BRB No. 00-1097 BLA

ASA M. WRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
A & E COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Mark E. Solomons (Greenberg Taurig LLP), Washington, D.C., for employer.

Dorothy L. Page (Howard M. Radzely, Acting 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0452) of Administrative Law Judge Pamela Lakes Wood 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] Based on the filing date of March 9, 1998, the administrative law

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

judge adjudicated this claim pursuant to 20 C.F.R Part 718. Director's Exhibit 1. The administrative law judge credited claimant with thirty-nine years of coal mine employment and found employer to be the responsible operator. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1),(4), 718.203(b), 718.204(b), (c)(1),(2),(4) (2000). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred by finding that claimant established that he was totally disabled due to pneumoconiosis pursuant to Section 718.204(b) (2000). 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 the merits of this appeal.[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 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 disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2001). 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*).

[2]We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(c) (2000), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 administrative law judge's Decision and Order must be vacated and the case remanded to the administrative law judge for further consideration. Employer asserts that the administrative law judge erred in failing to apply the standard enunciated in *Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998), which requires a claimant to establish that pneumoconiosis is more than a *de minimis* contributing factor to his total disability.[3] Subsequent to the issuance of the administrative law judge's Decision and Order, the regulations concerning total disability causation were amended and became applicable to all pending claims. *See supra* at 2 n.1. Pursuant to 20 C.F.R. §718.204(c) (2001):

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in 20 C.F.R. §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure that is unrelated to coal mine employment.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

20 C.F.R. §718.204(c) (2001).[4] In this case, the administrative law judge gave greatest weight to the opinion of Dr. Robinette and determined that Dr. Robinette's statement that at least part of claimant's pulmonary impairment was directly related to his coal dust exposure establishes that claimant is totally disabled due to pneumoconiosis. Decision and Order at 14; Claimant's Exhibit 1. It is not clear, however, whether Dr. Robinette's opinion is sufficient to satisfy claimant's burden as defined in Section 718.204(c) (2001). Therefore, we vacate the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis and remand the case to the administrative law judge for reconsideration of this issue in accordance with applicable law. 20 C.F.R. §718.204(c) (2001); *see Smith, supra*; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

We now turn to employer's remaining assertions with respect to the administrative law judge's findings regarding total disability causation. We find no merit in employer's contention that the administrative law judge erred by failing to find that claimant's age - related and smoking - related health conditions were intervening and superseding causes of claimant's total disability. Employer's various arguments should be considered in the administrative law judge's reconsideration of the relevant evidence in light of Section 718.204(c) (2001) on remand. In addition, the administrative law judge is not required to consider claimant's age or whether claimant was also disabled by an independent, non-coal dust related condition, as these factors do not automatically exclude claimant's entitlement under the Act. *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130 (6th Cir. 1993) *cert. denied*, 510 U.S. 1040 (1994). Moreover, 20 C.F.R §718.204(a) (2001), provides that any nonpulmonary or nonrespiratory

[4]In the comments accompanying the publication of the amended regulations, the Department of Labor (DOL) indicated that the "substantially contributing cause" standard set forth in 20 C.F.R. §718.204(c) implements the standard developed "in court of appeals precedent since 1989 which varie[s] little from circuit to circuit." 65 Fed. Reg. 79946 (2000). DOL also stated that the addition of the word "material" to Section 718.204(c), establishes that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability" does not satisfy the standard. *Id*.

condition which causes a disability that is not related to a miner's pulmonary or respiratory disability must not be considered in determining whether a miner is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(a) (2001).

We further reject employer's contention that the administrative law judge erred in according greater weight to Dr. Robinette's opinion than to the contrary opinions of record. The administrative law judge considered the relevant evidence of record and permissibly determined that Dr. Robinette's opinion was entitled to the most weight, as he examined claimant, had the opportunity to review all of claimant's medical records, and as a pulmonologist, is better qualified to express an opinion concerning the etiology of claimant's respiratory impairment. Decision and Order at 13; *see Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Additionally, the administrative law judge reasonably concluded that the opinion of Dr. McSharry, which the administrative law judge found to be well reasoned and documented, was outweighed by the explanation provided in Dr. Robinette's opinion. Decision and Order at 14; *see Clark*, *supra*. We affirm, therefore, the administrative law judge's decision to accord greater weight to the opinion of Dr. Robinette.[5]

[5]Any error in the administrative law judge's consideration of Dr. Kleinerman's opinion is harmless, as the administrative law judge has provided a valid alternative rationale for according the opinion of this pathologist less weight. Decision and Order at 12-13; *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-376 (1983).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge