BRB No. 01-0865 BLA

WILLIAM R. OATES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce , Greenville, Kentucky, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand - Denying Benefits (99-BLA-0611) of Administrative Law Judge Rudolf L. Jansen 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] This case is before the Board for the second time. In a Decision and Order dated September 29, 1999, the administrative law judge considered the claim, which was filed on January 20, 1998, pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). After crediting claimant with nineteen years of coal mine employment based upon the stipulation of the parties, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) (2000), and total disability under 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, he denied benefits. Claimant appealed. The Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(1)-(3) (2000) and 718.204(c)(1)-(3) (2000), but vacated the administrative law judge's findings under Sections 718.202(a)(4) (2000) and 718.204(c)(4) (2000). *Oates v. Peabody Coal Co.*, BRB No. 00-0156 BLA (Dec. 18, 2000) (unpublished). The Board remanded the case for the administrative law judge to discuss specifically the qualifications of Dr. Lane and the credibility of Dr. Fino's opinion. The Board further instructed the administrative law judge to consider the relative timing of the evidence as this could affect the credibility of the evidence. *Id*.

In his Decision and Order on Remand, the administrative law judge found the weight of the medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). The administrative law judge further found the evidence sufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(iv), but insufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c).[2] Consequently, he denied benefits. On appeal, claimant contends that the

[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]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

administrative law judge erred in finding the weight of the evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) and total disability due to pneumoconiosis under Section 718.204(c). Employer responds in support of the administrative law judge's denial of benefits, arguing that claimant's contentions on appeal amount to no more than a request that the Board reweigh the evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating he does not presently intend to participate in the proceedings on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

On appeal, claimant contends that the administrative law judge erred in stating that the preponderance of the medical opinion evidence to which he accorded greatest weight was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). This contention lacks merit. The administrative law judge reasonably determined that claimant did not establish by a preponderance of the evidence that he suffers from pneumoconiosis. The administrative law judge properly gave greatest weight to the opinions of Drs. Baker, Gallo and Lane under Section 718.202(a)(4) on the basis that they were well-reasoned and documented, and submitted by Board-certified pulmonologists who were also examining physicians. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Claimant argues that the administrative law judge erred in finding the preponderance of the evidence did not establish the existence of pneumoconiosis because two of the three opinions which the administrative law judge found entitled to greatest weight supported that finding. Decision and Order at 4; Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibit 8. The administrative law judge's analysis, however, reflects his correct understanding of the teachings of the United States Court of Appeals for the Sixth Circuit,[3] within whose jurisdiction this case arises, which has cautioned against head counting of physicians' reports. *See Woodward, supra*.

Furthermore, the administrative law judge correctly recognized that he was required to consider all relevant evidence. 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); *see Perry, supra;* 20 C.F.R. §718.202(a)(4). The record contains medical opinions from six physicians relevant to the issue of the existence of pneumoconiosis. Director's Exhibits 8, 12, 13; Claimant's Exhibit 1; Employer's Exhibits 3, 4, 7, 8. In addition to the opinions from Drs. Baker, Gallo and Lane, Director's Exhibits 12, 13; Claimant's Exhibit 1; Employer's Exhibit 8, the record includes opinions from Drs. O'Bryan, Fino and Simpao. Director's Exhibit 8; Employer's Exhibits 3, 4, 7. The administrative law judge properly found that the opinion of Dr. O'Bryan, an examining physician, and the opinion of Dr. Fino, a Board-certified pulmonologist, indicate that claimant does not have pneumoconiosis and corroborate Dr. Gallo's opinion, that claimant does not have the disease. Decision and Order at 4; Employer's Exhibits 3, 4, 7. The administrative law judge properly determined that while the opinions of Drs. O'Bryan and Fino were not entitled to weight equal to that given to the

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

aforementioned opinions of Drs. Baker, Lane and Gallo, because neither Dr. O'Bryan nor Dr. Gallo is both an examining physician and a Board-certified pulmonologist, yet the opinions of Drs. O'Bryan and Fino are well-reasoned and documented, and entitled to some weight. *Id*. Similarly, the administrative law judge found the opinions of Drs. Lane and Baker were supported by that of Dr. Simpao, an examining physician but not a Board-certified pulmonologist. Decision and Order at 4; Director's Exhibits 8, 12; Claimant's Exhibit 1; Employer's Exhibit 8. It is thus evident that the evidence of record was mixed and that the administrative law judge reasonably determined that claimant failed to establish the existence of pneumoconiosis by a preponderance of the medical opinion evidence. The Board must affirm the findings of fact of an administrative law judge which are supported by substantial evidence. *See* 33 U.S.C. §921(b)(3); *Woodward, supra*; *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987). We affirm, therefore, the administrative law judge's finding that claimant did not meet his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

We need not review the administrative law judge's findings regarding the issues of total disability and total disability causation under 20 C.F.R. §718.204(b) and (c), as any errors the administrative law judge may have made in making those findings would be harmless in light of the administrative law judge's proper determination that claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement. *See Trent, supra; Gee, supra; Perry, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

PETER A. GABAUER, Jr.
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge explicitly found the opinions of Drs. Baker, Gallo and Lane entitled to the *greatest weight* of all of the opinions of record because the three opinions are well-reasoned and documented, and the three physicians examined claimant and are Board-certified in internal medicine and pulmonary diseases. Decision and Order at 4; Director's Exhibits 12, 13; Claimant's Exhibit 1; Employer's Exhibits 4, 8. While it was proper for the administrative law judge to credit the opinions of Drs. Baker, Gallo and Lane under Section 718.202(a)(4) on these bases, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the administrative law judge ultimately misstated that the preponderance of the three opinions indicated that claimant does not have pneumoconiosis. Decision and Order at 4. In fact, two of the physicians' opinions to which the administrative law judge explicitly gave greatest weight, *i.e.*, the opinions of Drs. Baker and Lane, indicated that claimant has the disease. The administrative law judge's finding simply does not correspond to the record and is inadequately explained. When an administrative law judge does not make necessary findings, the proper course for the Board is to remand the case to the administrative law judge rather than attempting to fill in the gaps in the administrative law judge's opinion, as the majority has done in this case. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). I would vacate, therefore, the administrative law judge's conclusion that the preponderance of the most credible medical opinion evidence was insufficient to establish the existence of pneumoconiosis, and remand

the case for the administrative law judge to further explain his findings under Section 718.202(a)(4).

In remanding the case, I would also vacate the administrative law judge's findings regarding total disability and total disability causation under 20 C.F.R. §718.204(b) and (c). There is merit in employer's contention in its response brief that the administrative law judge mechanically rejected Dr. Fino's opinion that claimant is not totally disabled from a respiratory standpoint because Dr. Fino never examined claimant. While an administrative law judge may credit the opinion of an examining physician over that of a non-examining physician, whether or not a physician examines the miner is only one factor to be considered. *See Tussey, supra; King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In the instant case, the administrative law judge discounted Dr. Fino's opinion with regard to total disability solely because Dr. Fino did not examine claimant. Decision and Order at 5. The administrative law judge did not explain why this factor alone detracted from the opinion, which was based upon the Board-certified pulmonary specialist's review of all of the medical evidence of record. *See Tussey, supra*; *King, supra; Worthington, supra*; *but see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); Decision and Order at 5; Employer's Exhibits 3, 7. In addition, employer correctly contends that the administrative law judge erred in failing to discuss adequately his weighing of the like and unlike evidence in finding total disability established under Section 718.204(b)(2)(i)-(iv). I would instruct the administrative law judge to consider the like and unlike evidence with regard to total disability in determining whether, when considered together, it establishes that element of entitlement.[4] *See* 20 C.F.R. §718.204(b); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Claimant also contends that the administrative law judge's finding that the evidence

[4]Employer also contends, citing the decision of the United States Court of Appeals for the Sixth Circuit in *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-135 (6th Cir. 2000), that it was improper for the administrative law judge to credit the opinions of Drs. Baker, O'Bryan and Simpao, which indicate that claimant is totally disabled, rather than reject them as unreasoned on the ground that the doctors did not address the specific physical requirements of claimant's usual coal mine employment. This contention lacks merit. In *Cornett*, the court held that an administrative law judge should consider whether a physician who finds that a claimant is *not* totally disabled had any knowledge of the exertional requirements of the claimant's last coal mine employment before crediting that physician's opinion. The administrative law judge's decision in the instant case to credit the opinions of Drs. Baker, O'Bryan and Simpao does not run afoul of the court's holding in *Cornett* inasmuch as these physicians explicitly found claimant to be totally disabled. *See Cornett, supra.*

was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c) was erroneous in light of the administrative law judge's erroneous finding that the existence of pneumoconiosis was not established. As claimant contends on appeal, the administrative law judge stated that he accorded greatest weight to Dr. O'Bryan's opinion, that claimant's total disability is due to cigarette smoking, and not pneumoconiosis, because the record does not support a finding of the existence of pneumoconiosis. Decision and Order at 5; Employer's Exhibit 4. Consistent with my view that this case should be remanded for further consideration under Section 718.202(a)(4), I would also vacate the administrative law judge's finding that the weight of the medical opinion evidence was insufficient to establish total disability causation under Section 718.204(c), and instruct the administrative law judge to reconsider the relevant evidence on the issue of total disability causation at Section 718.204(c), if reached.[5]

ROY P. SMITH
Administrative Appeals Judge

[5]The Board has held previously that an administrative law judge may give less weight to an opinion on disability causation on the basis that its underlying premise that the miner did not have pneumoconiosis was inaccurate. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). The Board, however, has not held that an administrative law judge is required to consider this as a factor in determining the credibility of an opinion or that he must give little or no weight to such an opinion.