BRB No. 00-0694 BLA

THOMAS W. TURPIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-1138) of Administrative Law Judge Michael P. Lesniak 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] The administrative law judge accepted the parties' stipulation of twenty-five years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000), in light of claimant's January 28, 1999 filing date. Weighing the medical evidence of record, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). In addition, the administrative law judge found the medical evidence insufficient to establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the evidence of record is sufficient to establish entitlement to benefits. Claimant asserts that the administrative law judge erred in finding the medical evidence insufficient to establish the existence of pneumoconiosis. Claimant also generally asserts that the administrative law judge erred in finding the evidence insufficient to establish a totally disabling respiratory or pulmonary impairment. In response, employer urges affirmance of the administrative law

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that she will not file a response brief in this appeal.[2]

[2] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-five years of coal mine employment, his determination that employer was the properly named responsible operator, or his findings under 20 C.F.R. §§718.202(a)(1)-(2) (2000) and 718.204(c)(1)-(3) (2000). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on March 2, 2001, to which employer and the Director have responded.[3] The Director asserts that the amended regulations at issue in the lawsuit do not affect the outcome of this case. Employer initially asserts that the amended regulations should not be applied retroactively to cases before the Board. In addition, employer argues specifically that this case should be held in abeyance pending the outcome of the lawsuit inasmuch as the amended versions of 20 C.F.R. §§718.104, 718.201 and 718.204 could affect the outcome of this case. Lastly, employer contends that if the new regulations are to be applied, the proper procedure is to remand the case to the Office of Workers' Compensation Programs for the parties to develop evidence responsive to the new regulations.[4] Based on the briefs submitted by employer and the Director, and our review, we hold that the ultimate disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law

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[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case. Claimant has not responded to this Order.

[4] We reject employer's contention that the amended version of 20 C.F.R. §718.104(d) will effect the outcome of this case inasmuch as the changes to Section 718.104(d) only apply to claims filed after January 19, 2001, *see* 20 C.F.R. §§718.101, 718.104. Moreover, we reject employer's contention that the amended version of 20 C.F.R. §718.201(c) will affect the outcome of this case inasmuch as the Board need not address the issue of the existence of pneumoconiosis in light of our ultimate disposition of this case, *see* discussion, *infra*. Similarly, the amended version of 20 C.F.R. §718.204(a) does not affect the ultimate disposition of this case inasmuch as none of the parties are alleging that a nonpulmonary or nonrespiratory condition caused total respiratory disability in this case.

judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

In challenging the administrative law judge's denial of benefits, claimant generally contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish a totally disabling respiratory or pulmonary impairment. In particular, claimant argues that the record contains three medical opinions which state that claimant is not capable of performing his usual coal mine employment due to his coal dust exposure and, thus, has established entitlement to benefits. We disagree.

Contrary to claimant's contention, the administrative law judge correctly set forth the medical opinions of record, Decision and Order at 9-14, and found the evidence insufficient to establish total respiratory disability. Within a reasonable exercise of his discretion, the administrative law judge accorded greater weight to the opinions of Drs. Renn and Pacht, that claimant was not totally disabled and, from a pulmonary standpoint, was capable of performing his usual coal mine employment, based on his determination that their opinions were well reasoned and documented.[5] The administrative law judge further found that these opinions

[5] Dr. Pacht opined that claimant does not have a significant respiratory impairment and from a purely ventilatory standpoint, claimant would be able to perform his last coal mine employment. Employer's Exhibits 12, 16. Dr. Renn opined that claimant had a mild obstructive ventilatory defect with some impairment. However, Dr. Renn further opined that claimant has the pulmonary capacity to be able to return to his coal mine employment as a general inside laborer, which included the duties of a face worker, loading machine operator, roof bolter and continuous miner operator. In addition, Dr. Renn noted that claimant stated that the hardest part of his job was pulling track, carrying ties and building cribs, which entailed lifting eighty to ninety pounds with help or forty pounds alone. Employer's Exhibits 1, 3, 15.

were better supported by the objective evidence of record than the contrary opinions of Drs. Levine and Gress. Decision and Order at 19; *compare* Employer's Exhibits 1, 3, 12, 15, 16 with Claimant's Exhibits 1, 3, 8, 10; *see Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985).

The administrative law judge further found that the opinions of Drs. Renn and Pacht were supported by the opinion of Dr. Jaworski, which included a diagnosis of a mild impairment, but which further stated that the mild impairment would not prevent claimant from performing his last coal mine employment.[6] Decision and Order at 19; Director's Exhibit 6; *see Lane, supra*; *see generally Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). In addition, the administrative law judge permissibly found the opinion of Dr. Sachs, that claimant should not return to coal mine employment because further coal dust exposure may cause progression of his simple pneumoconiosis, insufficient to demonstrate total respiratory disability since such an opinion is not the equivalent of a finding of total disability. Decision and Order at 19, n.4; *see Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see generally Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Inasmuch as the administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant failed to satisfy his burden of proof in establishing a totally disabling respiratory or pulmonary impairment. Decision and Order at 19; *see Lane, supra; Akers, supra*.

Claimant's failure to establish total respiratory disability pursuant to Section

[6] Dr. Jaworski noted that claimant's last coal mine employment was as a general inside laborer, whose duties included roofbolting, setting four foot by eight inch cribs weighing thirty to eighty pounds and carrying them up to 250 feet, and also laying track. Dr. Jaworski noted that the hardest part of the job was pulling track, weighing sixty pounds per foot, and ties weighing thirty-five to forty pounds. In addition, Dr. Jaworski noted that claimant also performed the duties of motorman and supplyman. Director's Exhibit 6.

718.204(c) (2000) or 65 Fed. Reg. 80,049, to be codified at 20 C.F.R. §718.204(b), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718 and we need not address claimant's other arguments on appeal regarding the existence of pneumoconiosis. *Anderson, supra; Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge