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BRB No. 97-1543 BLA

BERKLEY CONNER	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED 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 of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Fairmont, West Virginia, for employer.

Jill M. Otte (Marvin Krislov, Deputy Solicitor for National Operations; 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1090) of Administrative Law Judge James W. Kerr, 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). The administrative law judge, based on the parties' stipulation, credited claimant with twenty-four years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[1] The administrative law judge, however, found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(2) and (c)(4). Claimant also contends that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, contending that the administrative law judge erred in his weighing the medical opinion evidence at 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. Alternatively, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[2] *See King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

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

[1]The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3).

[2]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1) and (c)(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Initially, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(2). We disagree. The administrative law judge considered the arterial blood gas study evidence of record, which consists of two studies dated September 18, 1995 and April 16, 1997. The April 16, 1997 study yielded non-qualifying[3] values at rest and after exercise. Employer's Exhibit 3. Whereas the September 18, 1995 study yielded non-qualifying values at rest, this study yielded qualifying values after exercise. Director's Exhibit 13. The administrative law judge properly accorded determinative weight to the April 16, 1997 study over the September 18, 1995 study because he found it to be the "more recent blood gas study." Decision and Order at 11; *see Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984). Thus, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(2).

Next, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Specifically, claimant argues, and the Director agrees, that the administrative law judge erred by relying on Dr. Tuteur's equivocal opinion to discredit Dr. Rasmussen's opinion. The administrative law judge considered the medical opinions of Drs. Rasmussen and Tuteur and accorded "greater weight to the medical opinion of Dr. Tuteur." Decision and Order at 12. Whereas Dr. Rasmussen opined that claimant suffers from a disabling respiratory impairment, Director's Exhibit 12; Claimant's Exhibit 4, Dr. Tuteur stated that "the presence or absence of disability cannot be assessed," Employer's Exhibit 1. An equivocal medical opinion does not constitute substantial evidence to support a finding. *See generally Griffith v. Director, OWCP* [*Myrtle*], 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). Thus, since Dr. Tuteur did not provide a specific opinion with regard to whether claimant suffers from a disabling respiratory impairment, the administrative law judge erred in using Dr. Tuteur's opinion to discredit the opinion of Dr. Rasmussen. Thus, we vacate the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4), and remand the case for further consideration of all of the

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

relevant medical evidence of record.[4]

[4]The administrative law judge additionally failed to consider Dr. Zaldivar's opinion that claimant does not suffer from a disabling respiratory impairment. Employer's Exhibit 3.

In addition, as argued by the Director, the administrative law judge erred by discrediting Dr. Rasmussen's opinion because it is based on a non-qualifying pulmonary function study.[5] An administrative law judge may not discredit a physician's medical opinion because it is based on a non-qualifying pulmonary function study.[6] *See generally Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Further, as argued by the Director, the administrative law judge erred by discrediting Dr. Rasmussen's opinion because it is based on "a blood gas study which has been found inconsistent by a more qualified physician." Decision and Order at 12. Although the administrative law judge acknowledged that Dr. Tuteur opined that the after exercise values of the September 18, 1995 arterial blood gas study are internally inconsistent, Employer's Exhibit 1, the administrative law judge failed to consider Dr. Ranavaya's opinion that the September 18, 1995 arterial blood gas study is valid,[7] Director's Exhibit 14. While an administrative law judge is not

[5]The administrative law judge stated that he "questions the medical opinion of Dr. Rasmussen based on the fact that it was based on a non-qualifying pulmonary function study." Decision and Order at 12.

[6]Dr. Rasmussen characterized the results of claimant's September 18, 1995 pulmonary function study as demonstrating a "Minimal, irreversible restrictive ventilatory impairment." Director's Exhibit 12.

[7]The administrative law judge correctly stated that Dr. Tuteur is "a [B]oard certified physician in internal medicine and pulmonary diseases." Decision and Order at 8; Employer's Exhibit 1. Although the record does not indicate that Dr. Ranavaya's credentials are comparable to Dr. Tuteur's credentials, the administrative law judge nonetheless must consider Dr. Ranavaya's opinion

required to accept medical evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984).

Finally, inasmuch as we remand the case to the administrative law judge for further consideration of the evidence at 20 C.F.R. §718.204(c)(4), we will address employer's contention that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge stated that "Dr. Tuteur concluded that it was likely that Claimant did have a mild simple pneumoconiosis while Dr. Rasmussen found that Claimant did have pneumoconiosis." Decision and Order at 9; Director's Exhibit 12; Claimant's Exhibit 4; Employer's Exhibit 1. However, the administrative law judge failed to consider Dr. Zaldivar's opinion that claimant does not suffer from coal workers' pneumoconiosis. Employer's Exhibit 3. Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of all of the relevant medical evidence of record. *See McCune, supra*.

If reached, the administrative law judge must also consider whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) and whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). See *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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regarding the validity of the September 18, 1995 arterial blood gas study. Director's Exhibits 14, 15.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge