BRB No. 02-0788 BLA

SAM E. McCOWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NARROWS' BRANCH COAL, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: _____
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (2001-BLA-817) of Administrative Law Judge Thomas F. Phalen, Jr. 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] The administrative law judge determined that employer was the responsible operator and concluded that claimant established eleven years and eight months of coal mine employment. Decision and Order at 3-4. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b).[2] Decision and Order at 9-12. The administrative law judge further found that the record evidence was also sufficient to establish that claimant suffered from a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order at 12-14. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in his length of coal mine employment determination, in finding the existence of pneumoconiosis established pursuant to Section 718.202(a), that the pneumoconiosis arose out of coal mine employment pursuant to Section 718.203 and that claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not 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.*, 380 U.S. 359 (1965).

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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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant, Sam E. McCown, filed his claim for benefits on January 6, 2000. Director's Exhibit 1.

[3]The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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; *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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge awarding benefits must be vacated and the case remanded to the administrative law judge for further consideration. Employer initially contends that the administrative law judge erred in his length of coal mine employment determination since claimant's testimony, coal mine employment history form and Social Security Administration records were inconsistent with each other and he failed to specifically explain how he arrived at his conclusion in light of these conflicts as required by the Administrative Procedure Act (APA), 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).[4] We agree.

The administrative law judge's computation of time spent in coal mine employment will be upheld where it is based on a reasonable method of calculation and is supported by substantial evidence in the record considered as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). Further, it is within the administrative law judge's discretion as the trier-of-fact to make credibility determinations with respect to the testimony and documentary evidence of record concerning the miner's employment history. *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

The administrative law judge, in the instant case, stated that based upon the documentary evidence in the record, claimant established eleven years and eight months of coal mine employment. Decision and Order at 4. The administrative law judge further noted the dates of employment and the time credited for each employer listed on the Social Security Administration record. Decision and Order at 4; Director's Exhibit 5. The administrative law judge failed, however, to specify how he calculated the specific length of coal mine employment as many of the quarterly

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[4]The Administrative Procedure Act requires that each adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefore, on all material 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).

earnings are not listed and the records indicate concurrent periods of self-employment as well as employment with other coal and non-coal mine employers.[5] *See* APA, *supra; see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Fee v. Director, OWCP,* 6 BLR 1-1100 (1984); Director's Exhibit 5. We therefore vacate the administrative law judge's finding of eleven years and eight months of coal mine employment and remand this case for the administrative law judge to assess all of the record evidence pertaining to the computation of the years of coal mine employment and to provide a specific explanation for his determination. In light of this holding, we must also vacate the administrative law judge's finding that claimant was entitled to the rebuttable presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment. If the administrative law judge credits claimant with less than ten years of coal mine employment on remand, he must consider whether claimant has established this element of entitlement by a preponderance of the evidence. *See* 20 C.F.R. §718.203(c).

Employer further contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis as he failed to properly weigh the evidence of record. Employer's Brief at 10-13. Specifically, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) as the weight of the evidence does not support the administrative law judge's determination. 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 powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Rather, the administrative law judge determines the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

[5]The administrative law judge failed to consider claimant's employment with Blue Bird Coal Company in 1960. *See* Director's Exhibit 5.

In this case, the administrative law judge rationally found that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as the preponderance of x-ray readings by physicians with superior qualifications was positive.[6] Director's Exhibits 11, 13-15, 25, 28-30, 37, 39, 40; Claimant's Exhibits 1-8; Employer's Exhibits 1-3; Decision and Order at 10; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We, therefore, affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

In addressing the medical opinions of record pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204, the administrative law judge accorded greater weight to the opinions of Drs. Younes and Baker as the physicians are highly qualified and their opinions are well reasoned, documented and supported by the objective evidence of record. Decision and Order at 11, 13-14. The administrative law judge accorded less weight to the opinion of Dr. Dahhan, as his opinion was not well-reasoned. Decision and Order at 11, 13-14. The administrative law judge then concluded that claimant established by a preponderance of the evidence that he suffers from totally disabling pneumoconiosis arising out of coal mine employment. Decision and Order at 11-14.

Employer contends that the administrative law judge did not properly weigh the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4), 718.203 and 718.204, as he failed to adequately address the credibility of the physicians' conclusions.[7] We agree. Although credibility determinations are for the

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

[7] Because the United States Court of Appeals for the Sixth Circuit has not adopted the interpretation of 20 C.F.R. §718.202(a) that requires the administrative law judge to weigh all of the evidence relevant to the existence of pneumoconiosis together, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), whether the medical opinions of record support a finding of pneumoconiosis is not specifically at issue in this case. Nevertheless, we will address the administrative law judge's findings pursuant to Section 718.202(a)(4) because these findings impacted his treatment of the medical

administrative law judge, since we cannot affirm his length of coal mine employment finding, we must also vacate the administrative law judge's determination that Drs. Younes and Baker provided reasoned and documented opinions, as both physicians relied upon an exaggerated coal mine employment history. Decision and Order at 11, 13-14; Director's Exhibits 9, 30; *Wojtowicz, supra*. We therefore vacate the administrative law judge's credibility determinations with respect to the opinions of Drs. Younes and Baker and remand this case to the administrative law judge for further consideration of the reliability of these opinions in light of his length of coal mine employment determination and to specifically set forth the basis for finding their reports well-reasoned and well-documented. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985)

The administrative law judge discredited Dr. Dahhan's opinion as "[i]t is unreasonable to say that claimant suffers from a pulmonary defect due entirely to smoking and [that] his 11 plus years of coal mine employment did not in any way contribute to the defect with no further explanation of how the two causes were distinguished." Decision and Order at 11; Director's Exhibit 29. Employer asserts that the administrative law judge erred in according less weight to Dr. Dahhan's opinion, that there was no evidence of coal workers' pneumoconiosis and that claimant suffered from an obstructive ventilatory defect due to smoking, as the administrative law judge substituted his opinion for that of the physician. Employer's Brief at 13.

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opinions under Sections 718.203 and 718.204.

Employer's contention has merit, in part. It is undisputed that an administrative law judge may accord less weight to an opinion in which the physician fails to provide the rationale underlying his conclusions. *See Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Back v. Director, OWCP,* 796 F.2d 169, 9 BLR 2-93 (6th Cir. 1986); *Clark, supra*. In this case, however, because the administrative law judge relied upon what may be an inaccurate understanding of the length of claimant's coal mine employment in finding that the physician did not adequately explain why coal mine employment did not contribute to claimant's pulmonary condition, we must vacate the administrative law judge's findings with respect to Dr. Dahhan's opinion pursuant to Sections 718.202(a)(4), 718.203, and 718.204(c). The administrative law judge must reconsider this opinion in light of his length of coal mine employment finding on remand.

Finally, we reject employer's specific assertion that the opinions of Drs. Younes and Baker are insufficient to establish that claimant's total disability is due to pneumoconiosis under 20 C.F.R. §718.204(c) as the opinions do not establish that the pneumoconiosis is in and of itself totally disabling. Employer's Brief at 14. Contrary to employer's contention, the United States Court of Appeals for the Sixth Circuit has specifically stated that the miner does not need to prove total disability by pneumoconiosis, in and of itself. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). In this case, the administrative law judge specifically considered the opinions of Drs. Younes and Baker, stating that the miner's impairment was due to both smoking and coal dust exposure, pursuant to *Adams*, and the administrative law judge concluded that the physicians' opinions were sufficient to prove that claimant's total disability was due in part to pneumoconiosis. *See* 20 C.F.R. §718.204(c); Decision and Order at 13-14. As we have vacated the administrative law judge's credibility determinations with respect to the opinions of Drs. Younes and Baker, we must also vacate the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis and on remand, after determining the specific credibility of each relevant medical opinion, the administrative law judge is instructed to reconsider this issue in accordance with applicable law if necessary. 20 C.F.R. §718.204(c); *see Peabody Coal Co. v. Smith*,

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[8]The administrative law judge's determination that claimant's usual coal mine employment was that of an end loader operator requiring moderate to heavy labor is unchallenged on appeal and therefore is affirmed. *Skrack, supra*. The administrative law judge rationally determined, therefore, that Dr. Dahhan's opinion was entitled to little weight under 20 C.F.R. §718.204(b)(iv), as the doctor incorrectly considered claimant's usual coal mine employment to be that of a truck driver. Decision and Order at 13; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984).

[8]The revisions to 20 C.F.R. §718.204 concerning the extent to which

127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Adams, supra*.

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pneumoconiosis must be a causal factor in a miner's totally disabling respiratory or pulmonary impairment are inapplicable to claims such as this one, which were pending on January 19, 2001. See *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 864, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp. 2d 47, BLR (D.D.C. 2001). The law on this issue remains "exactly as it was prior to the regulations' promulgation for cases that had already been filed when the regulations were promulgated." *Id*. at 865.

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only.

REGINA C. McGRANERY
Administrative Appeals Judge