BRB No. 05-0201 BLA

LEDFORD LOVINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH MINERAL CORPORATION	)	DATE ISSUED: 09/30/2005
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Helen H. Cox (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6009) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) 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 twenty-five 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 insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges 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)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(iv). Further, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer has not participated in this appeal. The Director responds, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[1]

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 that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). We disagree. The record consists of the reports of Drs. Hussain, Merced, Baker, and Jarboe. In a report dated August 10, 2001, Dr. Hussain opined that claimant suffers from a moderate pulmonary impairment and that he does not have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 12. Dr. Merced, in a report dated June 19, 2002, opined that claimant suffers from a pulmonary impairment and that he does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 26. In a report dated June 20, 2001, Dr. Baker opined:

> The patient has a Class I impairment with the FEV1 and vital capacity both being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

[1]Since the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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> Patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 22. In contrast, Dr. Jarboe, in a report dated August 9, 2001, opined that claimant does not have a disabling respiratory impairment. Director's Exhibit 24. Dr. Jarboe further opined that claimant retains the functional respiratory capacity to do his last coal mining job or one of similar physical demand in a dust free environment. *Id*. Based on his findings that Dr. Baker's opinion does not support a finding of total disability and that the opinions of Drs. Hussain and Merced are outweighed by Dr. Jarboe's contrary opinion, the administrative law judge concluded that claimant failed to establish total disability. The administrative law judge specifically discounted Dr. Hussain's opinion of total disability on the basis that Dr. Hussain failed to adequately explain how the underlying objective evidence supported his opinion. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). However, claimant does not contest the administrative law judge's treatment of Dr. Hussain's disability opinion at 20 C.F.R. §718.204(b)(2)(iv).

Claimant asserts that the administrative law judge erred in discounting the opinions of Drs. Merced and Baker because they are based on non-qualifying pulmonary function studies.[2] Contrary to claimant's assertion, the administrative law judge permissibly discounted Dr. Merced's opinion because it is based on objective evidence that is not in the record. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). The administrative law judge specifically stated, "[b]ecause the objective studies on which Dr. Merced based his opinion are not part of the record, I discount his opinion because there is no way to verify the medical data to which he refers."[3] Decision and

[2]Claimant asserts that a single medical opinion supportive of a finding of total disability is "sufficient for invoking the presumption of total disability." Claimant's Brief at 7. However, claimant has not identified any presumption of total disability that is applicable in this case, nor does one exists, given the facts and evidence in this Part 718 case.

[3]In his report, Dr. Merced indicated that his opinion was based, in part, on a pulmonary function study. Director's Exhibit 26. However, a pulmonary function study was not admitted into record with Dr. Merced's report. Moreover, Dr. Merced did not provide the date of the pulmonary function study and none of the other pulmonary function studies of record are directly related to him.

Order at 15. Additionally, the administrative law judge rationally found that "the opinion from Dr. Baker fails to adequately diagnose a totally disabling respiratory impairment." *Id*. Because Dr. Baker failed to explain the severity of a Class I impairment or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class I impairment is insufficient to support a finding of total disability. *Budash*, 9 BLR at 1-51. Further, because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the second aspect of Dr. Baker's opinion is insufficient to support a finding of total disability. Thus, we reject claimant's assertion that the administrative law judge erred in discounting the opinions of Drs. Merced and Baker. Moreover, since the administrative law judge permissibly discounted Dr. Merced's opinion, *Budash*, 9 BLR at 1-51, and since he rationally found that Dr. Baker's opinion is insufficient to establish total disability, *Zimmerman*, 871 F.2d at 567, 12 BLR at 2-258, we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with the assessments of claimant's impairment by Dr. Merced and Dr. Baker.

We also reject claimant's assertion that the administrative law judge erred in failing to accord greater weight to Dr. Merced's opinion based upon his status as claimant's treating physician. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d).[4] Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). In the instant case, the administrative law judge noted that "Dr. Merced treats the [c]laimant not only for his breathing problems but also for his diabetes and cholesterol." Decision and Order at 3. However, the administrative law judge did not explicitly apply the criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician's opinion with regard to the issue of total disability. Nonetheless, because the administrative law judge permissibly discounted Dr. Merced's opinion because it is based on objective evidence that is not in the

[4]The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

record, *see* 20 C.F.R. §718.104(d)(5); *Budash*, 9 BLR at 1-51, we hold that any error by the administrative law judge in failing to apply the criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician's opinion with regard to the issue of total disability is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

In addition, we hold that, contrary to claimant's statement, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine work. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). We also reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled, since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv). Thus, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Since claimant failed to establish total disability at 20 C.F.R. §718.204(b),[5] an

[5]Claimant additionally contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). Specifically, claimant argues that the administrative law judge discredited Dr. Hussain's diagnosis of pneumoconiosis on the grounds that Dr. Hussain did not record the duration and extent of claimant's coal mine employment and that he does not provide any other reason for the diagnosis of the disease beyond the positive x-ray reading. Claimant's Brief at 5; Decision and Order at 11. In response to claimant's contention, the Director argues that Dr. Hussain credibly diagnosed both "legal" pneumoconiosis and "clinical" pneumoconiosis. In addition, the Director argues that Dr. Hussain provided a credible, though not dispositive, opinion on the issues of disability and disability causation. Thus, the Director argues that the Board should not remand this case to supplement Dr. Hussain's opinion. The Director's duty is to ensure the proper enforcement and lawful administration of the Act. *Hodges*, 18 BLR at 1-87; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*). As the Director argues, the administrative law judge did not discredit Dr. Hussain's disability opinion entirely. Rather, the administrative law judge merely found that Dr. Hussain's disability opinion was outweighed by Dr. Jarboe's contrary opinion. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). As we have affirmed the administrative law judge's

essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[6] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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denial of benefits at 20 C.F.R. §718.204(b), claimant could not prevail, even if the case were remanded in order to allow Dr. Hussain to supplement his opinion on the issue of pneumoconiosis. Thus, we decline to order a remand of this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6]In view of our disposition of this case at 20 C.F.R. §718.204(b), we decline to address claimant's contention at 20 C.F.R. §718.202(a)(1) and (a)(4).