

BRB No. 02-0363 BLA

JOHN V. WARD, JR.)
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 Claimant-Petitioner)
)
 v.)
)
 SMC COAL & TERMINAL COMPANY and)
 PIER IX TERMINAL COMPANY) DATE ISSUED:
)
 and)
)
 SHELL MINING 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 on Remand-Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Paul D. Deaton, Paintsville, Kentucky, for claimant.

Bonnie Hoskins (Hoskins Law Offices PLLC), Lexington, Kentucky, for employer.

Mary Forrest-Doyle (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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals

Judges.
PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Benefits (99-BLA-0124) of Administrative Law Judge Joseph E. Kane (the administrative law judge) 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 originally filed an application for benefits on April 26, 1991. This claim was administratively denied on September 25, 1991. Director's Exhibit 31. On April 24, 1994, claimant filed a second claim for benefits, which was administratively denied. Director's Exhibits 9, 13. Claimant then filed a series of requests for modification, which were denied by the Office of Workers' Compensation Programs (OWCP). Finally, on August 4, 1998, claimant requested a formal hearing. The case was referred to the Office of Administrative Law Judges for a hearing. Following a hearing, the administrative law judge issued a Decision and Order denying benefits on September 19, 1999. Upon claimant's appeal of the Decision and Order, the Board affirmed the administrative law judge's findings that the evidence established the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2000) and 718.203(b)(2000), but failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(c)(3)(2000).² *Ward v. SMC Coal & Terminal Co.*, BRB No. 00-0958 BLA (June 28, 2001)(unpublished). However, the Board vacated the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(4)(2000). The Board remanded the case for the administrative law judge to reconsider the medical opinion evidence at Section 718.204(c)(4)(2000). *Id.*

¹The 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.

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 total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c). However, throughout his analysis of the claim, the administrative law judge continued to refer to Section 718.204(c) in reference to his discussion of total disability.

On remand, the administrative law judge again concluded that the medical report evidence failed to establish that claimant is totally disabled pursuant to Section 718.204(c)(4)(2000).³ Thus, the administrative law judge again denied benefits. Claimant then filed the instant appeal.

On appeal, claimant asserts that in reassessing Dr. Haseeb's opinion at Section 718.204(c)(4) (2000), the administrative law judge ignored the Board's remand instruction to consider whether Dr. Haseeb's opinion is tantamount to a diagnosis of total disability. Claimant maintains that inasmuch as "the Board determined Dr. Haseeb to be a treating physician, [it intended that] he be given great credibility with regard to his findings." Claimant's Brief at 4 (unpaginated). Employer responds, urging affirmance of the Decision and Order denying benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a statement indicating that he will not participate in this appeal.

The Board must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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). To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 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)(*en banc*). Failure to prove any of these requisite elements precludes entitlement.

³ Although the Board affirmed the administrative law judge's disability findings pursuant to 20 C.F.R. §718.204(c)(1)-(c)(3)(2000), the administrative law judge, nonetheless, reiterated his findings under these provisions. Decision and Order on Remand at 8.

Claimant argues that the administrative law judge erred in failing to credit the opinion of Dr. Haseeb as establishing that claimant is totally disabled pursuant to Section 718.204(c)(4)(2000).⁴ We disagree. In the original Decision and Order the administrative law judge did not credit Dr. Haseeb's opinion as establishing total disability on the basis that the doctor's opinion merely recommended against the claimant returning to his job. Decision and Order at 14. Dr. Haseeb opined that, based on the claimant's "history of myocardial infarction...coronary artery bypass surgery, and early occupational lung disease...it is strongly recommended that [claimant] discontinue any further efforts to go back to his regular work." Director's Exhibit 31-49. The administrative law judge found that Dr. Haseeb's opinion was not well-documented, noting that Dr. Haseeb failed to "state the medical data upon which he relied in diagnosing 'early occupational lung disease' and did not explain how the data supported his diagnosis." *Id.* On appeal, the Board noted that the

⁴ Dr. Haseeb issued an opinion letter on April 30, 1991, stating that he had been claimant's treating physician since September 6, 1990. Director's Exhibit 31-49. Although Dr. Haseeb's curriculum vitae is not in the record, his letterhead lists his specialty as "cardiovascular diseases." He stated that claimant is "known to have [certain] problems," one of which he listed as "early occupational lung disease." He concluded that based on the presence of this disease, claimant should not return to his regular employment. In making these findings, he referred to the letter written to him by Dr. Jose Mendieta, whose letterhead notes his specialties as "internal medicine" and "pulmonary disease." Director's Exhibit 31-50. Dr. Mendieta concluded that claimant has decreased pulmonary function that "may be from occupational exposure to coal dust and even possibly the fumes from his welding. This may be early signs of occupational lung disease." *Id.* Dr. Mendieta recommended a change in work place.

doctor's assessment of claimant's physical capability may be "tantamount to a finding of total disability." *Ward v. SMC Coal & Terminal Co.*, BRB No. 00-0958 BLA (June 28, 2001)(unpublished). Therefore, the Board vacated the administrative law judge's finding under Section 718.204(c)(4)(2000), and remanded the case for reconsideration of Dr. Haseeb's opinion.

On remand, the administrative law judge acted within his discretion in finding that Dr. Haseeb's opinion is not well-documented.⁵ Other than the reference made to Dr. Mendieta's letter, which itself does not identify its documentation, the administrative law judge's finding that the opinion is not well-documented signifies that the medical opinion is unsupported by objective indications. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-106 (6th Cir. 1983). It is within the administrative law judge's discretion to determine whether a medical opinion is sufficiently documented, and to reject a medical opinion found not to be well-documented. *Id.*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In the instant case, claimant has failed to present any argument even suggesting that Dr. Haseeb's opinion is documented. Claimant, rather, asserts that Dr. Haseeb's opinion should be credited as establishing total disability because it was rendered by the treating physician. While the opinion of a treating physician may be accorded deference in the weighing of the medical opinion evidence, see *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case lies, has held that treating physicians are not to be automatically accorded controlling weight. In *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 709, BLR (6th Cir. 2002), the Sixth Circuit noted its agreement with the position taken by the United States Court of Appeals for the District of Columbia Circuit in *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861, BLR (D.C.Cir. 2002), that "an agency adjudicator may give weight to the treating physician's opinion when doing so makes sense in light of the evidence and the record, but may not mechanically credit the treating physician solely because of his relationship with the claimant." See also *Griffith v. Director, OWCP*, 49 F.3d 184, 186-187, 19 BLR 2-111, 2-117 (6th Cir. 1995). Claimant's sole basis for challenging the administrative law judge's rejection of Dr. Haseeb's opinion is the doctor's status as claimant's treating physician. Therefore, we affirm the administrative law judge's finding that the evidence fails to establish total disability pursuant to 20 C.F.R.

⁵ The administrative law judge accorded the greatest weight to the medical reports of Drs. Rasmussen, Castle, and Fino, whom he found to have opined that, from a respiratory standpoint, claimant is not totally disabled. Decision and Order on Remand at 10. The administrative law judge stated that he accorded significant weight to these opinions "in light of the thoroughness of their underlying analysis and their clarity." *Id.*

§718.204(c)(4)(2000).⁶

Inasmuch as claimant has failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, a finding of entitlement is precluded. *Trent, supra*; *Perry, supra*.

⁶ Furthermore, the United Court of Appeals for the Sixth Circuit has held that a medical opinion that merely advises against further exposure to coal mine dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988). It is undisputed that Dr. Haseeb's diagnosis only "recommended that [claimant] discontinue any further efforts to go back to his regular work." Director's Exhibit 31-49.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge