BRB No. 98-0144 BLA

DENZIL HOWARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

J. Matthew McCracken (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, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1610) of Administrative Law Judge Robert L. Hillyard 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 years of coal mine employment and adjudicated this claim[1] pursuant to the regulations contained in 20 C.F.R. Part

[1]Claimant filed his claim for benefits on August 1, 1994. Director's Exhibit 1. This claim was denied by the Department of Labor (DOL) on December 22, 1994.

718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(4).[2] Accordingly, the administrative law judge denied benefits. On

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Director's Exhibit 16. On January 16, 1996, the DOL informed claimant that it construed his correspondence dated December 22, 1995 as a request for modification. Director's Exhibit 17. The district director issued a Proposed Decision and Order Denying Request for Modification on May 20, 1996. Director's Exhibit 18. Claimant requested a hearing which was held by the administrative law judge on April 22, 1997. In his decision, the administrative law judge stated that "[b]ecause of the limited medical evidence and the fact that this involves the first hearing in this case, [he] will review the entire file in order to determine the claimant's entitlement to benefits." Decision and Order at 4. The administrative law judge also stated that "[i]n doing so, [he] will necessarily determine whether a change in conditions or a mistake in [a] determination of fact has been established." *Id*.

[2]The administrative law judge did not render a finding pursuant to 20 C.F.R. §718.204(c)(3). Inasmuch as there is no evidence of cor pulmonale with right sided congestive heart failure, the evidence is insufficient to establish total disability at 20

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)(4). The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief contending that the administrative law judge erred in finding that Dr. Baker's opinion is insufficient to establish total disability.[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).

C.F.R. §718.204(c)(3).

[3]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204(c)(1) and (c)(2) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 that the administrative law judge erred in discrediting Dr. Clarke's opinion. The administrative law judge considered the opinions of Drs. Baker and Clarke. Dr. Baker opined that claimant suffers from a mild respiratory impairment. Director's Exhibit 12. Dr. Clarke opined that claimant suffers from a totally disabling respiratory impairment. Director's Exhibit 19. The administrative law judge properly discredited Dr. Clarke's opinion because he found it to be not well reasoned and documented.[4] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject claimant's assertion that the administrative law judge erred by discrediting Dr. Clarke's opinion.[5] The Director argues that the administrative law judge erred in finding that Dr. Baker's opinion is insufficient to establish total disability. The administrative law judge found that Dr. Baker's opinion that "claimant had only a mild impairment...is insufficient to support a finding of disability." Decision and Order at 6. Contrary to the administrative law judge's finding, Dr. Baker's opinion concerning the extent of claimant's impairment may, if

[4]The administrative law judge stated that Dr. Clarke "gave no basis or reasoning for his opinion." Decision and Order at 6. In addition, the administrative law judge observed that Dr. Clarke's "pulmonary function study was non-qualifying and the results of his test were substantially lower than the test administered by Dr. Baker, only fourteen months earlier." *Id*. Moreover, the administrative law judge observed that "Dr. Clarke did not administer a blood gas study." *Id*.

[5]In considering Dr. Clarke's opinion regarding total disability, the administrative law judge stated that "Dr. Clarke's x-ray interpretation of '2/1 P' is not in accord with the more qualified interpretations." Decision and Order at 6. An administrative law judge may not discredit a doctor's report relevant to disability because the administrative law judge does not credit the x-ray upon which the doctor partially relied. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Nonetheless, since the administrative law judge provided a valid alternate basis for discrediting Dr. Clarke's opinion, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he discredited Dr. Clarke's opinion because he found it to be not well reasoned and documented, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

credited, and when compared with the exertional requirements of claimant's usual coal mine employment, support a finding of total disability.[6] *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 104 (1986); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). 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 to the administrative law judge to compare Dr. Baker's opinion with the exertional requirements of claimant's usual coal mine employment.[7] *See Pifer v. Florence Mining Co.*, 8 BLR 1-153 (1985).

Finally, if reached, the administrative law judge must consider and weigh all of the contrary probative evidence of record, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Moreover, if reached, the administrative law judge must consider whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

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[6]The record contains claimant's testimony regarding the exertional requirements of his usual coal mine employment. Hearing Transcript at 7-9.

[7]Claimant asserts that the administrative law judge erred by failing to consider claimant's age, education and work experience in the administrative law judge's total disability analysis because these factors affect claimant's ability to obtain gainful employment. Contrary to claimant's assertion, an administrative law judge must consider medical evidence at 20 C.F.R. §718.204(c)(4). The fact that a miner would not be hired does not support a finding of total disability. *See Ramey v. Kentland-Elkhorn*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge