BRB Nos. 03-0202 BLA
and 03-0202 BLA-A

ROBERT C. WEST	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/26/2003
	)	
LODESTAR ENERGY, INCORPORATED d/b/a PYRO MINING	)	
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order - Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Stanley S. Dawson (Fulton & Devlin), Louisville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting 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: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals, and claimant cross-appeals, the Decision and Order – Award of Benefits (01-BLA-1154) of Administrative Law Judge Robert L. Hillyard issued 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] After crediting claimant with sixteen years of coal mine employment based upon the stipulation of the parties, the administrative law judge considered the instant claim, which was filed on October 3, 2000, pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found the x-ray evidence and medical opinion evidence sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(4), respectively. The administrative law judge further found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. In addition, the administrative law judge found the pulmonary function study evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), but found the arterial blood gas study and medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). Finally, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, he awarded benefits.

On appeal, employer contends the administrative law judge erred in discounting Dr. O'Bryan's opinion when weighing the evidence at Sections 718.202(a)(4) and 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, in employer's appeal, in which he takes issue with employer's suggestion that the administrative law judge was required to give deference to Dr. O'Bryan's opinion as a treating physician's opinion. The Director indicates he does not otherwise take a position with respect to the administrative law judge's credibility determinations. In his cross-appeal, claimant challenges the administrative law judge's findings with

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

respect to the pulmonary function study evidence of record. Claimant also argues that the administrative law judge improperly concluded that Dr. O'Bryan's opinion is insufficient to establish total disability because the administrative law judge did not make the requisite comparison of the exertional requirements of claimant's coal mining job to Dr. O'Bryan's assessment that claimant's obstructive ventilatory impairment is moderate. Employer has filed a response brief, opposing claimant's contentions on cross-appeal. The Director has filed a letter indicating he does not intend to file a substantive response to claimant's cross-appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Employer contends that the administrative law judge improperly rejected Dr. O'Bryan's opinion that claimant does not have pneumoconiosis at Section 718.202(a)(4). Specifically, employer contends that, pursuant to the newly promulgated regulation at 20 C.F.R. §718.104, the administrative law judge was required to take into consideration several factors in weighing the opinion of Dr. O'Bryan, one of claimant's treating physicians, and erred by failing to do so. Employer further contends that the administrative law judge irrationally rejected Dr. O'Bryan's opinion as unreasoned and undocumented. Employer argues that, moreover, the administrative law judge should have accorded greater weight to Dr. O'Bryan's opinion given the doctor's credentials as a Board-certified pulmonary specialist.

Employer's contentions lack merit. First, the regulation at 20 C.F.R. §718.104(d), which provides that the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record and must weigh various factors in considering a treating

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[2]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3-4, 11-12, 14. In addition, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b) inasmuch as employer does not challenge this finding, and the finding has not prejudiced claimant's case. *Skrack*, 6 BLR at 1-711; Decision and Order at 15.

physician's opinion, s*ee* 20 C.F.R. §718.104(d)(1)-(5), applies to evidence developed after January 19, 2001. 20 C.F.R. §718.101(b). Contrary to employer's contention, the provision at Section 718.104(d) thus does not apply to the opinion of Dr. O'Bryan, who treated claimant on July 20, 2000 and November 22, 2000.[3] Employer's Exhibit 3.

Secondly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit,[4] which has held that in black lung litigation, the opinions of treating physicians are not presumptively correct nor are they afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 510-513, BLR (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 277 F.3d at 513. In the instant case, the administrative law judge reasonably discounted, as unreasoned and undocumented, Dr. O'Bryan's opinion that claimant does not have pneumoconiosis. C*lark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 13-14; Employer's Exhibit 3. Specifically, the administrative law judge determined that Dr. O'Bryan did not explain how he concluded that claimant does not suffer from pneumoconiosis, given his objective findings of an abnormal spirometry, pleural thickening in both midlungs on x-ray, and an underground coal mine employment history of twelve to fourteen years. Decision and Order at 13-14. The administrative law judge thus properly found that Dr. O'Bryan's opinion is not well-reasoned and is not supported by the evidence of record. *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988). While employer "rejects the ALJ's conclusion that Dr. O'Bryan's opinions are unreasoned and undocumented," Employer's Brief at 4, employer's argument is unavailing. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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[3]Employer asserts that the administrative law judge "makes no mention of Dr. O'Bryan's status as a treating physician." Employer's Brief at 7. The record shows, however, that the administrative law judge correctly recognized that Dr. O'Bryan treated claimant in July 20, 2000 and November 2000. Decision and Order at 7.

[4]Because the miner's coal mine employment occurred in Kentucky, the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Lastly, contrary to employer's argument, the administrative law judge was not required to accord greater weight to Dr. O'Bryan's opinion based upon the doctor's credentials as a Board-certified pulmonary specialist. The administrative law judge properly considered the doctor's credentials, Decision and Order at 13, and permissibly discounted Dr. O'Bryan's opinion as unreasoned and undocumented notwithstanding the fact that Dr. O'Bryan is Board-certified in pulmonary medicine. *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). We affirm, therefore, the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4), having rejected employer's challenges thereto.

Employer also contends that the administrative law judge erred in failing to consider Dr. O'Bryan's opinion in weighing the evidence on the issue of disability causation pursuant to Section 718.204(c). Employer's contention has merit. The administrative law judge stated that the record contains the opinions of five physicians who address whether claimant is totally disabled due to pneumoconiosis – the opinions of Drs. Powell, Broudy, Younes, Hardison and Simpao. Decision and Order at 16. The administrative law judge determined that Dr. O'Bryan did not address the question of total disability, and thus the administrative law judge apparently did not consider Dr. O'Bryan's opinion probative of disability causation under Section 718.204(c). *Id*. Dr. O'Bryan, however, did, in fact, address whether pneumoconiosis contributed to claimant's pulmonary impairment. Dr. O'Bryan stated that claimant exhibits a moderate obstructive ventilatory impairment which is due to his prolonged, thirty-five pack year smoking habit, and that claimant's twelve to fourteen year history of coal mine dust exposure did not contribute substantially to his impairment. Employer's Exhibit 3. Thus, the administrative law judge erred in failing to weigh Dr. O'Bryan's opinion in considering whether claimant's total disability is due to pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 16; Employer's Exhibit 3. Where an administrative law judge's evidentiary analysis does not coincide with the evidence of record, the case must be remanded for reevaluation of the issue to which the evidence is relevant. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Our dissenting colleague would hold that remanding the case for this reason is an exercise in futility. The decision of the United States Court of Appeals in *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995), upon which she relies in support of her position, has been vacated, however, and thus is of no moment. Furthermore, we disagree with our dissenting colleague that Dr. O'Bryan's opinion has no probative value with regard to disability causation because the doctor's opinion as to the existence of pneumoconiosis was deemed to be unreasoned and undocumented. The administrative law judge could reasonably hold that Dr.

O'Bryan's opinion regarding disability causation is reasoned and documented by the objective evidence underlying that aspect of his opinion. Ultimately, this factual determination is for the administrative law judge to make. We vacate, therefore, the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). On remand, the administrative law judge must weigh all of the relevant evidence to determine whether it is sufficient to establish disability causation pursuant to Section 718.204(c) and the applicable case law. 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Finally, inasmuch as we affirm herein the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b) on the record evidence, we need not address claimant's contentions on cross-appeal which concern only certain of the administrative law judge's total disability findings. The administrative law judge's findings which claimant challenges on cross-appeal have not prejudiced claimant's case.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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PETER A. GABAUER, Jr.
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I agree with the majority that the administrative law judge properly determined that claimant had established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), after carefully considering the x-ray evidence, crediting the opinions of Drs. Hardison, Simpao and Powell, and finding Dr. O'Bryan's opinion to be unreasoned. I believe the administrative law judge also properly found that claimant had established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), after crediting the opinions of Drs. Hardison and Simpao, and finding unreasoned the opinions of Drs. Powell and Broudy.

The only allegation of error which employer makes with respect to the administrative law judge's finding that claimant established that he was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c) is that the administrative law judge failed to consider Dr. O'Bryan's opinion that "coal mine dust exposure did not contribute substantially to [claimant's] impairment." Employer's Exhibit 3 at 2. Although the administrative law judge is obliged to consider "all relevant evidence," *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144, 1-146 (1981), his failure to discuss Dr. O'Bryan's causation opinion in the case at bar is plainly harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). I respectfully dissent from the majority's determination to vacate the administrative law judge's decision and to remand the case for the administrative law judge to consider Dr. O'Bryan's opinion on causation. The majority's opinion is neither rational, nor in accordance with law.

It is not rational for the majority to remand the case for reconsideration of Dr. O'Bryan's opinion on causation, while affirming the administrative law judge's discounting of Dr. O'Bryan's opinion on the existence of pneumoconiosis, as unreasoned. Obviously, the doctor's causation opinion, ruling out coal dust exposure as a substantial contributor to claimant's impairment, must be based on his unreasoned opinion that claimant does not have pneumoconiosis. Logically, the causation opinion cannot be credited when the underlying opinion cannot rationally be credited. Furthermore, a glance at Dr. O'Bryan's opinion reflects that his discussion of causation is as deficient as his discussion of the existence of pneumoconiosis. The doctor stated in relevant part:

> As a Board-certified pulmonary physician who has treated this gentleman, I have come to the following conclusions:
>
> A. This gentleman does not have pneumoconiosis.
> B. This gentleman's moderate obstructive ventilatory impairment is due to his prolonged and sustained smoking habit.

> In my opinion, coal mine dust exposure did not contribute substantially to this impairment.

Employer's Exhibit 3 at 2.

The majority is mistaken in asserting that Dr. O'Bryan's causation opinion can be found to be reasoned "based upon the objective evidence underlying that aspect of his opinion": reference to objective evidence shows that an opinion is documented, it does not explain how the doctor's conclusion is derived from the evidence; that explanation is what makes an opinion reasoned. Since the doctor's opinion on causation is as unreasoned as his opinion on the existence of pneumoconiosis, it does not constitute substantial evidence which could support a legal determination. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Thus, remand of the case to consider Dr. O'Bryan's causation opinion serves no purpose because the administrative law judge could not properly credit that opinion over the opinions of Drs. Hardison and Simpao. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 510-513, BLR (6th Cir. 2003)(Court reversed an award of benefits in a survivor's claim where administrative law judge's conclusion that pneumoconiosis hastened the miner's death depended upon the treating physician's opinion which the court held was conclusory). It is appropriate for the Board to determine, as well as the court, whether the credited evidence is legally sufficient. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 215, 20 BLR 2-360, 2-368 (6th Cir. 1996)(The standards for review for the Board and the court are the same).

In remanding the case for the administrative law judge to consider Dr. O'Bryan's opinion on causation, even though Dr. O'Bryan did not diagnose pneumoconiosis and the administrative law judge found the existence of pneumoconiosis established, the majority ignores the law of the Sixth Circuit. The United States Court of Appeals for the Sixth Circuit has declared that such opinions should be considered "less significant" because they are "of little help with respect to causation…" and therefore, the court held in that case, that those opinions could not outweigh the opinions of two doctors who had diagnosed pneumoconiosis and had stated it was a cause of his total disability. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993)(Causation opinion had no probative weight because it was authored by a doctor who did not diagnose pneumoconiosis, and the x-ray evidence established the existence of pneumoconiosis); *see also Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-63 (6th Cir. 1989)(Administrative law judge properly rejected the causation opinion of a

doctor who incorrectly concluded that claimant did not suffer from pneumoconiosis).

To evade the force of the argument that its decision contravenes Sixth Circuit law, the majority ignores the dissent's citations to *Tussey* and *Adams* and asserts that *Skukan* has no persuasive authority because it was vacated on other grounds. As I have shown, examination of the Sixth Circuit's decisions in *Skukan*, *Tussey* and *Adams* reveals that the court has consistently determined that an administrative law judge cannot rely upon a causation opinion by a doctor who has not diagnosed pneumoconiosis, when the administrative law judge has found pneumoconiosis established. The Sixth Circuit is also consistent in continuing to cite *Skukan* as instructive authority when cautioning administrative law judges not to rely on causation opinions like that of Dr. O'Bryan in the case at bar, *e.g.*: *Kendrick v. Bethenergy Mines, Inc.*, No. 01-3989, 29 Fed.Appx. 263, 2002 WL 187401, * at 3 (6th Cir. Feb. 4, 2002); *Bartley v. Director, OWCP*, No. 00-4390, 11 Fed.Appx. 564, 2001 WL 669991, * at 3 (6th Cir. Jun. 7, 2001); *Brumley v. H.C. Coal Co.*, No. 98-3602, 187 F.3d 634, 1999 WL 430204, * at 3 (6th Cir. June 14, 1999). Thus, analysis of Sixth Circuit decisions which address causation opinions by doctors who incorrectly find no pneumoconiosis reveals that such opinions cannot constitute substantial evidence to support a determination that claimant's respiratory impairment was caused by coal mine employment. These Sixth Circuit decisions are entirely consistent with the Fourth Circuit's decision in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. May 2, 2002). The *Scott* court held that the administrative law judge had erred in crediting the opinions of two doctors on causation when their opinions contradicted the administrative law judge's finding that pneumoconiosis was established; the court reversed the administrative law judge's decision denying benefits and ordered benefits to be awarded because one medical opinion established causation, even though it was poorly documented. The court explained:

> Two opinions that may hold no weight, or at most may hold little weight allowed by [teaching in prior caselaw], cannot suffice as substantial evidence to support the ALJ determination that Scott's respiratory impairment was not caused at least in part by pneumoconiosis. This is especially true when one causation opinion based on the proper diagnosis, even a poorly documented one, links the disability to pneumoconiosis.

Scott, 289 F.3d at 270, 22 BLR at 2-384. Because Dr. O'Bryan's opinion cannot be deemed substantial evidence which could outweigh the credited opinions of Drs. Hardison and Powell, remand of the case for consideration of his opinion is an exercise in futility. *See Skukan,* 993 F.3d at 1233, 17 BLR at 2-104, *see also Williams*, 338 F.3d at 510-513, BLR at .

In sum, the majority's decision to remand this case for the administrative law judge to consider Dr. O'Bryan's opinion on causation does not accord with reason or with law because Dr. O'Bryan's opinion cannot constitute substantial evidence which could outweigh the properly credited causation opinions of Drs. Hardison and Powell.

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REGINA C. McGRANERY
Administrative Appeals Judge