BRB No. 02-0271 BLA

NELLIE M. HONAKER (Widow of FRED HONAKER) Claimant-Respondent v. RANGER FUEL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Nellie M. Honaker, Glen Daniel, West Virginia, *pro se*.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (91-BLA-2871) of Administrative Law Judge Stuart A. Levin awarding benefits on a miner's duplicate 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] This case is before

[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.

the Board for the fourth time. Initially, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) (2000), 718.203(b) (2000) and further found that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c) (2000). Accordingly, the administrative law judge found that the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and awarded benefits on the miner's duplicate claim.

Employer appealed and the Board vacated the award of miner's benefits. *See Honaker v. Ranger Fuel Corporation*, BRB No. 93-2538 BLA (May 31, 1995)(unpub.). The Board affirmed, as unchallenged, the administrative law judge's findings regarding the length of the miner's coal mine employment and pursuant to Sections 718.202(a)(2) (2000), 718.203 (2000), 718.204(c)(1)-(3) (2000), and 725.309 (2000), but vacated the administrative law judge's findings that claimant[2] established total respiratory disability pursuant to Section 718.204(c) (2000) and total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b) (2000) and remanded the case for further consideration.[3] *Id.*

On first remand, the administrative law judge again concluded that the evidence of record was sufficient to establish that the miner had total respiratory disability pursuant to Section 718.204(c) (2000) and total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b) (2000). Accordingly, benefits were awarded.

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[2]Claimant is Nellie Honaker, widow of the miner, Fred Honaker, who died on October 3, 1990. The miner's first claim for benefits, filed on November 8, 1979, was finally denied on June 19, 1981. Director's Exhibit 20. The miner's present claim for benefits was filed on February 1, 1984 and is being pursued by claimant. Director's Exhibit 1.

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now set out at 20 C.F.R. §718.204(b) in the amended regulations, while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) in the amended regulations.

Subsequent to a second appeal by employer, the Board again vacated the award of benefits. *Honaker v. Ranger Fuel Corp.*, BRB No. 98-0372 BLA (Dec. 1, 1998)(unpub.)(*Honaker II*). Specifically, the Board affirmed, as unchallenged, the administrative law judge's finding that the evidence established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c) (2000), *Honaker II*, *slip op.* at 2 n.2, but vacated the administrative law judge's finding that the evidence of record established total respiratory disability due to pneumoconiosis at Section 718.204(b) (2000), *Honaker II*, *slip op.* at 3. The Board held that, in reaching his determination at Section 718.204(b) (2000), the administrative law judge relied upon evidence which could not be located in the record. Accordingly, the Board concluded that the administrative law judge's finding was violative of the Administrative Procedure Act (APA). *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Honaker II*, *slip op.* at 3. The Board, therefore, remanded the case for further consideration of the relevant evidence at Section 718.204(b) (2000). *Id.*

On second remand, the administrative law judge stated that the evidence he had previously relied upon was part of the record and that the Board erred in holding that such evidence was not part of the record. Accordingly, the administrative law judge incorporated by reference his previous findings of fact and conclusions of law and awarded benefits.

Thereafter, employer filed a third appeal, and the Board again vacated the award of benefits and remanded for further consideration. *Honaker v. Ranger Fuel Corp.*, BRB No. 99-1273 BLA (Nov. 17, 2000)(unpub.)(*Honaker III*). Regarding the "missing opinions," referenced in the Board's previous Decision and Order, the Board stated that "the administrative law judge specifically addressed the medical opinions in question and...employer has failed to challenge the findings that such reports were part of the record." *See Honaker III*, *supra*. Therefore, the Board concluded that "such reports are part of the record, *see* Director's Exhibit 7, and may be considered by the administrative law judge under the APA." *See Honaker III*, *supra*. Accordingly, the Board stated that its review of this case would encompass a review of the administrative law judge's most recent Decision and Order on Remand, dated August 17, 1999, and his previous Decision and Order on Remand, dated April 23, 1997. *Id.* Additionally, the Board held that Dr. Daniel's opinions "fail[] to demonstrate the 'nexus' between the miner's pneumoconiosis and his totally disabling respiratory impairment." *See Honaker III*, *slip op.* at 5. The Board instructed the administrative law judge to reconsider the opinions of Drs. Crisalli, Kleinerman, Hutchins, Bush, and Naeye pursuant to Section 718.204(b) (2000) on remand. *See Honaker III*, *slip op.* at 6-7.

On third remand, the administrative law judge again found that claimant established that the miner's total respiratory disability was due to pneumoconiosis based on Dr. Daniel's

opinion. Decision and Order on Remand at 2. Accordingly, benefits were awarded.

In this appeal currently pending before the Board, employer asserts that the administrative law judge's award of benefits should be reversed inasmuch as the administrative law judge erred in relying upon the opinion of Dr. Daniel as support for his finding of total respiratory disability due to pneumoconiosis. Employer's Brief at 12-14. Employer further asserts that the administrative law judge erred in according less weight to the opinions of Drs. Kleinerman, Bush, Hutchins, and Crisalli regarding the cause of the miner's disability. Employer's Brief at 14-18. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

The disability causation standard established by the revised regulation at 20 C.F.R. §718.204(c) is as follows:

> 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:
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> (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.

The relevant medical evidence regarding the cause of the miner's impairment is as follows. Drs. Kleinerman, Hutchins, Bush, Chillag, Fino, and Zaldivar all found that the miner's simple coal workers' pneumoconiosis did not contribute to his respiratory impairment. Employer's Exhibits 2, 6, 9, 13, 14, 17; Director's Exhibit 42. Dr. Crisalli stated that even assuming low grade changes of coal workers' pneumoconiosis on x-ray, these changes are not expected to cause any restrictive defect in the miner's pulmonary function. Director's Exhibit 38. On June 16, 1984, Dr. Daniel diagnosed the miner with chronic obstructive pulmonary disease (COPD) unrelated to coal mine employment, found no x-ray evidence of pneumoconiosis, found no evidence of significant pulmonary dysfunction,

and stated that the miner should be able to perform his usual coal mine employment. Director's Exhibit 3. Dr. Daniel also treated the miner during various hospitalizations. In April 1985, Dr. Daniel noted that the miner was admitted to the emergency room with difficulty breathing, coughing, and wheezing. Director's Exhibit 14. Additionally, Dr. Daniel diagnosed COPD with hypoxemia and noted coal workers' pneumoconiosis on x-ray. *Id.* In November 1985 on a hospital discharge summary, Dr. Daniel noted dyspnea, wheezing, and coughing, and he diagnosed hypertensive arteriosclerotic heart disease, coal workers' pneumoconiosis, and acute exacerbation of COPD secondary to acute bronchitis. Unmarked Exhibit. On a hospital discharge summary in December 1986, Dr. Daniel noted that the miner had shortness of breath and difficulty breathing, and diagnosed acute asthmatic bronchitis, coal workers' pneumoconiosis, and arteriosclerotic heart disease. Unmarked Exhibit.

Employer asserts that the medical opinions of Dr. Daniel do not support a finding that the miner's total respiratory disability was due to pneumoconiosis inasmuch as this physician's opinions are silent on the issue and do not link the miner's disability to a coal mine dust induced lung disease. Employer's Brief at 12-13. Employer further asserts that previously the "Board held that Dr. Daniel's opinions failed to demonstrate the 'nexus' between the miner's pneumoconiosis and his totally disabling respiratory impairment." Employer's Brief at 7.

When this case was most recently before the Board on appeal, the Board, in discussing Dr. Daniel's opinions, stated that "a review of Dr. Daniel's various opinions of record, [citations omitted], fails to demonstrate the 'nexus' between the miner's pneumoconiosis and his totally disabling respiratory impairment." *See Honaker III*, *slip op.* at 5. The Board "vacated the administrative law judge's reliance on Dr. Daniel's opinion as more credible than the opinions of the pathologists" because "we have already concluded that Dr. Daniel's opinions are flawed to the extent that his opinions may not be supportive of a finding of total disability due to pneumoconiosis at Section 718.204(b) [(2000)]." *See Honaker III*, *slip op.* at 6-7. Accordingly, the Board vacated the administrative law judge's Section 718.204(b) (2000) finding and remanded this case for him to reconsider the relevant evidence pursuant to this subsection. *Id.*

In reconsidering Dr. Daniel's opinions on remand, the administrative law judge stated:

> Dr. Daniel considered the miner's symptoms related to his totally disabling respiratory impairment including shortness of breath, 'Dyspnea, wheezing, and coughing,' and diagnosed arteriosclerotic heart disease, with secondary diagnoses which included 'coal workers' pneumoconiosis'.... Since Dr. Daniel nowhere suggests that the diagnoses he rendered were unrelated to the symptoms and clinical impressions he noted, and which the Board affirmed, the 'nexus' between the miner's condition and the diseases Dr. Daniel

diagnosed is reasonably provided by the context of his reports considered as a whole.

Decision and Order on Remand at 2.[4] In his Decision and Order on Remand, the administrative law judge stated that "Dr. Daniel considered the miner's symptoms related to his totally disabling respiratory impairment," but nowhere in the administrative law judge's decision does he identify what in Dr. Daniel's opinions he relied upon to conclude that Dr. Daniel considered the miner's total respiratory disability to be due to pneumoconiosis. *Id.* The administrative law judge additionally stated that Dr. Daniel's opinions are supportive of a connection between the miner's total respiratory disability and his pneumoconiosis merely because Dr. Daniel *did not specifically state that a link was not established*. In doing so, the administrative law judge did not elaborate on his finding or refer to specific evidence demonstrating how Dr. Daniel's opinions are supportive of such a connection. As employer contends, it appears, therefore, that the administrative law judge "leaps" to a finding that Dr. Daniel's opinions establish total respiratory disability due to pneumoconiosis when no such opinion was offered by Dr. Daniel. In light of the foregoing, we hold that the administrative law judge's finding that claimant established total respiratory disability due to pneumoconiosis based on Dr. Daniel's opinions is irrational, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), and without support in the record.

In order to establish entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner's totally disabling respiratory impairment was due to his pneumoconiosis. *See* 20 C.F.R. §718.204(c); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). As the Board stated in its previous Decision and Order, Dr. Daniel failed to diagnose the presence of a totally disabling respiratory

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[4]The administrative law judge cites *Hoffman v. B&G Construction Co.*, 8 BLR 1-65 (1985), *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and *Justus v. Director, OWCP*, 6 BLR 1-1127 (1984), in support of the proposition that "clinical elements when considered by a treating physician are sufficient to support a reasoned medical opinion." Decision and Order on Remand at 2. These cases hold that an administrative law judge may not discredit a physician's opinion which is adequately supported by that physician's medical examination. *See Hoffman*, *supra*; *Hess*, *supra*; *Justus*, *supra*. *Hoffman*, *Hess*, and *Justus* do not provide support for an administrative law judge's decision to extrapolate a physician's conclusions from his medical findings where the physician has not made such a conclusion himself, *i.e.*, that the miner's total respiratory disability is due to his pneumoconiosis.

impairment or establish a link between such an impairment and the miner's pneumoconiosis in his medical opinions. Because Dr. Daniel did not explicitly state anywhere in his opinions that the miner's pneumoconiosis, as defined in 20 C.F.R. §718.201, was a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment in accordance with the revised regulations, we hold that Dr. Daniel's opinions are insufficient to establish that pneumoconiosis caused the miner's total respiratory disability. *See* 20 C.F.R. §718.204(c); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990), *citing Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

The record contains no other medical opinion that would, if credited, be sufficient to establish that the miner's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c). Therefore, we hold that the evidence of record is insufficient to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204(c) as a matter of law. *See generally Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Kowalchick v. Director, OWCP,* 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990). Since we hold that claimant has failed to establish that the miner's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c), a requisite element of entitlement under Part 718, *see Trent*, *supra*; *Perry*, *supra*, we also reverse the administrative law judge's award of benefits in this miner's claim.[5]

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is reversed and benefits are denied in the miner's claim.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[5]Given our disposition of this case, *see* discussion, *supra*, we need not reach employer's contention that the administrative law judge erred in according less weight to the opinions of Drs. Kleinerman, Bush, Hutchins, and Crisalli regarding the cause of the miner's disability, as it is moot. *See Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984); *see generally Creggar v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge