BRB No. 93-0459 BLA

WILLIAM H. CARSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WESTMORELAND COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr. (Clifford, Mann & Swisher), Charleston, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (90-BLA-0366) of Administrative Law

[1]Claimant is William Hugh Carson, the miner, who filed claims for benefits on July 25, 1979, and December 29, 1988. Director's Exhibit 1. The administrative law judge denied the first claim and the Board affirmed. *Carson v. Westmoreland Coal Co.*, BRB No. 84-0350 BLA (Aug. 27, 1986)(unpub.). Claimant appealed the Board's affirmance of the denial of his first claim to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. The court, in an unpublished decision, affirmed the Board's decision. *Carson v. Westmoreland Coal Co.*, No. 86-2612 (4th Cir. Aug. 25, 1987). Claimant took no further action until filing his second claim for benefits, more than one year later. *See* Director's Exhibit 1. Therefore, we affirm the administrative law judge's characterization of the present claim as a duplicate claim, 20 C.F.R. §725.309; *see Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992); *Spese v.*

Peabody Coal Co., 11 BLR 1-174 (1988).

Judge Martin J. Dolan, Jr., denying benefits on a claim filed pursuant to 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 applied the permanent regulations set forth at 20 C.F.R. Part 718 to the consideration of this claim. He accepted employer's stipulations to fifteen years' coal mine employment and the existence of pneumoconiosis arising out of coal mine employment, but found that claimant had failed to establish that he was totally disabled due to a respiratory disease and, accordingly, denied benefits. Decision and Order at 2-16; *see* 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(c). Claimant appeals, contending that the administrative law judge's analysis of the medical opinion evidence is flawed. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs.*, 380 U.S. 359 (1965).

The administrative law judge noted that there was "little question but that [claimant] has a respiratory impairment," and found that "the primary question is whether this impairment is due to a respiratory disease or to paralysis of the breathing apparatus [which paralysis was due to a stroke]." Decision and Order at 9. The

[2]We affirm the administrative law judge's findings regarding length of coal mine employment and pneumoconiosis arising out of coal mine employment as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge accorded determinative weight to Dr. Zaldivar's opinion[3] because of the physician's reliance on "extensive documentation" in formulating his opinion, his physical examination of claimant, his "excellent qualifications," and the fact that his "opinion is corroborated by the well-reasoned, well-documented medical opinions from other physicians with excellent qualifications." Decision and Order at 11.

The administrative law judge found that claimant failed to establish total respiratory disability pursuant to Section 718.204(c). *See Beatty v. Danri Corp.*, 16 BLR 1-11 (1991). He discounted Dr. Rasmussen's opinion of total pulmonary or respiratory disability, which he found equivocal because the doctor did "not indicate with any degree of certainty whether [claimant] is totally disabled from a respiratory disease alone." Decision and Order at 13. He also found Dr. Rasmussen's opinion to be "not as well-reasoned as the other opinions of record," less persuasive, and simply outweighed by the other opinions of record. Decision and Order at 13-14. The administrative law judge noted that Dr. Rasmussen offered no "explanation as to why he believe[d] that [claimant's] respiratory impairment could be due to a cigarette or coal dust induced lung disease," and also found him less qualified than other doctors of record. *Id.* The administrative law judge similarly accorded less weight to the opinion of Dr. Kayi, who attributed claimant's total disability to his stroke and coal dust exposure, because the doctor did not opine that claimant was totally disabled due to a respiratory condition, based his report on limited data, and did not state his qualifications. Decision and Order at 14.

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[3]Dr. Zaldivar submitted the results of his examination of claimant and review of medical records in two medical reports and testified at a deposition. Director's Exhibit 26; Employer's Exhibits 4, 9. In 1989, he diagnosed pneumoconiosis, but opined that claimant had a moderate impairment of the respiratory apparatus, not of the lungs. Claimant's restriction was not deemed due to pneumoconiosis, and his simple pneumoconiosis caused no pulmonary impairment. *See* Director's Exhibit 26. In 1991, after reviewing medical findings and data made both before and after claimant's stroke, Dr. Zaldivar reiterated his conclusion that claimant's respiratory impairment was the result of the stroke. *See* Employer's Exhibit 4. Dr. Zaldivar reached this same conclusion in his deposition testimony. *See* Employer's Exhibit 9.

On appeal, claimant contends that Drs. Rasmussen and Kayi possess expertise comparable to that of Dr. Zaldivar, that their reports were fully documented and corroborated, and that "[s]ignficant weight should have been accorded to their opinions." Claimant's Brief at 12. Claimant also argues that the administrative law judge "failed to accord significant weight to the opinion of Dr. Larson," claimant's "regular" physician. *Id.* Claimant concludes that the evidence in this case gives rise to a reasonable doubt and that this doubt "must be resolved in a claimant's favor." Claimant's Brief at 13. For the reasons that follow, we conclude that claimant's arguments are without merit.

Claimant argues that the administrative law judge failed to accord significant weight to the opinion of Dr. Larson, claimant's "regular" physician. Claimant's Brief at 12. This argument is without merit. Dr. Larson did not render any opinion regarding the cause or extent of claimant's respiratory impairment and would be insufficient to carry claimant's burden of proof under Section 718.204(c)(4).[4] Employer's Exhibit 2; *see Beatty*, *supra*. We thus affirm the administrative law judge's weighing of Dr. Larson's medical opinion.

We hold that the administrative law judge permissibly found that the medical opinions of Drs. Rasmussen and Kayi were insufficient to establish total respiratory disability pursuant to Section 718.204(c). In order to establish total disability pursuant to Section 718.204(c), "a claimant must establish that the miner's respiratory or pulmonary impairment is totally disabling and that non-respiratory and non-pulmonary impairments have no bearing on establishing total disability under this provision." *Beatty*, 16 BLR at 1-15; *see Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1262-63, 13 BLR 2-277, 2-280 (11th Cir. 1990); *see also Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040, 17 BLR 2-16, 2-21 (6th Cir. 1993). The disabling loss of lung function due to

[4]In progress notes of January 16, 1987, Dr. Larson indicated the results of a physical examination and noted claimant's weight loss, etiology unclear, controlled hypertension, and status post CVA. Employer's Exhibit 2. The discharge summary which Dr. Larson completed following claimant's March 4, 1989, release from the hospital indicated seizure disorder, complete occlusion, left common iliac and left superficial femoral arteries, peripheral vascular disease, hypertension, chronic obstructive pulmonary disease, and
status post right middle cerebral artery infarction with paresis, left extremity. *Id.* The documentation accompanying this admission similarly fails to relate the extent or cause of any respiratory disability. *Id.* The final discharge summary covering claimant's November 13, 1981 - December 15, 1981 hospitalization indicates that he suffered from right middle cerebral artery occlusion with leftsided hemiparesis, chronic obstructive pulmonary disease, hypertension, and pseudomonas urinary tract infection. *Id.* The admission forms covering this hospitalization do not shed any additional light on the extent or cause of any respiratory disability. *Id.* There are no other medical reports in the record written by Dr. Larson.

extrinsic factors, e.g., loss of muscle function due to a stroke, does not constitute respiratory or pulmonary disability pursuant to Section 718.204(c).[5]

[5]The opinion of a doctor who "specifically found no physical limitations due to pulmonary disease and noted that claimant's hemiparesis prevents him from performing physical tasks" is "relevant and probative to the issue of total disability under Section 718.204." *Beatty*, 16 BLR at 1-14; *cf. Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984)("[W]ithout further medical evidence establishing that carcinoma of the larynx was or resulted in a totally disabling respiratory or pulmonary impairment, evidence which merely establishes that decedent suffered from carcinoma of the larynx is insufficient to invoke the interim presumption under" 20 C.F.R. §727.203(a)(4)).

Because the administrative law judge could rationally determine that Drs. Rasmussen and Kayi attributed claimant's total disability, in part, to claimant's cardiovascular accident or stroke and failed to establish that claimant's respiratory disability was totally disabling, we conclude that he properly found that claimant failed to carry his burden of proof under Section 718.204(c) on the basis of their medical reports. 20 C.F.R. §718.204(c); *see Beatty*, *supra*; Decision and Order at 13-15; *see generally Bosco v. Twin Pine Coal*, 892 F.2d 1473, 13 BLR 2-196 (10th Cir. 1989); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987)(distinguishing issue of total respiratory disability under Section 718.204(c) from issue of whether such respiratory disability is due to pneumoconiosis under Section 718.204(b)). Inasmuch as the administrative law judge properly found the opinions of Drs. Kayi and Rasmussen inadequate to carry claimant's burden under Section 718.204(c), we need not reach claimant's argument that Drs. Rasmussen and Kayi are equally as qualified as Dr. Zaldivar, a factor which concerns the relative weight to be accorded the opinions of physicians when such opinions are both probative and conflicting regarding an issue, *see*, e.g., *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).[6]

We likewise affirm the administrative law judge's decision to accord determinative weight to the opinion of Dr. Zaldivar based on the reasoning and documentation reflected in his opinion as well as the corroboration offered by Dr. Fino's consulting medical opinion, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Moreover, assuming, *arguendo,* that the opinions of Drs. Kayi and Rasmussen were adequate to carry claimant's burden under Section 718.204(c), claimant's contention, that these opinions "were fully documented by appropriate underlying objective evidence; and . . . were also corroborated," Claimant's Brief at 12, is essentially a request that the Board reweigh the evidence, a function that it is not empowered to perform, *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), *aff'd*, 875 F.2d 861 (6th Cir. 1989)(table); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *cf. Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g Cox v. Director, OWCP*, 7 BLR 1-610 (1984).

The administrative law judge is charged with the evaluation and weighing of the medical evidence, and may, as here, draw appropriate inferences therefrom. *See Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 1224, 18 BLR 2-105, 2-111 (7th Cir. 1994); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir.

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[6]We note, however, that, if reached, the administrative law judge's conclusion that Dr. Zaldivar is better qualified is supported by the record, which indicates that Dr. Zaldivar is board-certified in internal medicine, pulmonary diseases, and sleep disorder medicine, Director's Exhibit 26; Employer's Exhibits 4, 9, and that Dr. Rasmussen is board-certified in internal medicine, Employer's Exhibit 1. The record does not contain a statement of Dr. Kayi's qualifications.

1990); *Lafferty*, *supra*. Because the administrative law judge has provided an adequate rationale, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), for his finding that claimant has not established total respiratory disability under Section 718.204(c) and that finding is supported by substantial evidence, it is affirmed.[7] In light of our disposition of claimant's arguments, we affirm the administrative law judge's denial of benefits. *See* 20 C.F.R. §718.204(c).

Accordingly, the Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[7]Claimant also argues that the evidence in this case gives rise to a reasonable doubt which must be resolved in his favor. Claimant's Brief at 13. We consider this argument a reference to the true-doubt rule, which was recently held invalid by the Supreme Court, *Director, OWCP v. Greenwich Collieries* [Ondecko], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and reject claimant's argument.