BRB No. 03-0215 BLA

LASTEL LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 10/24/2003
	)	
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 - Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Martin E. Hall (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM

Claimant appeals the Decision and Order - Denying Benefits (2001-BLA-649) of Administrative Law Judge Thomas F. Phalen, Jr. rendered 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] In this duplicate claim, the administrative law judge found the newly submitted evidence sufficient to establish a material change in conditions because it established total disability, one of the elements of entitlement previously adjudicated

[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.

against claimant. Considering all the relevant evidence of record, however, the administrative law judge found that it was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a)(1)-(a)(4). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge should have found that the medical opinions of the examining physicians established the existence of legal pneumoconiosis.[2] Employer 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 (the Director), has filed a letter indicating that he is not participating in this appeal.[3]

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 in a living miner=s claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally

[2] Legal pneumoconiosis is defined as any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. ' 718.201(a)(2).

[3] The administrative law judge=s findings that the evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3) and that the medical opinion evidence did not establish the existence of clinical pneumoconiosis, as defined at Section 718.201(a)(1), is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Likewise, the administrative law judge=s finding that the new evidence established total disability and thereby a material change in conditions is also affirmed as unchallenged on appeal. *Skrack*, 6 BLR 1-710.

disabling. *See* 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues that the administrative law judge should have credited the opinions of Drs. Baker, Houser, Traughber and Simpao, examining physicians, who found the existence of legal pneumoconiosis, because they examined claimant and because their opinions constituted a preponderance of the evidence from examining physicians. Claimant further contends that the administrative law judge erred in stating that the credentials of Dr. Houser, an examining physician, were unknown since the record contained evidence showing that Dr. Houser was a Board-certified pulmonologist. Likewise, claimant contends that the administrative law judge should have taken judicial notice of the fact that Dr. Traughber, an examining physician, was Board-certified in internal medicine since the credentials of physicians who conduct evaluations for the Federal Black Lung Program are supplied to both the district director and the Office of the Administrative Law Judges. Accordingly, claimant argues that, had the administrative law judge given appropriate consideration to the credentials of all the examining physicians, he would have found that three Board-certified pulmonologists and one Board-certified internist found the existence of legal pneumoconiosis, while only two Board-certified pulmonologists expressly stated that claimant=s lung disease was not caused by coal mine employment. Additionally, claimant contends that the administrative law judge should have considered the opinion of Dr. Simpao, an examining physician, on the issue of legal pneumoconiosis since, in addition to diagnosing the existence of coal workers= pneumoconiosis, Dr. Simpao found that claimant=s respiratory impairment arose out of coal mine employment. Claimant also contends that while Dr. Jarvis, an examining physician, who was also a board-certified pulmonologist, initially stated that claimant had no respiratory disease due to coal mine employment, he subsequently testified that claimant=s symptoms and physical findings were consistent with occupational disease and exposure to dust, fumes, and gases in coal mine employment that irritated claimant=s lungs and could produce chronic obstructive pulmonary disease.

In considering the above opinions, along with other medical opinion evidence addressing the existence of legal pneumoconiosis, the administrative law judge credited Dr. Baker=s opinion that claimant=s respiratory impairment arose out of coal mine employment, noting that he was a Board-certified pulmonologist and an examining physician. The administrative law judge, however, found the opinions of Drs. Houser and Traughber, examining physicians, entitled to less weight because their credentials were unknown. The administrative law judge considered the opinion of Dr. Simpao, an examining physician, along with evidence establishing the existence of clinical pneumoconiosis, but did not discuss it when addressing the medical opinion evidence relevant to the issue of legal

pneumoconiosis. Regarding the opinion of Dr. Jarvis, a Board-certified pulmonologist, and examining physician, the administrative law judge noted that he attributed claimant=s severe obstructive pulmonary impairment to smoking. The administrative law judge concluded, therefore, that claimant failed to prove the existence of legal pneumoconiosis by a preponderance of the medical opinion evidence by the better qualified physicians.[4]

Contrary to claimant=s argument, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has clearly held that the administrative law judge is not required to accord greater weight to the opinions of examining physicians. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 511-12, BLR (6th Cir. 2003); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir. 2002)(The credibility of a medical opinion is for the administrative law judge to determine); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 1-162, 2-177 (4th Cir. 2000)(AAn alj may not discredit a physician=s opinion solely because the physician did not examine the claimant.@). Contrary to claimant=s argument, therefore, the administrative law judge was not required to accord greater weight to the opinions of examining physicians. Nor, as claimant contends, was the administrative law judge required to take judicial notice of a physician=s credentials, *i.e.*, Dr. Traughber=s. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-140 (1990); *see also King v. Consolidation Coal Co.*, 8 BLR 1-262, 1-264 (1985). Rather, the party relying on a physician=s credentials must submit them for admission into the record. *See Maddaleni*, 14 BLR at 1-140. The administrative law judge did not, therefore, err in according less weight to the opinion of Dr. Traughber because his credentials were unknown. Further, contrary to claimant=s argument, the administrative law judge did not err in crediting Dr. Jarvis=s opinion that claimant=s respiratory impairment was due to smoking because, even though Dr. Jarvis acknowledged that exposure to irritants in coal mine employment could produce chronic obstructive pulmonary disease, the doctor stated that he did not believe that had happened in this case. Jarvis Deposition at 12. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

The administrative law judge did err, however, in stating that Dr. Houser=s credentials were unknown when he weighed Dr. Houser=s opinion with the other opinions, Decision and Order at 21, inasmuch as he had previously stated that Dr. Houser was a Board-certified pulmonologist, Decision and Order at 17, and the record supports that finding. Claimant=s Exhibit 1. This mischaracterization of the evidence, therefore, requires remand of the case for the administrative law judge to properly evaluate all the evidence inasmuch as the

[4] Inasmuch as claimant has not challenged the administrative law judge=s findings regarding the other physician=s opinions of record, those findings are affirmed. *Skrack*, 6 BLR 1-710; *Fish*, 6 BLR 1-107.

administrative law judge used the credentials of the physicians to assess the weight he accorded their opinions. Decision and Order at 23; *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); *Goode v. Eastern Assoc. Coal Co.*, 6 BLR 1-1064, 1-1066 (1984); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323, 2-341 (4th Cir. 1998). We remand this case because of the impact a correct view of Dr. Houser=s credentials may have on the qualitative analysis of the evidence; not the quantitative analysis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Likewise, on remand the administrative law judge should, as claimant contends, consider the opinion of Dr. Simpao, an examining physician, since in addition to diagnosing the existence of coal workers= pneumoconiosis, Dr. Simpao also opined that claimant=s respiratory impairment arose out of coal mine employment. The administrative law judge=s finding that the existence of legal pneumoconiosis was not established at Section 718.202(a)(4), is, therefore, vacated and the case is remanded for reconsideration of the medical opinion evidence and, if necessary, the other elements of entitlement. 20 C.F.R. ''718.203, 718.204.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge