BRB No. 98-0997 BLA

THEODORE BATEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 9/30/99
	)	
EASTERN ASSOCIATED COAL CORP.	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE CO.	)	
	)	
Employer/Carrier-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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Brian C. Murchison (Legal Practice Clinic, Washington and Lee University, School of Law), Lexington, Virginia, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1441) of Administrative Law Judge Stuart A. Levin 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 credited claimant with thirty-three years of coal mine employment and based on the filing date,[1] applied the regulations at 20 C.F.R. Part 718. The administrative law judge found that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). The administrative law judge also found that the weight of the medical evidence of record was sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c) and (b). Accordingly, benefits were awarded. On appeal, employer challenges the findings of the administrative law judge at 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(c) and 718.204(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.[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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203,

[1]Claimant filed his application for benefits on August 10, 1995. Director's Exhibit 1.

[2]We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and on total disability at 20 C.F.R. §718.204(c)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

718.204. Failure to establish 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*).

At Section 718.202(a)(4), the administrative law judge noted that the record contained medical reports from six physicians who examined claimant and from two physicians who did not examine claimant.[3] *See* Decision and Order at 16-17; Director's Exhibits 12, 14, 15; Claimant's Exhibits 1-3, 7, 9; Employer's Exhibits 1, 5-7. The administrative law judge properly found well documented the medical opinions of Drs. Rasmussen, Zaldivar, and Bembalkar, as each of these reports includes a medical, smoking and work history, x-ray, pulmonary function study, blood gas study, and physical examination results. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994), *modified on recon.* 20 BLR 1-64 (1996); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also properly found the medical opinions of Drs. Rasmussen, Zaldivar and Bembalkar, which diagnose the existence of pneumoconiosis, well-reasoned as each physician stated that he based his conclusion of the presence of pneumoconiosis on x-ray, clinical findings and/or claimant's years of work in the coal mines.[4] *Id.* We reject employer's argument that the administrative law judge's "failure to evaluate the x-ray evidence places a cloud over the opinions of Drs. Rasmussen and Bembalkar since their diagnoses of pneumoconiosis were clearly influenced by a positive x-ray interpretation that was later discredited by negative readings by doctors with superior expertise."

[3]The administrative law judge properly determined that after his 1983 examination of claimant, Dr. Mamita diagnosed chronic obstructive pulmonary disease (COPD), that the admission records from Plateau Medical Center contain regular diagnoses of COPD and acute bronchitis, and that Dr. Karam diagnosed COPD in May 1997. *See* Decision and Order at 17; Director's Exhibit 12; Claimant's Exhibits 1, 2. The administrative law judge also concluded that these physicians and hospital reports did not relate claimant's COPD and acute bronchitis to claimant's coal mine employment, and therefore, these diagnoses did not come within the provisions of 20 C.F.R. §718.201.

[4]A medical opinion is documented if it sets forth the clinical findings, observations, facts and other data upon which the physician based his opinion and a medical opinion is considered reasoned if the physician explains how the opinion's documentation supports his conclusion. *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.,* 6 BLR 1-1291 (1984).

Employer's Brief at 14. Employer thereby concedes that these doctors did not rely exclusively upon a positive x-ray reading to diagnose pneumoconiosis. It is well established that an administrative law judge may not reject an opinion on the sole ground that the physician relied in part on a positive x-ray where the weight of the x-ray evidence was negative. *See Winters v. Director, OWCP,* 6 BLR 1-877, 1-881 n.4 (1984). Hence, assuming that the weight of the x-ray evidence was negative, the administrative law judge did not err in crediting those doctors who relied in part on a positive x-ray. Likewise, contrary to employer's contention, the administrative law judge correctly determined that the opinions of Drs. Zaldivar and Fino established the existence of pneumoconiosis at Section 718.202(a)(4) because although they stated that claimant's chronic obstructive pulmonary disease (COPD) was not attributable to coal mine employment, each specifically diagnosed coal workers' pneumoconiosis. *See Perry, supra*. Finally, any error in the administrative law judge's decision to accord less weight to the medical opinion of Dr. Renn, who concluded that claimant did not suffer from clinical or legal pneumoconiosis, because Dr. Renn did not examine claimant, is harmless as employer cites no reason for finding that Dr. Renn's opinion should outweigh the opinions of the examining physicians diagnosing pneumoconiosis upon which the administrative law judge relied. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995) *aff'g* 16 BLR 1-11 (1991); *see also Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). We therefore affirm the administrative law judge's finding that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) as it is supported by substantial evidence and is in accordance with law.

Employer concedes that at Section 718.203(b), the administrative law judge properly found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment as claimant worked more than ten years in coal mining. *See* 20 C.F.R. §718.203(b). Employer disingenuously argues that the administrative law judge found claimant's COPD to be legal pneumoconiosis and that it had rebutted the presumption with the opinions from Drs. Zalivar, Fino and Renn attributing claimant's COPD to something other than coal mine employment. In fact, the administrative law judge relied upon the opinions of Drs. Zalivar and Fino, diagnosing separately both COPD and pneumoconiosis. The administrative law judge also relied on the opinions in which Drs. Rasmussen and Bembalkar diagnosed pneumoconiosis. The administrative law judge properly concluded that the record contained no evidence which rebutted the presumption as Drs. Rasmussen, Bembalkar, Zaldivar, and Fino all attributed the etiology of claimant's pneumoconiosis to his coal mine employment. *See* 20 C.F.R. §718.203(b);

Director's Exhibit 15; Claimant's Exhibit 7; Dr. Zaldivar's Deposition at 44; Dr. Fino's Deposition at 19. We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish rebuttal of the presumption at Section 718.203(b) as it is supported by substantial evidence and is in accordance with law.

Employer next contends that the administrative law judge erred when he found the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c).[5] As the administrative law judge found, Drs. Rasmussen, Zaldivar and Bembalker diagnosed total respiratory disability and, in his 1997 report, Dr. Amjad diagnosed pneumoconiosis and evaluated claimant as totally disabled and unable to perform his usual coal mine employment.[6] *See* Director's Exhibits 14, 15; Claimant's Exhibits 3, 7; Employer's Exhibits 1, 7. The administrative law judge also correctly concluded that Drs. Renn and Fino described claimant's respiratory impairment as mild to moderate. *See* Employer's Exhibits 5-7. While the administrative law judge accurately concluded that Dr. Renn did not opine that claimant could perform his usual coal mine employment, Employer's Exhibits 5, 7, the administrative law judge erred in stating that Dr. Fino offered no opinion on claimant's ability to perform his usual coal mine employment because the record reflects that Dr. Fino testified that from a respiratory standpoint, claimant was totally disabled from performing his usual coal mine employment. *See* Dr. Fino's deposition at 19. As Dr. Fino's opinion supports the opinions of Drs. Rasmussen, Zaldivar, Bembalkar, and Amjad, remand is not

[5]The administrative law judge determined that the record contained five pulmonary function studies and that the most recent study was qualifying. *See* 20 C.F.R. §718.204(c)(1). The administrative law judge concluded that six blood gas studies were qualifying, that fourteen blood gas study values were nonqualifying, and that thirteen nonqualifying blood gas studies were administered while claimant was receiving supplemental oxygen and thus, must be discounted due to oxygen treatment. *See* 20 C.F.R. §718.204(c)(2). The administrative law judge noted that Dr. Bembalkar diagnosed cor pulmonale and congestive heart failure, but that he did not specifically discuss whether the congestive heart failure was on the right side of the heart; thus, the administrative law judge did not find this evidence sufficient to establish cor pulmonale with right sided congestive heart failure at Section 718.204(c)(3). *See* Decision and Order at 18-19.

[6]In rendering his opinion on total disability, Dr. Amjad stated that claimant was unable to walk twenty to thirty feet without oxygen. *See* Claimant's Exhibit 3.

required. *See Larioni, supra*. Furthermore, we reject employer's contention that the administrative law judge erred in failing to inquire as to whether claimant would have been disabled to the same degree because of his non-coal mine related health problems, such as his history of heart disease. Employer does not point to specific evidence in the record in making this assertion, and the administrative law judge relied upon the opinions of physicians who agreed that claimant suffered from a total disability resulting from respiratory or pulmonary impairments. *See Jewell Smokeless Coal Corp. v. Street,* 42 F.3d 241 (1994). Based on his overall weighing of the medical opinion evidence, the administrative law judge permissibly found that the preponderance of the credible medical opinions demonstrated the presence of a totally disabling respiratory impairment at Section 718.204(c)(4). *See Carson, supra*; *Beatty, supra*; *Trent, supra*. Employer does not explain why Dr. Renn's opinion should be found to outweigh the opinions of the other five doctors. Additionally, the administrative law judge properly weighed the probative evidence at Section 718.204(c)(1)-(4), pro and con, and acted within his discretion as the finder of fact when he concluded that the weight of the evidence as a whole was sufficient to establish the presence of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(c)(1)-(4); *Fields, supra*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). We therefore affirm the administrative law judge's finding that claimant established total disability at Section 718.204(c) as it is supported by substantial evidence and is in accordance with law.

Finally, at Section 718.204(b), employer argues that the administrative law judge's decision to credit the medical opinions of Drs. Bembalkar and Amjad on the basis of their status as treating physicians runs afoul of the decisions of the United States Court of Appeals for the Fourth Circuit in *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997) and *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). In addition, employer argues that the medical opinions of Drs. Amjad and Bembalkar are not reasoned and documented because the physicians do not explain why they attribute claimant's disability to pneumoconiosis. Specifically, employer argues that the physicians failed to perform a detailed evaluation of their pulmonary function and blood gas studies, and to explain, based on this evaluation, how claimant's totally disabling respiratory impairment was caused by his pneumoconiosis. Employer next asserts that Dr. Rasmussen failed to provide a similar analysis, and therefore, failed to provide sufficient reasoning for his conclusion on causation. Finally, employer contends that the administrative law judge failed to consider the credentials of the various physicians when making his finding on causation.

In weighing the medical opinions under Section 718.204(b), the administrative law judge stated that:

> While the medical opinion evidence in respect to the etiology of Claimant's impairment is mixed, I have accorded the greatest weight to the opinions of Drs. Bembalkar and Amjad. Both are Claimant's treating physicians, and as corroborated by the opinion of Dr. Rasmussen, I believe their assessment of the cause of their patient's impairment is the most persuasive evidence of etiology in this record. Having considered the contrary opinion evidence in the record, I find, based upon the evaluations of Drs. Bembalker, Amjad, and Rasmussen, that pneumoconiosis contributed to Claimant's impairment. (citations omitted).

Decision and Order at 20.

As employer properly notes, the Fourth Circuit has held that an administrative law judge should not mechanically credit the testimony of a treating physician simply because the physician treated the miner; rather, the administrative law judge should also consider the qualifications of the treating physicians, the explanation of their medical opinions, and the documentation underlying their opinions. *See Hicks, supra.* Thus, the administrative law judge erred in according determinative weight to the opinions of Drs. Bembalkar and Amjad without considering whether the reports were documented and reasoned. *Id.* Moreover, the administrative law judge erred in failing to consider the qualifications of the physicians and the credibility of reports of Drs. Rasmussen, Fino and Zaldivar.[7] *Id; see Akers, supra; Fields, supra.* We therefore vacate the administrative law judge's finding that the medical opinion evidence was sufficient to establish that pneumoconiosis contributed to claimant's impairment pursuant to Section 718.204(b) and remand the case for reconsideration

[7]We reject employer's suggestion that Dr. Rasmussen's opinion is insufficient to support a finding of total disability due to pneumoconiosis. In his August 28, 1997 report, Dr. Rasmussen found that claimant's coal workers' pneumoconiosis was a significant contributing factor to his total disabling respiratory impairment. Claimant's Exhibit 9. Thus, Dr. Rasmussen's opinion, if credited, is sufficient to support claimant's burden of establishing that pneumoconiosis is a contributing cause of his total disability. *See Robinson v. Pickands Mather & Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

of the medical opinion evidence in light of *Hicks* and *Akers. See Hicks, supra; Akers, supra.*

Employer also argues that the administrative law judge erred in discrediting Dr. Renn's opinion on the ground that Dr. Renn did not diagnose pneumoconiosis. The administrative law judge found that the opinion in which Dr. Renn stated that claimant's obstruction resulted from smoking was entitled to little weight, since the physician concluded that claimant did not have pneumoconiosis, citing *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) and *Hobbs v. Clinchfield Coal Co.,* 45 F.3d 790, 19 BLR 2-86 (4th Cir. 1995). Decision and Order at 20.

In *Hobbs*, the United States Court of Appeals for the Fourth Circuit held that the opinions of two doctors who found that the miner did not suffer from coal workers' pneumoconiosis were not in conflict with the administrative law judge's finding of the existence of pneumoconiosis since both doctors found that the miner suffered from respiratory problems arising out of coal mine employment.[8] *See Hobbs, supra.* The Fourth Circuit subsequently held in *Dehue Coal Co., v. Ballard*, 65 F.3d 1189, 19 BLR 2-306 (4th Cir. 1995), that once an administrative law judge has found that the miner suffers from some sort of pneumoconiosis, a medical opinion premised upon an understanding that the miner does not have coal workers' pneumoconiosis may hold probative value. The court further noted that a medical opinion that acknowledges the miner's respiratory or pulmonary impairment but concludes that an ailment other than pneumoconiosis caused the total disability is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to the disability. *See Ballard, supra.* In the instant case, Dr. Renn diagnosed chronic bronchitis due to smoking and indicated that claimant suffers from a mild to moderate obstructive impairment. Employer's Exhibits 6, 7. Inasmuch as Dr. Renn acknowledged claimant's respiratory impairment, we vacate the administrative law judge's finding with regard to Dr. Renn and remand the case for reconsideration of that finding in light of *Hobbs* and *Ballard*. On remand, the administrative law judge should consider the credibility of all relevant medical opinion

[8]In *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit held that an opinion regarding causation must be discredited if the physician rests his conclusion upon a disagreement with the administrative law judge as to either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment.

evidence in determining whether the evidence is sufficient to establish that pneumoconiosis is a contributing cause of his total disability. *See Robinson v. Pickard Mather Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated 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

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge