BRB No. 97-0690 BLA

GROVER MUNCY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	
	)	Date Issued:
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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Grover Muncy, Lovely, Kentucky, *pro se*.[1]

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

[1]Claimant's response was filed on claimant's behalf by Susie Davis of the Kentucky Black Lung Association of Pikeville, Kentucky, but Ms. Davis is not representing claimant on appeal. *See* 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995).

Employer appeals the Decision and Order (95-BLA-1447) of Administrative Law Judge Paul H. Teitler awarding 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 initially noted that the parties stipulated that claimant had twenty-nine years of coal mine employment and the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that, although the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), it was established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b). Finally, the administrative law judge found total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in his weighing of the medical opinion evidence in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), total disability established pursuant to Section 718.204(c), *see* 20 C.F.R. §718.204(c)(4), and total disability due to pneumoconiosis established pursuant to Section 718.204(b). Claimant responds, urging that the administrative law judge's Decision and Order awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to 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).

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.*[3] Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones*

[2]Claimant filed a claim on March 4, 1994, Director's Exhibit 1.

[3]Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is not applicable to this claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1.

& Laughlin Steel Corp., 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Moreover, pursuant to Section 718.204(b), in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, claimant must prove that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis, *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Pursuant to Section 718.202(a)(4), the administrative law judge found the existence of pneumoconiosis established by the medical opinion evidence of record. Initially, employer correctly contends that the administrative law judge failed to consider the medical opinion of Dr. Dahhan, which was, apparently, submitted by employer and admitted into the record. The record contains a letter dated March 27, 1996, from employer's counsel at that time submitting Employer's Exhibits 3-28 which, according to the letter's description, included the medical opinion of Dr. Dahhan, x-ray re-readings and statements of physicians' qualifications. Although the letter indicates that Employer's Exhibits 3-28 were submitted with the letter, the record does not contain Employer's Exhibits 3-28. Employer's counsel further noted that these exhibits would be offered into the record at the hearing.

At the hearing held on May 23, 1996, Employer's Exhibits 1-28 were offered by employer as evidence for the record, Hearing Transcript at 5, and the administrative law judge admitted Employer's Exhibits 1-28 into the record, Hearing Transcript at 6. The record contains a subsequent letter dated August 1, 1996, however, from the legal technician of the administrative law judge to employer's counsel at that time noting that Employer's Exhibits 3-28 were not contained in the record file and that she believed they were apparently lost in transit on return from the hearing. Thus, employer's counsel was requested to resubmit Employer's Exhibits 3-28. Finally, a letter dated September 12, 1996, from the legal technician of the administrative law judge to employer's counsel at that time informed employer's counsel that Employer's Exhibits 3-28 were apparently never received in the Office of Administrative Law Judges and asks that employer's counsel submit the exhibits within thirty days of the letter, otherwise a decision would be rendered by the administrative law judge on the record as it stood at that time.

Thus, while the record does not contain Employer's Exhibits 3-28, including Dr. Dahhan's opinion, these exhibits were apparently admitted into the record, *see* Hearing Transcript at 5-6. Moreover, although employer's counsel apparently never resubmitted Employer's Exhibits 3-28 as requested by the administrative law judge's legal technician, neither the record or the administrative law judge's Decision and Order contain any order or holding by the administrative law judge regarding whether the administrative law judge would render a decision on the record without Employer's Exhibits 3-28. Moreover, according to employer's brief on appeal, the opinion of Dr. Dahhan is contrary to the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(b), (c). Consequently, inasmuch as the administrative law judge did not consider Employer's Exhibits 3-28, which were apparently admitted into

the record, *see* 20 C.F.R. §725.456(c); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate the administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.203(b) and 718.204(b), (c), and remand the case for reconsideration and/or to allow the administrative law judge to provide reasons for excluding and/or not considering Employer's Exhibits 3-28, *see* 20 C.F.R. §725.456.

In order to avoid any repetition of error on remand, we nevertheless address employer's contentions regarding the administrative law judge's findings on the merits.[4] Pursuant to Section 718.202(a)(4), the administrative law judge considered the other five medical opinions of record from Drs. Broudy, Younes, Guberman, Clarke and Wells. Dr. Younes read an x-ray as negative for pneumoconiosis, found the results of a blood gas study revealed disabling hypoxemia, but found no evidence of pulmonary disease, Director's Exhibit 10. Dr. Broudy also read an x-ray as negative for pneumoconiosis and found the results of a blood gas study revealed hypoxemia, but found that claimant did not have coal workers' pneumoconiosis and was not totally disabled from a respiratory standpoint, Employer's Exhibit 1. Dr. Broudy further found the results of the blood gas study and pulmonary function study he administered suggested claimant's dyspnea was non-pulmonary in origin *id*. Next, Dr. Guberman read an x-ray as negative for pneumoconiosis, found the results of a blood gas study revealed hypoxemia, which he related to claimant's coal mine employment, and found that claimant was totally disabled from a pulmonary standpoint, Administrative Law Judge's Exhibit 1. Finally, Drs. Clarke and Levine both read x-rays as positive for pneumoconiosis, 2/1, and found that claimant was totally disabled due to his coal workers' pneumoconiosis, Director's Exhibit 15.

The administrative law judge found that Drs. Broudy, Younes and Guberman all found that claimant had hypoxemia and that Dr. Guberman found that claimant's hypoxemia was due to his coal mine employment, which was sufficient to establish the existence of pneumoconiosis as more broadly defined by the Act and regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201. Decision and Order at 7. Moreover, the administrative law judge noted that Drs. Broudy and Younes found that claimant was totally disabled due to his hypoxemia and that Drs. Clarke and Wells both found that claimant had coal workers' pneumoconiosis. Thus, although the administrative law judge noted that he did not find the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge found the existence of pneumoconiosis established by the medical opinion evidence pursuant to Section 718.202(a)(4).

The administrative law judge failed to consider, however, that while Drs. Broudy

[4]Inasmuch as the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(3) are not challenged by any party on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and Younes both also found, like Dr. Guberman, that claimant's blood gas study results indicated hypoxemia, Dr. Younes found no evidence of pulmonary disease and Dr. Broudy found that claimant's blood gas study results suggested claimant's dyspnea was non-pulmonary in origin. Thus, the administrative law judge did not resolve the conflicts in the opinions of Drs. Guberman, Younes and Broudy as to the cause of the hypoxemia revealed on claimant's blood gas study results. The administrative law judge's function is to resolve the conflicts in the medical evidence, see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989).

Moreover, while the administrative law judge noted under Section 718.202(a)(4) that Drs. Clarke and Wells both found coal workers' pneumoconiosis, the administrative law judge gave less weight to the opinions of Drs. Clarke and Wells under Section 718.204(c)(4), inasmuch as the administrative law judge found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), whereas the administrative law judge found that Drs. Clarke and Wells based their diagnosis of pneumoconiosis and total disability largely on the results of x-ray readings, Decision and Order at 10. Thus, the administrative law judge's analysis of the medical opinion evidence and credibility determinations under Section 718.202(a)(4) are inconsistent with his analysis of the same evidence under Section 718.204(c), *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Wike v. Bethlehem Mines Corp.*, 7 BLR 1-593 (1984). In addition, as discussed *supra*, the administrative law judge did not consider the opinion of Dr. Dahhan, Employer's Exhibit 3, *see Tackett, supra*. Consequently, the administrative law judge should reconsider all of the relevant medical opinion evidence of record pursuant to Section 718.202(a)(4) on remand, resolve the conflicts in the opinion of Dr. Guberman with the opinions of Drs. Younes and Broudy, see *Lafferty, supra*; *Fagg, supra,* and resolve the inconsistency in his weighing of the opinions of Drs. Clarke and Wells under subsection (a)(4) as opposed to Section 718.204(c) when reconsidering the medical opinion evidence under subsection (a)(4), *see Revnack, supra*.

Finally, the administrative law judge found the medical opinion evidence sufficient to establish total disability pursuant to Section 718.204(c) and total disability due to pneumoconiosis pursuant to Section 718.204(b). The administrative law judge initially listed the results of the pulmonary function studies and blood gas studies of record, Decision and Order at 9, but did not weigh the contrary pulmonary function study and blood gas study evidence together with the medical opinion evidence when determining that total disability was established pursuant to Section 718.204(c). The administrative law judge must weigh all relevant evidence, like and unlike, pursuant to Section 718.204(c), with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash, supra; Fields, supra*; *Rafferty, supra*; *Shedlock, supra*.

Next, after giving little weight to the opinions of Drs. Clarke and Wells, as discussed *supra*, the administrative law judge noted that Drs. Younes and Guberman

found claimant totally disabled due to his hypoxemia, whereas Dr. Broudy found that claimant was not totally disabled. Noting that all three physicians found that claimant had hypoxemia, the administrative law judge ultimately gave greater weight to the opinions of Drs. Younes and Guberman due to the thoroughness of their opinions and therefore found total disability established by the preponderance of the evidence pursuant to Section 718.204(c). Decision and Order at 10-11. Finally, the administrative law judge noted that while both Dr Younes and Guberman found that claimant was totally disabled by his hypoxemia, Dr. Guberman found that claimant's hypoxemia was due to his coal mine employment and there was no contradictory evidence in the record. Thus, the administrative law judge found total disability due to claimant's coal mine employment established pursuant to Section 718.204(b), *see also* 20 C.F.R. §718.201. Decision and Order at 11-12.

Although Dr. Younes found claimant disabled in light of his blood gas study results which revealed hypoxemia, Dr. Younes also found no evidence of pulmonary disease. Section 718.204(c) requires a claimant to establish a totally disabling respiratory or pulmonary impairment and non-respiratory or non-pulmonary impairments are irrelevant to establishing total disability under Section 718.204(c), *see Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); *see also Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Thus, contrary to the administrative law judge's characterization, the opinion of Dr. Younes does not support a finding of total disability pursuant to Section 718.204(c) and is contradictory to Dr. Guberman's opinion under Section 718.204(b). Moreover, inasmuch as Dr. Broudy found that claimant's blood gas study results suggested claimant's dyspnea was non-pulmonary in origin, his opinion is also contradictory to Dr. Guberman's opinion under Section 718.204(b). Thus, the administrative law judge did not resolve the conflicts in the opinions of Drs. Guberman, Younes and Broudy under Section 718.204(b), (c), *see Lafferty, supra; Fagg, supra*. Finally, as discussed *supra*, the administrative law judge did not consider the opinion of Dr. Dahhan, Employer's Exhibit 3, under Section 718.204(b), (c), *see Tackett, supra*. Consequently, the administrative law judge should reconsider all of the relevant pulmonary function study, blood gas study and medical opinion evidence of record pursuant to Sections 718.204(c) and/or 718.204(b) on remand and resolve the conflicts in the opinion of Dr. Guberman with the opinions of Drs. Younes and Broudy, see *Lafferty, supra*; *Fagg, supra.*

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge