BRB No. 00-1107 BLA

STANLEY CASTEEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
T & T FUELS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Robert Weinberger (State of West Virginia Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

Jennifer U. Toth (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 the 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:

Claimant appeals the Decision and Order (99-BLA-0591) of Administrative Law Judge Edward Terhune Miller denying benefits in 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] The administrative law judge credited claimant with twenty-one years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

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[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, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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.

[2]Claimant filed a claim for benefits on December 16, 1991. Director's Exhibit 1. On June 12, 1991, the district director administratively awarded benefits. Director's Exhibit 30. However, Administrative Law Judge Robert G. Mahony subsequently issued a Decision and Order denying benefits because claimant failed to establish the existence of pneumoconiosis, Director's Exhibit 47, which the Board affirmed, *Casteel v. T & T Fuels, Inc.*, BRB No. 96-0932 BLA (May 23, 1997)(unpub.). Further, the Board denied claimant's request for reconsideration. *Casteel v. T & T Fuels, Inc.*, BRB No. 96-0932 BLA (July 8, 1997)(unpub. Order). Following an appeal by claimant, the United States Court of Appeals for the Fourth Circuit affirmed Judge Mahony's denial of benefits. *Casteel v. Director, OWCP*, No. 98-1055 (4th Cir. Mar. 26, 1998)(unpub.). On June 30, 1998, claimant filed a request for modification. Director's Exhibit 63.

§718.202(a)(1) and (a)(4) (2000). Consequently, the administrative law judge found the evidence sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[3] The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(2) (2000).[4] However, the administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Carrier responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge erred in finding Dr. Trainor's opinion insufficient to establish total disability due to pneumoconiosis in accordance with *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

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).

Claimant contends, and the Director agrees, 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) (2000). The United States Court of Appeals for the Fourth Circuit,

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[3]The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

within whose jurisdiction this case arises, has held that pneumoconiosis must be at least a contributing cause of a miner's totally disabling respiratory impairment in order to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). *See Robinson, supra*. In addition, the revised regulation at 20 C.F.R. §718.204(c) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §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 unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

The record contains the opinions of Drs. Cale, Fino,[5] Robinette and Trainor. Director's Exhibits 19, 20, 43, 46; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge stated, "[t]he only two physicians of record whose opinions might be construed as suggesting that [c]laimant's pneumoconiosis was a contributing cause of his totally disabling respiratory impairment are Drs. Trainor and Robinette." Decision and Order

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[5]Administrative Law Judge Edward Terhune Miller (the administrative law judge) stated, "[o]n August 23, 1999, this tribunal granted [c]laimant's request that the claim be decided upon the written record and allowed the parties forty-five (45) days to file closing arguments." Decision and Order at 2. The administrative law judge also stated, "[b]y order dated October 27, 1999, this tribunal permitted [e]mployer 'to file a single rereading of Dr. Robinette's x-ray report, and to take a deposition of Dr. Robinette and/or submit a consultative report reviewing Dr. Robinette's examination report.'" *Id.* Additionally, the administrative law judge observed that "[t]he order further explicitly stated that 'a medical records review of all medical reports is not timely or appropriate.'" *Id.* Nonetheless, the administrative law judge stated that "[d]espite the clear parameters of this evidentiary order, [e]mployer filed a December 1, 1999, medical records review by Dr. Fino, which reviewed medical records generated between 1991 and 1995, but did not discuss Dr. Robinette's findings." *Id.* Therefore, the administrative law judge concluded that "Dr. Fino's report is lodged and identified as E-1, but not admitted into evidence because it does not comply with the order of October 27, 1999, and was not accompanied by any request for pertinent relief." *Id.*

at 12. However, the administrative law judge stated that "their opinions are not sufficient by themselves, or in the context of contrary opinions of record, to form a reliable basis for concluding that pneumoconiosis was a contributing cause of [c]laimant's total disability." *Id.*

In a report dated January 30, 1992, Dr. Trainor diagnosed chronic obstructive lung disease and opined that claimant suffers from a significant impairment in physical abilities. Director's Exhibit 19. In a subsequent report dated May 22, 1992, Dr. Trainor opined that "[claimant's] most predominate medical condition regarding his lungs is related to emphysema...[and] he does have some symptoms of chronic bronchitis, which could be related to dust disease." Director's Exhibit 20. Dr. Trainor therefore stated, "I would say, in all likelihood, [claimant] has a mixed condition, perhaps 80% emphysema, 20% possible dust disease." *Id.* Dr. Trainor further opined that claimant suffers from a total disability and that about 80% of claimant's condition would be related to cigarette smoking and 20% related to coal dust exposure. *Id.* Dr. Trainor stated, "I am basing this estimate on the fact that [claimant] does have severe air flow obstruction...[and] [t]here is some reversibility, which is more likely related to symptoms of chronic bronchitis, and symptoms of chronic bronchitis may be related to coal dust exposure, as well as cigarettes." *Id.* In a report dated June 30, 1999, Dr. Robinette diagnosed coal workers' pneumoconiosis, and noted that "[t]he literature clearly documents the existence of severe respiratory impairments in patients who have had dust exposure in the past."[6] Claimant's Exhibit 1. The administrative law judge permissibly discredited the opinion of Dr. Trainor because he found it to be equivocal.[7] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we reject the Director's assertion that the administrative law judge erred in discrediting the opinion of Dr. Trainor.[8] Moreover, inasmuch as Dr. Robinette did not render an opinion with respect to the issue of total disability due to pneumoconiosis, we reject claimant's assertion that the administrative law judge erred in finding Dr. Robinette's opinion insufficient to establish total disability due to pneumoconiosis. Inasmuch as it is supported

[6]The administrative law judge observed that "Dr. Robinette never directly discussed the etiology of [c]laimant's lung impairment." Decision and Order at 12.

[7]The administrative law judge stated that "Dr. Trainor's use of qualifying terms such as 'in all likelihood,' 'perhaps,' 'possible,' 'could be,' and 'may be,' when diagnosing [c]laimant's disease process and its etiologies, renders his opinion too equivocal to be determinative." Decision and Order at 12.

[8]The Director asserts that Dr. Trainor opined that coal dust exposure and smoking contributed to claimant's physical impairment without equivocation in the January 30, 1992 report. Contrary to the Director's assertion, Dr. Trainor did not specifically indicate that claimant's condition was related to coal dust exposure. Director's Exhibit 19.

by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis.[9] *See* 20 C.F.R. §718.204(c).

Since claimant failed to establish total disability due to pneumoconiosis, *see* 20 C.F.R. §718.204(c), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[9]The administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis in accordance with *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). However, the revised regulation at 20 C.F.R. §718.204(c) provides the standard for disability causation. Nevertheless, inasmuch as the administrative law judge permissibly discredited the only opinion of record that could support a finding of disability causation, we need not remand this case for reconsideration pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge