BRB No. 00-0802 BLA

PAUL MARK SPURLOCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW HORIZONS COAL, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
HARTFORD ACCIDENT AND INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Paul Mark Spurlock, Grays Knob, Kentucky.

David L. Murphy and Scott C. Wilhoit (Clark, Ward & Cave), Louisville, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Judith E. Kramer, 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: SMITH and DOLDER, Administrative Appeals Judges, and

NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-0717) of Administrative Law Judge Robert L. Hillyard 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).[1] The administrative law judge credited claimant with twenty-three 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 sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) (2000) and 718.203(b) (2000). However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000).[2] Further, the administrative law judge found the evidence insufficient to establish invocation of the irrebuttable

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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

presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in response to claimant's appeal.[3]

[3]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) (2000) and 718.203(b) (2000), which are not adverse to this *pro se* claimant, are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which claimant, employer and the Director have responded. In a brief dated April 3, 2001, employer indicated that the revisions to the contested regulations would not affect the outcome of the case. In a brief dated March 29, 2001, the Director indicated that it is his position that the instant case would not be affected by application of the contested regulations. The Director, therefore, indicated that the Board could decide the instant case. In a brief dated March 16, 2001, claimant indicated that the revisions to the regulations at 20 C.F.R. §§718.104(d) and 718.204(d)(5) would affect the outcome of the case. However, the new regulation at 20 C.F.R. §718.104(d) only applies to claims filed after January 19, 2001. Consequently, the provision requiring that special consideration be accorded to the report of a treating physician does not apply to the instant claim. Moreover, no substantive revisions were made to the provision at 20 C.F.R. §718.204(d)(5), which was previously found at 20 C.F.R. §718.204(d)(2) (2000).[4] Based on the briefs submitted by claimant, employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into

[4]In addition, the regulation at 20 C.F.R. §718.304 has not been changed. Further, no substantive revisions have been made to the regulations which are relevant to the issue of total disability at 20 C.F.R. §718.204(b)(1)(i), (ii), (iii) and (iv). Lastly, inasmuch as there is no evidence which pertains to the revisions at 20 C.F.R. §718.204(a), the revisions related to this provision do not alter the outcome in the instant case.

the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address the administrative law judge's findings at 20 C.F.R. §718.304 (2000). In finding the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(a) (2000), the administrative law judge considered the relevant x-ray evidence. Of the sixteen x-ray interpretations of record, ten readings do not demonstrate the presence of complicated pneumoconiosis, Director's Exhibits 19, 27, 30, 32, 33, 54, 57, and six readings demonstrate the presence of complicated pneumoconiosis, Director's Exhibits 27-29, 31, 34, 35. In addition to noting the numerical superiority of the x-ray interpretations which do not demonstrate the presence of complicated pneumoconiosis, the administrative law judge also considered the qualifications of the various physicians.[5] *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.304(a). Further, inasmuch as there is no biopsy or autopsy evidence of record, we affirm the administrative law judge's finding that this evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.304(b).

[5]In evaluating the x-ray evidence, the administrative law judge indicated that he "focus[ed] on the number of x-ray interpretations, the readers' qualifications, and the dates, quality, and actual reading of the films." Decision and Order at 14.

In finding the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(c) (2000), the administrative law judge considered the relevant medical opinions of Drs. Baker, Broudy, Bushey, Clarke, Dineen, Harrison, Powell and Vuskovich. Whereas Drs. Broudy, Clarke, Dineen and Harrison diagnosed coal workers' pneumoconiosis, Director's Exhibits 20, 22, 23, 54; Employer's Exhibit 1, Drs. Bushey, Baker, Vuskovich and Powell diagnosed complicated pneumoconiosis or progressive massive fibrosis, Director's Exhibits 21, 24, 25, 57. The administrative law judge properly accorded greater weight to the opinions of Drs. Broudy, Dineen and Harrison than to the contrary opinions of Drs. Baker, Bushey, Powell and Vuskovich because he found the former opinions to be better supported by the underlying documentation of record.[6] *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Thus, since the administrative law judge properly discredited the only medical opinions of record which could support a finding that claimant suffers from complicated pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis.[7] *See* 20 C.F.R. §718.304(c). Moreover, in view of our affirmance of the administrative law judge's weighing of the conflicting x-ray and medical opinion evidence of record, we affirm the administrative law judge's finding that the evidence is insufficient to

[6]The administrative law judge observed that the opinions of Drs. Broudy, Dineen and Harrison "are most consistent with the objective clinical test results, including the preponderance of the x-ray evidence which showed advanced simple pneumoconiosis, and the nonqualifying, valid, pulmonary function studies and arterial blood gas tests, which revealed little or no respiratory or pulmonary impairment." Decision and Order at 15-16.

[7]The administrative law judge stated, "[w]hile I recognize that Dr. Bushey was the [c]laimant's treating physician, I do not find his opinion to be persuasive." Decision and Order at 15. The United States Court of Appeals for the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of nontreating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The Sixth Circuit has also indicated, however, that this principle does not alter the administrative law judge's duty, as fact-finder, to evaluate the credibility of the treating physician's opinion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the present case, the administrative law judge permissibly discredited Dr. Bushey's opinion because he found it not to be supported by the underlying documentation of record. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983).

establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.304.

Next, we address the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c) (2000). Inasmuch as none of the pulmonary function or arterial blood gas studies of record yielded qualifying[8] values, Director's Exhibits 13-18, 23, 26, 54, we affirm the administrative law judge's finding that this evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(ii). In addition, inasmuch as there is no evidence of cor pulmonale with right sided congestive heart failure, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.203(b)(2)(iii).

The administrative law judge further found the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4) (2000). Whereas Drs. Bushey, Clarke and Harrison opined that claimant suffers from a disabling respiratory impairment, Director's Exhibits 20, 23, 54, 57, Drs. Broudy, Dineen, Powell and Vuskovich opined that claimant does not suffer from a disabling respiratory impairment, Director's Exhibits 21, 22, 23, 24, 54; Employer's Exhibit 1. Dr. Baker opined that claimant suffers from a mild to moderate impairment. Director's Exhibit 25. The administrative law judge permissibly discredited the opinions of Drs. Bushey and Clarke because he found that their opinions are not supported by the underlying objective evidence.[9] *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Additionally, the administrative law judge permissibly discredited Dr. Harrison's opinion because he found it to be equivocal.[10] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v.*

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[8]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

[9]The administrative law judge observed that the conclusions of Drs. Bushey and Clarke "are not consistent with the credible objective clinical tests." Decision and Order at 16.

[10]The administrative law judge stated that "Dr. Harrison's report is somewhat ambiguous in this regard." Decision and Order at 16-17. The administrative law judge observed that "Dr. Harrison marked the "No" box indicating that the [c]laimant could not perform such work." *Id*. at 12. The administrative law judge also observed that "Dr. Harrison added the following handwritten note: 'He could work in a dust free environment, but I would not recommend further exposure to coal, rock or sand dust.'" *Id*.; *see Zimmerman*

Director, OWCP, 11 BLR 1-16 (1987).

v. Director, OWCP, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

With regard to Dr. Baker's opinion, the administrative law judge stated that "Dr. Baker did not expressly address the issue [of total disability]." Decision and Order at 17. However, as the administrative law judge observed, "[Dr. Baker] found at most a 'mild to moderate' impairment, while interpreting a pulmonary function study as consistent with a 'mild obstructive defect' and an arterial blood gas test as 'within normal limits.'" *Id*. An administrative law judge must determine the exertional requirements of a miner's usual coal mine work, and compare those requirements with the doctor's opinions regarding the degree of the miner's disability and/or inability to perform usual coal mine work. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Keen v. Laurel Creek Coal Co.*, 7 BLR 1-498 (1984). In the instant case, Dr. Baker did not render an explicit opinion with regard to whether claimant suffers from a totally disabling respiratory impairment. Nonetheless, there is no indication that the administrative law judge compared Dr. Baker's opinion with the exertional requirements of claimant's usual coal mine employment.[11] The opinion of Dr. Baker may, if credited, and when compared with the exertional requirements of claimant's usual coal mine employment, support a finding of total disability. *See Budash, supra*; *cf. Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Thus, we vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability, and remand the case for further consideration of the evidence. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal Co.*, 227 F.3d 569, BLR (6th Cir. 2000); *see also Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash, supra*; *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983).

If reached, the administrative law judge must consider and weigh all of the relevant evidence of record, including the contrary probative evidence, like and unlike, to determine whether the evidence is sufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v.*

[11]The administrative law judge stated that "[c]laimant testified that his last coal mine job was as a continuous miner operator." Decision and Order at 4. The administrative law judge also stated that claimant "classified this job, as well as any in the mining industry, as 'hard.'" *Id*. The administrative law judge observed that "[c]laimant stated that the work was 'strenuous.'" *Id*. Further, the administrative law judge observed that claimant "noted that the roof of the mine was only 42" and that he, therefore, often had to be on his hands and knees." *Id*. Moreover, the administrative law judge observed that "[c]laimant stated that the job entailed considerable lifting, pulling, and tugging because he had to move cables when he operated the continuous miner." *Id*.

Bethlehem Mines Corp., 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Moreover, the administrative law judge must consider whether the evidence is sufficient to establish total disability due to pneumoconiosis, if reached. *See* 20 C.F.R. §718.204(c).[12]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

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[12]Section 718.204(c)(1) provides that:

> 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:
>
> (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.

20 C.F.R. §718.204(c)(1)(i), (ii).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge