BRB No. 98-1268 BLA

HAROLD MCCAIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/29/99
	)	
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.

Gregory E. Hull (Millikin & Fitton Law Firm), Hamilton, Ohio, for claimant.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1450) 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 credited claimant with 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 total disability pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found the evidence

sufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.[1] However, the administrative law judge found the evidence insufficient to

[1]Claimant filed his claim for benefits on February 17, 1994. Director's Exhibit 1. On June 14, 1994, a Department of Labor (DOL) claims examiner denied this claim because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibit 15. Claimant filed a request for reconsideration dated June 13, 1995, which the DOL construed as a request for modification. Director's Exhibits 16, 18. In his decision, however, the administrative law judge found that claimant's request for modification must be treated as a duplicate claim in view of the fact that it was not received by the DOL until June 15, 1995. Contrary to the administrative law judge's finding, as the Director concedes, claimant's letter requesting reconsideration dated June 13, 1995 was properly construed as a request for modification since it was mailed within one year of the prior denial. 20 C.F.R. §725.303(b). Nonetheless, we hold that the administrative law judge's error in this regard is harmless since the administrative law judge rationally found the evidence sufficient to establish a

establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he had established only four years of coal mine employment. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's length of coal mine employment finding and contending that the administrative law judge erred in discrediting Dr. Rubio's opinion.[2]

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.*,

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mistake in a determination of fact at 20 C.F.R. §725.310 and considered all of the evidence on the merits with respect to his findings at 20 C.F.R. §§718.202(a) and 718.204(b). The DOL again denied this claim on June 23, 1995, November 22, 1995, February 2, 1996 and December 18, 1996. Director's Exhibits 18, 26, 29, 40. On April 7, 1997, claimant filed correspondence in pursuit of his claim, which the DOL properly construed as a request for modification. Director's Exhibit 42.

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

380 U.S. 359 (1965).

Initially, claimant contends that the administrative law judge erred in finding that he established only four years of coal mine employment. We disagree. The administrative law judge credited claimant with four years of coal mine employment after considering the relevant evidence of record, including claimant's application for benefits, Director's Exhibit 1, claimant's employment history form, Director's Exhibit 2, claimant's testimony, Hearing Transcript at 9-18, 20-26, affidavits of fellow workers and family members, Director's Exhibits 16, 24, and the Social Security Itemized Statement of Earnings, Director's Exhibit 3. After noting the inconsistencies in the evidence with regard to claimant's coal mine employment, the administrative law judge found the Social Security Itemized Statement of Earnings to be "independent and official evidence of the Claimant's coal mine employment."[3] Decision and Order at 4. A review of the Social Security Itemized Statement of Earnings establishes fourteen quarters of coal mine employment in which claimant earned $50.00 or more. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); Director's Exhibit 3. The administrative law judge concluded that "[t]his statement shows that the Claimant worked in or around the coal mines for Collins Mining [Company]...for a total of three

[3]With regard to the affidavits signed by Effie McCain Young, Lenzy McCain, Laura McCain, Peter McCain and Estle McCain, the administrative law judge observed that "[t]hese statements can be given little weight because they are written in general terms, give no specifics, do not state whether the alleged employment was steady, and they, in some cases, conflict with the Claimant's own statements and history." Decision and Order at 4. The administrative law judge also observed that "[t]he statements of L. McCain, H. Phillips, and P. McCain attest to coal mine employment during the years 1951 and 1952, when claimant was in the military." *Id*. Further, the administrative law judge noted that "[t]he Claimant stated at the hearing that it was difficult remembering his coal mine employment." *Id*. The administrative law judge correctly observed that although "Claimant testified that Collins Coal [Company] did not start taking out Social Security until he was about 18 years of age..., on his employment history, the only coal mine employment alleged was from January 1948 to January 1951 and February 1953 to December 1953." Decision and Order at 4; Director's Exhibit 2. In addition, the administrative law judge correctly observed that "Claimant alleged only four years [of coal mine employment] on his application for benefits and failed to list any coal mine employer other than Collins Coal [Company] on his employment history form." Decision and Order at 4; Director's Exhibit 1.

years and four months."[4] Decision and Order at 4.

[4]Although the Social Security Itemized Statement of Earnings indicates that claimant worked one quarter of coal mine employment in 1951, which could be considered the equivalent of three months of coal mine employment, the administrative law judge rationally found that "[t]his statement shows that the Claimant worked in or around the coal mines for Collins Mining [Company for]...one month in 1951 prior to going into military service." Decision and Order at 4. The administrative law judge observed that claimant testified that he served "in the armed forces from February 2, 1951 to February 3, 1953." *Id*. at 3.

Further, based on claimant's testimony, the administrative law judge credited claimant "with an additional eight months of coal mine employment with Collins Coal [Company] prior to 1947."[5] *Id*. Claimant, citing *Slusher v. Director, OWCP*, No. 92-3237 (6th Cir. December 28, 1992), asserts that the administrative law judge erred in discounting his uncontradicted testimony concerning his years of coal mine employment since the United States Court of Appeals for the Sixth Circuit has held that it is unreasonable for an administrative law judge to completely discount a former miner's testimony and affidavits of co-workers, even in light of contradictory evidence from Social Security records, when assessing the term of coal mine employment. As an unpublished opinion, *Slusher* lacks precedential authority. 6th Cir. R. 28(g). Furthermore, the facts in *Slusher* are distinguishable from the facts in the instant case. In *Slusher*, the administrative law judge noted inconsistences among the various pieces of oral and documentary evidence with respect to the length of claimant's coal mine employment. Because of the inconsistencies in the other evidence, the administrative law judge concluded that he would rely solely on claimant's Social Security earnings statement. Accordingly, the administrative law judge credited claimant with four years and three months of coal mine employment based on claimant's Social Security earnings statement. The court, however, stated that "although it was within the discretion of the ALJ to accord the Social Security records more weight than the testimony and affidavits, the ALJ was required to provide some rationale for its decision to do so." *Slusher*, No. 92-3237, slip op. at 4 (6th Cir. December 28, 1992). Since the court held that the administrative law judge did not provide a reason for finding the Social Security records more reliable than the other relevant evidence of record, the court remanded the case to the administrative law judge to identify his reasons for reaching such a finding.

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[5]Claimant asserts that his testimony establishes that he worked at least ten years of coal mine employment beginning in 1941 or 1942. The administrative law judge observed that claimant "testified that he first went to work in mines with his father in 1941 **or** 1942, mining house coal in small mines" and "[t]his continued until 1944 at which time he began to work at Collins Coal [Company]." Decision and Order at 3 (emphasis added). The administrative law judge also observed that claimant "testified that he was in charge of operating a trap door for air control from 1944 until he turned 18 in 1947 and then worked as a coal loader and an operator of a motor." *Id*. Claimant also testified that he attended school during this period. Hearing Transcript at 12. Since the record does not indicate the specific number of hours or days that claimant worked as a coal miner during this period, we hold that, based on circumstances of this case, the administrative law judge rationally found that claimant's testimony only established eight months of coal mine employment prior to 1947. *See Walraven v. Director, OWCP*, 4 BLR 1-29 (1981).

In the instant case, the administrative law judge discounted the probative value of claimant's testimony and the affidavits of claimant's co-workers and family members as he found that they evidenced inconsistencies and conflicts. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). The administrative law judge also explained that the Social Security Itemized Statement of Earnings is the most reliable evidence of record because "[t]he Social Security earnings statement is independent and official evidence of the Claimant's coal mine employment." Decision and Order at 4. Thus, unlike the decision by administrative law judge in *Slusher*, the administrative law judge in the case at bar provided an adequate reason for finding the Social Security Itemized Statement of Earnings to be more reliable than the other evidence of record. Therefore, we reject claimant's assertion that the administrative law judge erred by discounting his uncontradicted testimony concerning his years of work in coal mines.[6] Moreover, we affirm the administrative law judge's length of coal mine employment finding as it is based on a reasonable method of calculation and supported by the evidence of record. *See Justice, supra*; *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *Mullins v. Director, OWCP*, 6 BLR 1-508 (1983); *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-188 (1983).

[6]The administrative law judge permissibly discounted claimant's testimony that he worked for Challas Bandy, a strip mine employer, as an operator of heavy equipment for two winters around 1956 and 1957 since "there is no corroboration whatsoever and the first time such employment is alleged was at the hearing." Decision and Order at 4.

Next, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Burton, Fritzhand and Rubio. Whereas Drs. Burton and Fritzhand opined that claimant does not suffer from pneumoconiosis, Director's Exhibits 11, 35, Dr. Rubio opined that claimant suffers from pneumoconiosis,[7] Director's Exhibits 21, 25, 41; Claimant's Exhibit 1. The administrative law judge discounted Dr. Rubio's opinion because Dr. Rubio relied, in part, on claimant's coal mine employment history and a pulmonary function study.[8] The administrative law judge also discounted Dr.

[7]Dr. Rubio based his diagnosis of pneumoconiosis on claimant's cme history, x-ray evidence and pulmonary function study evidence. Director's Exhibits 21, 25, 41; Claimant's Exhibit 1.

[8]The administrative law judge observed that Dr. Rubio "stated that he based his diagnosis 'primarily on pulmonary function criteria' as the Claimant has a significant restrictive component which goes 'with pneumoconiosis rather than chronic obstructive pulmonary disease.'" Decision and Order at 12. The administrative law judge stated that "[p]ulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis." *Id*. Further, the administrative law

Rubio's opinion because Dr. Rubio did not consider claimant's heart surgery and smoking history.[9] Contrary to the administrative law judge's finding, a physician's opinion with regard to the existence of pneumoconiosis may be based on a pulmonary function study and a miner's coal mine employment history. 20 C.F.R. §718.202(a)(4). The pertinent regulation provides that a physician's finding that a miner suffers from pneumoconiosis "shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, **pulmonary function studies**, physical performance tests, physical examination, and medical and **work histories**." *Id*. (emphasis added).

Further, contrary to the administrative law judge's finding, an examination of the record reveals that Dr. Rubio did not ignore claimant's smoking history and heart surgery. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). In his March 26, 1997 report, Dr. Rubio did not rule out the possibility that claimant suffers from other pulmonary conditions. Director's Exhibit 41; Claimant's Exhibit 1. To the contrary, Dr. Rubio merely stated that "[i]t should be pointed out again that [claimant] has had

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judge observed that"Dr. Rubio...mentioned that the Claimant's exposure history is adequate and prolonged enough to justify the diagnosis." *Id*. The administrative law judge stated that "[a] history of coal dust exposure is an insufficient basis on which to make a finding of pneumoconiosis." *Id*.

[9]The administrative law judge observed that "Dr. Rubio, in a letter dated March 26, 1997, stated that...the Claimant 'has had no other significant pulmonary insult during his lifetime to merit the number on his pulmonary function test." Decision and Order at 14. The administrative law judge found that "[t]his statement seemingly ignores the Claimant's quadruple CABG occurring in 1993." *Id*. The administrative law judge also found that "Dr. Rubio fails to explain why he discounts the Claimant's smoking history and the CABG performed in 1993." *Id*.

no other **significant** pulmonary insult during his lifetime to merit the number on his pulmonary function test." *Id* (emphasis added). In his December 15, 1997 report, Dr. Rubio stated, "I do understand that there are other factors including his previous smoking, heart disease and open heart surgery." Claimant's Exhibit 1. Therefore, since the administrative law judge did not provide a valid basis for discounting the opinion of Dr. Rubio, we vacate the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

On remand, the administrative law judge must initially consider whether Dr. Rubio's opinion is reasoned, and then take Dr. Rubio's status as claimant's treating physician into consideration in weighing the conflicting medical opinion evidence of record. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). In addition, if reached, the administrative law judge must consider whether the evidence is sufficient to establish that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(c). *See Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). Finally, inasmuch as we vacate the administrative law judge's finding of no pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding of no total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) and remand the case for further consideration of the evidence thereunder, if reached. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

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 proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge