BRB No. 08-0554 BLA

J.K.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/27/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-6144) of Administrative Law Judge Pamela Lakes Wood rendered on a subsequent 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). Claimant filed his first claim for benefits on January 27, 1992, which was denied on March 20, 1992, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed his second and instant subsequent claim for benefits on September 26, 2005. Director's Exhibit 3.

In her decision, the administrative law judge initially credited claimant with seventeen years of coal mine employment, as stipulated.[1] Additionally, based on a concession by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and thereby demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on the merits, however, the administrative law judge found that the evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv) when she credited Dr. Ewald's opinion over that of Dr. Schaaf. The Director responds, urging affirmance of the administrative law judge's denial of benefits.[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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge credited Dr. Ewald's opinion, that claimant's impairment is not totally disabling, over the contrary opinion of Dr. Schaaf. The administrative law judge considered the qualifications of both

[1] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9.

physicians, and found "no compelling reason to give additional weight to either" doctor "on the issue of credentials." Decision and Order at 11. Moreover, the administrative law judge considered the documentation and reasoning supporting both opinions, and found that Dr. Ewald's opinion was better supported by claimant's non-qualifying pulmonary function and blood gas studies.[3] *Id.*

Claimant first argues that the administrative law judge erred in not considering the opinions of Drs. Ewald and Schaaf in light of the exertional requirements of claimant's usual coal mine employment involving heavy labor. Claimant's contention lacks merit. Although the administrative law judge did not discuss the exertional requirements of claimant's usual coal mine employment in her weighing of the opinions of Drs. Ewald and Schaaf, she identified claimant's usual coal mine employment as an underground supervisor, and noted that "[i]n that capacity, he was expected to work six days a week, 'right beside' the other miners, and he was commonly required to lift between 50 and 100 pounds." Decision and Order at 3-4. Further, the record reflects that both Drs. Ewald and Schaaf understood that claimant's work as a supervisor required heavy labor.[4] Director's Exhibit 13; Claimant's Exhibit 3. As Dr. Ewald understood that claimant's usual coal mine employment required heavy work, the administrative law judge did not err in relying on Dr. Ewald's opinion to find that claimant was not totally disabled from a pulmonary standpoint. *See Gonzales v. Director, OWCP*, 869 F.2d 776, 779, 12 BLR 2-192, 2-197 (3d Cir. 1989); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

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[3] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, in Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

[4] Specifically, Dr. Ewald stated, in his January 17, 2006 report that:

> [Claimant's] last actual job was as supervisor, and yet in his capacity as supervisor, he tells me that he on a daily basis helped to do jobs, instruct in [sic] jobs, so he did all of the heavy labors mentioned above, roof bolting, rock dusting, lifting 50 pound bags of rock dust and 75 pounds of materials to be used for roof bolting. All in all, all of his years involved heavy labor.

Director's Exhibit 13 at 1. Likewise, Dr. Schaaf described claimant's last coal mine employment as a supervisor, involving heavy work, in his deposition dated February 16, 2007. Claimant's Exhibit 3 at 9, 20.

Next, claimant argues that the administrative law judge erred in according greater weight to Dr. Ewald's opinion merely because it was supported by the objective, non-qualifying studies. Claimant also argues that the administrative law judge erred in relying on Dr. Ewald's opinion when it was equivocal. These contentions lack merit. Dr. Ewald opined, in his narrative report, that:

> I believe [claimant] has some degree of lung disability; however I cannot say . . . at this point that he is totally disabled from [a] pulmonary standpoint. His degenerative joint disease of the knees would be a contributing factor in his inability to perform his last job in the coal mines. However from the purely pulmonary standpoint, again I do not see total disability.

Director's Exhibit 13 at 3. Dr. Ewald reiterated his opinion that claimant is not totally disabled from a pulmonary standpoint in his form report. *See* Director's Exhibit 13. An administrative law judge may credit the opinion of a physician that he or she finds to be better supported by the objective evidence of record. *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262, 1-265 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829, 1-832 (1985). Thus, the administrative law judge rationally credited Dr. Ewald's opinion because it was better supported by the objective medical data. Moreover, contrary to claimant's contention, the administrative law judge was not required to reject Dr. Ewald's opinion as equivocal. The use of cautious language does not necessarily reflect equivocation by the doctor. *See Perry v. Mynu Coals, Inc*., 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Soubik v. Director, OWCP*, 366 F.3d 226, 234 n.12, 23 BLR 2-82, 2-98 n.12 (3d Cir. 2004); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763-64, 21 BLR 2-587, 2-605-06 (4th Cir. 1999); *V.M. v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-75 (2008).

Lastly, claimant argues that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Schaaf based on his qualifications. We disagree. As the administrative law judge noted, Dr. Schaaf is Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibit 3 at 4-6. Dr. Ewald is Board-certified in Internal Medicine and is a Program Physician for the Chronic Respiratory Disease Program at the Centerville Clinics. Director's Exhibit 13. Finding that both physicians possessed "excellent credentials," the administrative law judge permissibly declined to automatically accord greater weight to Dr. Schaaf's opinion based upon his Board-certification in Pulmonary Disease. *See Martin v. Ligon Prep'n Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005).

Moreover, substantial evidence supports the administrative law judge's alternative finding that, at best, the two conflicting opinions were in equipoise and that therefore,

claimant did not meet his burden to establish that he is totally disabled.[5] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994). In sum, the administrative law judge discussed the qualifications of the physicians and the quality of their respective reasoning, and substantial evidence supports the administrative law judge's findings, which are in accordance with law. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002). Consequently, we affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv).

Because claimant did not establish total disability pursuant to Section 718.204(b)(2), a requisite element of entitlement in a miner's claim, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[5] Both parties agree that the 1992 opinions of Drs. Parcinski and Pickerill from claimant's earlier claim are not relevant to the issue of claimant's condition at the time of the hearing on March 14, 2007. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); Claimant's Brief at 3; Director's Brief at 5 n.4.