BRB No. 97-0603 BLA

TALMON GRIGSBY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
WHITAKER COAL CORPORATION	)	
	)	
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for employer.

J. Matthew McCracken (J. Davitt McAteer, 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (95-BLA-2308) of Administrative Law Judge Michael P. Lesniak 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). This claim, filed on January 28, 1992, was properly adjudicated

pursuant to the permanent regulations at 20 C.F.R. Part 718.[1] After crediting claimant with nineteen and one-quarter years of coal mine employment, the administrative law judge found the medical opinion evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge found the evidence sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge also found the evidence of record sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c), and causation of

[1]The relevant procedural history of this case is as follows: Claimant filed his claim for Black Lung benefits with the Department of Labor on January 28, 1992. Director's Exhibit 1. The claim was initially denied by the district director on July 14, 1992. Director's Exhibit 14. On September 9, 1992, claimant requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 15. Subsequent to an informal conference, the district director affirmed his initial finding of non-eligibility, Director's Exhibit 22, and the case was transferred to the OALJ for a hearing on June 2, 1993. Director's Exhibit 23. On November 11, 1993, pursuant to a request by claimant, the case was remanded to the district director for further development. Director's Exhibit 24. On March 20, 1995, the district director again denied the claim. *Id*. On July 28, 1995, the case was again transferred to the OALJ. Director's Exhibit 25. On May 24, 1996, pursuant to a May 21, 1996 request by claimant, Administrative Law Judge Michael P. Lesniak canceled the scheduled hearing, and issued an Order Granting Request for Decision on the Record. *See* Decision and Order at 2; Order, dated May 24, 1996. Judge Lesniak issued his decision on January 2, 1997. Decision and Order at 1.

disability under 20 C.F.R. §718.204(b). Accordingly, he awarded benefits. Employer appeals, arguing that the administrative law judge committed several errors in his weighing of the medical opinion evidence. Claimant responds, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, (the Director) filed a limited response to two specific arguments advanced by employer. Employer replies, reiterating its arguments.[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 under Part 718 in a living miner's claim, 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 prove 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]Inasmuch as the administrative law judge's findings of nineteen and one-quarter years of coal mine employment, as well as his findings under 20 C.F.R. §§718.202(a)(1)-(3), 718.203, and 718.204(c)(1)-(3) are unchallenged on appeal, they are hereby affirmed. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Initially, under 20 C.F.R. §718.202(a)(4), employer argues that the administrative law judge erred in crediting physicians' opinions which were partially based on positive x-ray readings, given the specific language of subsection (a)(4). We disagree. The Board has held that the phrase "notwithstanding a negative x-ray" in Section 718.202(a)(4) means that "even if there is a negative x-ray, the doctor's report may establish pneumoconiosis under Section 718.202(a)(4)." *See Taylor v. Director, OWCP,* 9 BLR 1-22 (1986). Employer's first assignment of error is therefore rejected,[3] and inasmuch as employer raises no further arguments regarding the administrative law judge's findings under Section 718.202(a)(4), *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987), his finding that the evidence of record is sufficient to establish the existence on pneumoconiosis is affirmed.

[3]Employer's argument that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by means of 33 U.S.C. §919(d) and 30 U.S.C. §932(a), 5 U.S.C. §554(C)(2), because he failed to explain why he did not accept Dr. Burki's opinion is rejected, as the administrative law judge did not reject the doctor's opinion but merely found it outweighed at 20 C.F.R. §718.202(a)(4). *See Director, OWCP v. Greenwich Collieries [Ondecko],* 117 S.Ct. 2251, 18 BLR 2A-1 (1994); Decision and Order at 7.

Next, under 20 C.F.R. §718.204(c)(4), employer argues that the administrative law judge erred in crediting Dr. Baker's opinion. *Inter alia,* employer contends that the administrative law judge failed to adequately explain his acceptance of Dr. Baker's initial opinion as uncontradicted. We agree. Employer contends that Dr. Baker's first opinion appears to be based on the same supporting documentation as his second opinion, which the administrative law judge discredited. In examining the reports of Dr. Baker, the administrative law judge noted that the physician issued a January 1992 report and a March 1992 report. Decision and Order at 5, 9. In the January report, which diagnosed claimant as having difficulty performing manual labor, Dr. Baker partially relied on a pulmonary function study which had been discredited by its administering physician, Dr. Burki. *See* Director's Exhibit 24. In finding the existence of a totally disabling respiratory or pulmonary impairment, the administrative law judge credited this opinion because, "Dr. Baker did not rely solely upon this test in determining disability." Decision and Order at 9. However, the administrative law judge failed to identify the evidence which did support the doctor's opinion, or the reason he found the report uncontradicted in light of the March report, which he discredited.[4] The Board has consistently held that a reasoned medical opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *See Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Fuller v. Gibralter Coal Corp.,* 6 BLR 1-1291 (1984). The administrative law judge's terse discussion of Dr. Baker's reports does not satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by means of 33 U.S.C. §919(d) and 30 U.S.C. §932(a), 5 U.S.C. §554(C)(2). On remand the administrative law judge must fully discuss and furnish an appropriate rationale for his consideration of Dr. Baker's opinions.

Additionally, employer contends that Dr. Baker's opinion, that claimant would have difficulty performing "sustained manual labor, on an 8 hour basis," is not a diagnosis of total disability under Section 718.204(c)(4). Contrary to employer's contention, Dr. Baker's findings regarding claimant's physical limitations may support a finding of total disability if the administrative law judge compares the limitations in the doctor's opinion to the physical requirements of claimant's usual coal mine employment, *see e.g.*, *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Parsons v. Black Diamond Coal Co.,* 7 BLR 1-236 (1984), an analysis in which the administrative law judge did not engage. On remand, therefore, the administrative law judge is instructed to determine the nature of claimant's usual coal mine employment, and compare the exertional requirements of claimant's work with Dr. Baker's opinion regarding claimant's work capability. See *McMath, supra; Parsons, supra; see also Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-362 (6th Cir. 1996).

Next, under Section 718.204(c)(4), employer contends that the administrative law judge committed error in mechanically discrediting Dr. Burki's opinion based on *Skukan v.*

[4] In the March 1992, report Dr. Baker reported that he "could not determine the level of impairment due to the invalid pulmonary function study." Decision and Order at 9; Director's Exhibit 7.

Consolidation Coal Co., 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993). We agree. As the administrative law judge himself noted, *Skukan*, which was vacated on other grounds, dealt with disability causation under Section 718.204(b), not total disability under Section 718.204(c)(4). Moreover, the existence of pneumoconiosis and total disability are separate issues. *See* 20 C.F.R. §§718.202(a), 718.204(c); *Trent, supra*. In rejecting Dr. Burki's diagnosis that claimant is not totally disabled simply because the doctor failed to diagnose pneumoconiosis (which was contrary to the administrative law judge's finding under Section 718.202(a)), without further explanation, the administrative law judge has failed to provide an adequate rationale for his finding under the APA. On remand, the administrative law judge must reweigh the medical opinion evidence under Section 718.204(c)(4), and explain his findings thereunder. *See Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162 (1989).

Turning to the administrative law judge's findings under 20 C.F.R. §718.204(b), employer contends that the administrative law judge erred in crediting the opinions of Drs. Baker and Sundaram, because these doctors made only a *de minimis* connection between claimant's pneumoconiosis and his total disability, and failed to apportion the causal effects of claimant's coal mine employment and cigarette smoking. We disagree. Contrary to employer's contention, both physicians identify claimant's pneumoconiosis as a substantial cause of his totally disabling respiratory or pulmonary impairment, and these opinions, therefore, are sufficient under the applicable standard. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); 20 C.F.R. §718.204(b). Additionally, however, employer argues that the administrative law judge erred in crediting Dr. Sundaram's opinion on the issue of disability causation in light of the doctor's reliance on an inaccurate smoking history. We agree. We note that in his decision, the administrative law judge partially discredited Dr. Sundaram on the issue of total disability at Section 718.204(c)(4) because he was unaware of claimant's cigarette smoking history, yet then credited his opinion on the issue of disability causation at Section 718.204(b). Dr. Sundaram's reliance on an inaccurate smoking history is arguably irrelevant when considering the issue of total disability. *See e.g., Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). It is highly relevant, however, when considering the issue of disability causation. *See Bobick v. Saginaw Mining Co*., 13 BLR 1-52 (1988); *Fitch v. Director, OWCP,* 9 BLR 1-45 (1986); *Stark v. Director, OWCP,* 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). On remand, under Section 718.204(b), the administrative law judge must consider Dr. Sundaram's reliance on an inaccurate smoking history, and the impact, if any, on the credibility of his opinion. *See Bobick , supra; Fitch, supra; Stark, supra; Maypray, supra*. Consequently, we vacate the administrative law judge's weighing of the medical opinion evidence under Section 718.204(b), and remand this case for reconsideration under Section 718.204(b), if total disability at 718.204(c)(4) is found.

Finally, employer contends that the administrative law judge erred in setting the date for the commencement of benefits. We agree. If, on remand, benefits are again awarded, we modify the date for the commencement of benefits to May 1, 1995, the first month after claimant's retirement from coal mine employment. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); 20 C.F.R. §725.503A.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part, vacated in part, and modified in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge