BRB No. 02-0156 BLA

BILL N. HOLBROOK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Goldberg (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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits (00-BLA-0049) of Administrative Law Judge Joseph E. Kane on a claim[1] filed pursuant to the provisions of Title IV of the Federal Coal

[1] Claimant is Bill N. Holbrook, the miner, who filed his first application for benefits on August 7, 1992, which was finally denied on December 28, 1992. Director's Exhibit 19. Claimant requested a formal hearing on September 20, 1993, which the district director denied as untimely on October 6, 1993. *Ibid*. On June 9, 1994, claimant filed a second application for benefits. Director's Exhibit 1. Administrative Law Judge Daniel J. Roketenetz found that claimant's June 1994 claim constituted a timely request for modification of the district director's October 1993 determination. Director's Exhibit 21. Administrative Law Judge Roketenetz found that claimant failed to demonstrate either a mistake in a determination of fact or a change in conditions, and thus, denied benefits. *Ibid*. Claimant appealed and the Benefits Review Board vacated the denial and remanded the case because the Director, relying on newly submitted evidence, now conceded that claimant

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded, commencing on September 1, 1993.

On appeal, the Director argues that the administrative law judge erred in finding disability causation established based on the opinion of Dr. Charms despite several flaws contained in Dr. Charms's opinion. Specifically, the Director contends that Dr. Charms's reliance on an inaccurate smoking history, an exaggerated coal mine employment history, and an invalid ventilatory test renders his opinion less credible on the issue of disability causation and that the administrative law judge erred, therefore, in crediting it without sufficiently accounting for these flaws. Claimant has not filed a response brief in this appeal.[3]

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suffered from pneumoconiosis which arose out of his coal mine employment and thus, modification was established, and that claimant was totally disabled. *Holbrook v. Director, OWCP*, BRB No. 97-0928 BLA (Mar. 19, 1998) (unpub.); Director's Exhibit 22. Accordingly, the administrative law judge was instructed to consider the issue of whether claimant's total disability was due to pneumoconiosis. *Ibid*.

[2] 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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] We affirm the administrative law judge's weighing of the medical opinions of Drs.

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Woskobnick and Sisson and his date of onset of total disability finding as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 8, 11; Director's Brief in Support of His Petition for Review at 15.

The Director first argues that the administrative law judge erred by crediting the opinion of Dr. Charms on causation because Dr. Charms relied on an exaggerated length of coal mine employment of twelve years, which far exceeds the one and one-half years of coal mine employment found by Administrative Law Judge Daniel J. Roketenetz in the previous Decision and Order in this case and affirmed by the Board on appeal.[4]

It is well established that, where a discrepancy exists between the administrative law judge's finding as to the claimant's length of coal mine employment and the assumption by the physicians regarding length of coal mine employment, it is within administrative law judge's authority as the trier-of-fact to weigh the discrepancy and determine whether it is significant in assessing the credibility of the physicians' opinions. *Sellards v. Director, OWCP*, 17 BLR 1-77 (1983); *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984).

In the instant case, while the administrative law judge found that Dr. Charms's opinion was not entitled to "full probative weight" because he relied on a coal mine employment history of approximately twelve years which was "significantly higher" than the one and one-half years found by Judge Roketenetz and affirmed by the Board, *see Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); Decision and Order at 8; Director's Exhibit 11, his opinion was nonetheless "very probative" because of its clarity, detail and demonstrated analysis. This was rational. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Thus, inasmuch as the administrative law judge rationally considered the discrepancy between claimant's actual length of coal mine employment, and Dr. Charms's understanding but nonetheless found that the credibility of Dr. Charms's opinion was not significantly undermined because of its overall clarity, detail, and demonstrated analysis, we reject the Director's argument that the administrative law judge erred in relying on Dr. Charms's opinion because of this flaw. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Fitch, 9 BLR at 1-46; Decision and Order at 8.

The Director next argues further that the administrative law judge failed to comply with his duty under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as

[4] Administrative Law Judge Daniel J. Roketenetz credited claimant with one and one-half years of qualifying coal mine employment, Director's Exhibit 21 at 5-7, which was affirmed by the Board, *Holbrook*, *slip op*. at 2-3.

incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by failing to consider that Dr. Charms had relied on a cigarette smoking history of only ten-pack years when claimant had testified at the 1996 formal hearing to a thirty-pack year history and also argues that this further detracts from the credibility of Dr. Charms's opinion. We disagree.

In summarizing the medical opinion evidence, the administrative law judge noted that Dr. Charms had recorded a cigarette smoking history of one-half pack per day for twenty years ending eight years before his examination of claimant. Decision and Order at 5; Director's Exhibit 11. Thus, contrary to the Director's contention, we cannot say that the administrative law judge was unaware of Dr. Charms's finding regarding claimant's smoking history. Decision and Order at 5. Further, a review of claimant's testimony at the formal hearing held on July 25, 1996, before Administrative Law Judge Roketenetz, does not affirmatively establish a thirty-pack year cigarette smoking history because claimant was unable to definitively state when he started smoking: guessing at around the age of 14 or 15, testifying that he "probably smoked a pack a day" quitting in 1986, and admitting having quit and started the smoking habit on more than one occasion. [1986] Hearing Transcript at 27-28. Thus, contrary to the Director's contention, we cannot say the administrative law judge erred in not finding a discrepancy between Dr. Charms's understanding of claimant's smoking history and that testified to by claimant. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985).[5]

[5] There is no credible evidence of record demonstrating the actual length of claimant's cigarette smoking history. During the hearing before Administrative Law Judge Kane on September 21, 2000, a review of the transcript reveals that the only mention of claimant's cigarette smoking history was that claimant quit smoking on Dr. Felton's recommendation. Hearing Transcript at 15. Further, although Dr. Woskobnick recorded a cigarette smoking history of one pack per day for twenty years and claimant quitting eight years prior to examination, Dr. Sisson noted one and one-half pack per day history from 1958 to 1983, and Dr. Katzman noted that

Accordingly, we reject the Director's contention that the administrative law judge's Decision and Order does not comport with the requirements of the APA to consider all relevant evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

The Director also contends that the probative value of Dr. Charms's opinion is further diminished because the pulmonary function study upon which Dr. Charms relied does not contain tracings, as required by the regulatory quality standards. A pulmonary function study's compliance with the quality standards, however, is a factor the administrative law judge may consider in assessing the credibility of the study, but failure to comply with the standard does not require rejection of the study. 20 C.F.R. §718.204(b)(2)(i); 718.103; *see Gorman v. Hawk Contracting, Inc.*, 9 BLR 1-76 (1986); *cf. Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Thus, an administrative law judge is not required to reject an opinion merely because it is based, in part, on a pulmonary function study which did not conform to the quality standards; especially where, as here, Dr. Charms's opinion was based on several factors, *i.e.*, histories, physical examination findings, electrocardiogram, pulmonary function study, blood gas study, and chest x-ray, and the administrative law judge noted that Dr. Charms recognized that claimant's "vital capacity and flow rates are on the borderline levels." Decision and Order at 5; Director's Exhibit 1. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Further, we note that pulmonary function studies, while relevant to the presence or absence of a respiratory or pulmonary impairment, the presence of which is undisputed in the case at bar, are not determinative of the cause of such impairment. *See Piniansky v. Director, OWCP*, 7 BLR 1-171, 1-174 (1984). We, therefore, reject the Director's argument.

Finally, the Director contends that the administrative law judge erred in rejecting Dr. Katzman's opinion based on Dr. Katzman's failure to diagnose pneumoconiosis and provide a fully explained opinion. Specifically, the Director contends that the administrative law judge should have credited Dr. Katzman's opinion because of Dr. Katzman's superior qualifications and because he, unlike Dr. Charms, relied on accurate smoking and employment histories. Further, the Director notes that even though Dr. Katzman did not affirmatively diagnose pneumoconiosis, he did not state that the disease was absent, and

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claimant smoked one pack per day for twenty-four or twenty-five years, Director's Exhibits 19, 29, the administrative law judge discredited these opinions as inadequately reasoned.

nonetheless concluded that claimant's one and one-half years of coal mine employment was insufficient to have caused claimant's disabling pulmonary impairment.

While acknowledging that Dr. Katzman's superior credentials and expertise, *i.e.*, Dr. Katzman is board certified in internal medicine, specializing in internal, cardiology and pulmonary medicine, the administrative law judge, nonetheless, within a proper exercise of his discretion, found that Dr. Katzman's opinion was entitled to less probative weight on the issue of disability causation because he failed to find the existence of pneumoconiosis, failed to adequately state the bases for his opinion, and failed to render a reasoned opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Clark, supra*; *Lucostic, supra*; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); *Scott v. Mason Coal Co.*, 2002 WL 832020 (4th Cir. May 2, 2002); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (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); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see Bobick, supra*; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).[6] Accordingly, we affirm the administrative law judge's discounting of Dr. Katzman's opinion and his determination that Dr. Charms's opinion outweighed those of Drs. Katzman, Sisson, and Woskobnick to conclude that claimant established total disability causation. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see also Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, inasmuch as the administrative law judge properly found that claimant satisfied his burden of establishing that his pneumoconiosis was a "substantially contributing cause of [his] totally disabling respiratory or pulmonary impairment," we affirm his finding on causation. 20 C.F.R. §718.204(c); Decision and Order at 8-9.

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

[6] In response to the question posed by the district director inquiring as to whether claimant's pulmonary condition was the result of coal workers' pneumoconiosis, Dr. Katzman in a letter dated May 10, 1999, replied, "Based on 1-1/2 years of approved earnings as a coal worker, his condition would not be the result of his coal mine work. If the 14 years were allowed, it is possible that it would have been related to his coal work experience." Director's Exhibit 29.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge