has not had any exposure to coal dust since 1991, a duration of absence sufficient to cause cessation of any industrial bronchitis that he may have had. Furthermore, he responds to bronchodilator therapy in the laboratory despite being on bronchodilators on a regular basis as prescribed by his family physician, which indicates that his obstructive ventilatory defect is responsive to bronchodilator therapy. This finding is inconsistent with the permanent adverse affects [sic] of coal dust on his respiratory system. Finally, he has no evidence of progressive massive fibrosis or complicated coal workers' pneumoconiosis that could cause a secondary obstructive ventilatory abnormality.
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> If [claimant] was found to have radiological evidence of simple coal workers' pneumoconiosis, then I continue to conclude that his chronic bronchitis and emphysema with secondary pulmonary disability are not due to this entity. It is known that simple coal workers' pneumoconiosis can cause a type of emphysema known as focal emphysema. However, this type of emphysema simply causes a dilatation of the alveolar ducts and is not associated with the destruction of the alveolar sacs nor does it cause any significant alteration in the respiratory reserve. On the other hand, cigarette smoke can cause centrilobular emphysema, a type of emphysema that does cause destruction of the alveolar sacs and significant alteration in the respiratory mechanics and ventilatory reserve.

Director's Exhibit 24.

errors committed by the administrative law judge, his statements amount to no more than a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Claimant finally argues that the administrative law judge erred in relying upon Dr. Branscomb's opinion because the doctor failed to explain why claimant's disability could not be due to pneumoconiosis. Claimant's Brief at 16. While the administrative law judge acknowledged that Dr. Branscomb did not provide a reason for his opinion that claimant's disability could not be due to pneumoconiosis, we find no error in the administrative law judge's finding that the opinions of Drs. Younes and Baker are supported by Dr. Branscomb's disability causation opinion.[12] *See* Decision and Order on Remand at 4-5. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability was due to pneumoconiosis. 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

[12]Dr. Branscomb opined that claimant's respiratory impairment was due to chronic obstructive pulmonary disease caused by cigarette smoking in a person with a tendency toward asthma or bronchospasm. Director's Exhibit 26. Dr. Branscomb further opined that claimant's respiratory impairment was neither caused nor aggravated by coal workers' pneumoconiosis or by exposure to coal mine dust. *Id.*

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge