BRB No. 02-0364 BLA

BOBBY MYERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Bobby Myers, Princeton, Wisconsin, *pro se*.

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order on Remand Denying Benefits (98-BLA-0881) of Administrative Law Judge Jeffrey Tureck 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] Claimant filed a duplicate claim for

[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.

benefits on February 12, 1993.[2] In an initial Decision and Order dated July 26, 1994, Administrative Law Judge Robert G. Mahony stated that both parties agreed to a decision on the record, and then applied the regulations at 20 C.F.R. Part 718 (2000) in considering entitlement. Judge Mahony found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000) and total disability due to pneumoconiosis under 20 C.F.R. §718.204(b) and (c) (2000). Judge Mahony determined that claimant failed, therefore, to establish a material change in conditions under 20 C.F.R. §725.309 (2000), and, consequently, denied benefits. Claimant appealed. The Board vacated Judge Mahony's Decision and Order. *Myers v. Director, OWCP*, BRB No. 94-3735 BLA (Feb. 28, 1995)(unpublished). The Board held that since claimant had not waived in writing his right to a hearing, Judge Mahony's finding of a valid waiver was erroneous. *Id*. The Board further vacated Judge Mahony's findings with regard to entitlement, and remanded the case for further findings pursuant to 20 C.F.R. §§725.309 (2000), 718.202(a) (2000) and 718.204(b), (c) (2000), as well as with regard to length of coal mine employment. *Id*.

[2]Claimant filed a previous claim on May 17, 1989. Director's Exhibit 21. The claim was finally denied on December 12, 1989 by the district director, who found that claimant failed to establish the existence of pneumoconiosis and total disability. *Id*. Claimant did not take any further action in pursuit of benefits until filing the instant duplicate claim on February 12, 1993. Director's Exhibit 1.

On remand, the case was assigned to Administrative Law Judge Jeffrey Tureck (the administrative law judge), who held a hearing on January 25, 1999, at which claimant was represented by counsel. In a Decision and Order dated May 18, 1999, the administrative law judge credited claimant with exactly ten years of coal mine employment and considered the evidence under the applicable regulations at Part 718 (2000). Noting that the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant became totally disabled, the administrative law judge found that claimant established a material change in conditions under Section 725.309 (2000).[3] The administrative law judge then found the evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) (2000) and total disability due to pneumoconiosis under Section 718.204(b) (2000). Accordingly, he denied benefits. Claimant appealed. The Board affirmed the administrative law judge's length of coal mine employment finding and his finding that claimant failed to establish total disability due to pneumoconiosis under Section 718.204(b) (2000). *Myers v. Director, OWCP*, BRB No. 99-1023 BLA (June 29, 2000)(unpublished). The Board thus affirmed the denial of benefits.[4] *Id*.

Thereafter, claimant filed an appeal with the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the administrative law judge's length of coal mine employment finding and findings that the existence of pneumoconiosis was not established under Section 718.202(a)(1)-(3) (2000), but vacated the administrative law judge's consideration of the medical opinion evidence under Sections 718.202(a)(4) (2000) and 718.204(b) (2000). *Myers v. Director, OWCP*, No. 00-4528 (6th Cir. Sept. 17, 2001)(unpublished Order). The court instructed the administrative law judge to reconsider the medical opinions of Drs. Giminez, Kryda and Harrison. *Id*.

In his Decision and Order on Remand dated January 29, 2002, the administrative law judge reconsidered the relevant medical opinion evidence of record and found it insufficient to establish the existence of pneumoconiosis under Section 718.202 (a)(4). Accordingly, he denied benefits. On appeal, claimant contends that the administrative law judge erred in

[3]The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

[4]The Board held that it did not need to review the administrative law judge's findings under 20 C.F.R. §718.202(a)(1)-(4) (2000) in view of its affirmance of the administrative law judge's finding that benefits were precluded in light of claimant's failure to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(b) (2000), a requisite element of entitlement under 20 C.F.R. Part 718 (2000). *Myers v. Director, OWCP*, BRB No. 99-1023 BLA (June 29, 2000)(unpublished), slip op. at 3, n.3.

denying benefits. The Director responds in support of the administrative law judge's decision denying benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We hold that the administrative law judge properly weighed the medical opinion evidence on remand in this case pursuant to the Sixth Circuit's instructions in finding that the weight of the evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). With regard to Dr. Giminez's opinion, the administrative law judge properly considered whether it should be accorded greater weight, in light of Dr. Giminez's statement in his report dated December 28, 1998, that he had been claimant's treating physician since 1992. Decision and Order on Remand at 2-4; Claimant's Exhibit 1. The administrative law judge found that, taken together, two factors cast doubt on Dr. Giminez's statement that he was claimant's treating physician from 1992 until 1998. Decision and Order on Remand at 3. Specifically, the administrative law judge noted that hospital records from 1996 and 1997 did not list a family physician, Director's Exhibits 33, 35, and that in his March and April 1997 reports, Dr. Giminez did not indicate his familiarity with claimant, nor did he refer to previous examinations. *Id.*; Director's Exhibits 33, 40; Claimant's Exhibit 1.

Moreover, while an administrative law judge must give consideration to a physician's status as a miner's treating physician, an administrative law judge is not required to give greater weight to the opinion of a treating physician where the administrative law judge finds the opinion flawed.[5] *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir.

[5]20 C.F.R. §718.104(d) provides that the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record, and weigh various factors in considering a treating physician's opinion. *See* 20 C.F.R. §718.104(d)(1)-(5)*; but see Jericol Mining, Inc. v. Napier*, F.3d , 2002 WL

1995); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge properly discounted Dr. Giminez's opinion as not well-reasoned and documented because the doctor's speculation in his March 27, 1997 report, that "it is possible that [claimant's] original problem started with a chronic bronchitis from prolonged exposure to coal dust in his early life" Director's Exhibit 40, was markedly different from Dr. Giminez's unambiguous statement in a report dated only days later, on April 1, 1997, that claimant's severe pulmonary disease was primarily due to his prolonged coal dust exposure. Decision and Order on Remand at 3; Director's Exhibit 33. The administrative law judge found it significant that Dr. Giminez neither offered an explanation nor did he cite a basis for the changed statement. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); Decision and Order on Remand at 3.

1988221 (6th Cir., Aug. 30, 2002). The provision at Section 718.104 applies to evidence developed after January 19, 2001, and thus does not apply to the opinion of Dr. Giminez. *See* 20 C.F.R. §718.104.

With regard to the conflicting opinions of Drs. Kryda and Harrison, the administrative law judge properly found Dr. Harrison's opinion, that claimant does not suffer from pneumoconiosis, entitled to more weight because Dr. Harrison's opinion was consistent with the results of his examinations, and was based upon relatively accurate smoking and work histories, while Dr. Kryda's opinion was completely unexplained, inconsistent with an x-ray taken during his examination, and based upon a smoking history of only one-quarter pack per day from age twelve to age forty-five.[6] *See Clark, supra; Tackett, supra*; Decision and Order on Remand at 4; Director's Exhibits 12, 21, 49. We affirm, therefore, the administrative law judge's finding on remand that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

[6]Dr. Kryda noted that claimant, who was fifty-two years old when Dr. Kryda examined claimant on September 26, 1989, indicated he smoked one-quarter pack of cigarettes per day from age twelve until age forty-five, when he quit smoking cigarettes, *i.e.*, he had smoked for thirty-three years. Director's Exhibit 21. As the administrative law judge noted in his prior, 1999 Decision and Order, claimant testified at his 1999 hearing, when he was sixty-one years old, that he was still smoking cigarettes, albeit only a few per day. 1999 Decision and Order at 4; Hearing Tr. at 108. Claimant indicated to Dr. Harrison in 1993 that he was a current smoker of about three to four cigarettes daily, and had been smoking since age fourteen. Director's Exhibit 12.

The administrative law judge's findings in his Decision and Order dated May 18, 1999, that the evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(3) (2000), were affirmed by the Sixth Circuit, as discussed *supra*.[7] Thus, inasmuch as claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4), the administrative law judge properly found entitlement to benefits precluded. *See Trent, supra; Gee, supra; Perry, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH

[7]The administrative law judge found the preponderance of the x-ray evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) (2000), since only one of the ten x-ray readings of record was positive for the disease. 1999 Decision and Order at 4-5; Director's Exhibits 15, 21, 35-39, 51, 57. The administrative law judge further found that the record does not contain autopsy or biopsy evidence of pneumoconiosis and that, therefore, the record did not establish the existence of pneumoconiosis under Section 718.202(a)(2) (2000). 1999 Decision and Order at 5. The administrative law judge also found that claimant was precluded from establishing the existence of pneumoconiosis under Section 718.202(a)(3) (2000), as none of the presumptions thereunder applied. *See* 20 C.F.R. §§718.305, 718.305 and 718.306 (2000).

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge