BRB No. 99-0365 BLA

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

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Timothy G. Lenahan (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Richard A. Seid (Henry L. Solano, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0785) of Administrative Law Judge Robert D. Kaplan denying benefits on a duplicate[1] claim filed pursuant to the

[1] Claimant filed his first claim for benefits on November 15, 1982. Director's Exhibit 37. After a hearing on the merits, Administrative Law Judge Thomas W. Murrett issued a Decision and Order on December 3, 1986, in which he credited claimant with five and one-quarter years of coal mine employment. Judge Murrett found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a); 718.203(b), but found the evidence insufficient

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). Administrative Law Judge Robert D. Kaplan (the administrative law judge) found the evidence of record insufficient to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4), and thus found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R.§725.309. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings at Section 718.204(c)(1) through (c)(3), but vacated his finding at Section 718.204(c)(4). The Board remanded the case to the administrative law judge for reconsideration of the opinions of Drs. Aquilina and Cohen. *Zdancewicz v. Director, OWCP*, BRB No. 97-1836 BLA (July 27, 1998) (unpub).

On remand, the administrative law judge found that the medical opinions of Drs. Aquilina and Cohen were insufficient to establish a totally disabling respiratory impairment at Section 718.204(c)(4). Thus the administrative law judge concluded that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. Accordingly, benefits were

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to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). *Id.* On appeal, the Board affirmed the administrative law judge's finding at Section 718.204(c). *Zdancewicz v. Director, OWCP*, BRB No. 86-3104 BLA (Aug. 24, 1988) (unpub). Director's Exhibit 37. Claimant took no further action until he filed a second claim on February 7, 1991. *Id.* Administrative Law Judge Ainsworth A. Brown issued a Decision and Order denying benefits on November 23, 1992. Judge Brown found the evidence of record insufficient to establish a totally disabling respiratory impairment at Section 718.204(c). On appeal, the Board affirmed the finding at Section 718.204(c)(4) and the denial of benefits. *Zdancewicz v. Director, OWCP*, BRB No. 93-0992 BLA (June 29, 1994) (unpub). *Id.* Claimant took no further action until he filed the instant claim on June 14, 1996. Director's Exhibit 1.

denied. Claimant appeals, challenging the administrative law judge's findings at Section 718.204(c)(4). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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, 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*).

This case arises within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit. Pursuant to the decision of the Third Circuit in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), the administrative law judge must consider, in a duplicate claim, all of the new evidence, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes that element, he has demonstrated, as a matter of law, a material change in conditions under 20 C.F.R. §725.309(c). Then the administrative law judge must consider all the evidence of record, "including that submitted with the prior claim, to determine whether such evidence supports a finding of entitlement to benefits." Id. at 318, 20 BLR at 2-96.

At Section 718.204(c)(4), claimant argues that the administrative law judge erred in his consideration of Dr. Cohen's medical opinion. Specifically, claimant asserts that Dr. Cohen was claimant's treating physician, and relied on x-rays, a pulmonary function study, and findings on physical examination, as well as three other medical reports, in concluding that claimant suffered from "a marked disability secondary to his ongoing miner's asthma." Claimant's Exhibit 2. The administrative law judge found that Dr. Cohen relied solely on the medical opinions of three [unidentified] other physicians and accepted their conclusions, rather than reviewing and analyzing the objective evidence underlying those reports, as Dr. Spagnolo did. Decision and Order at 3, 4. The administrative law judge further noted that Dr. Cohen reviewed some x-rays, and referred to an unidentified ventilatory study, but his ultimate conclusion appeared to be based solely on the conclusions of the three other physicians, thus "...Dr. Cohen expressed no independent opinion of his own." Decision and Order at 4. The administrative law judge's interpretation of Dr. Cohen's opinion is

reasonable. Inasmuch as it is the duty of the administrative law judge to weigh the evidence and draw conclusions and inferences, *See Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989), we hold that the administrative law judge permissibly accorded no weight to Dr. Cohen's opinion as he found that the physician merely reported the opinions of three other, unnamed physicians. Claimant's Exhibit 2. Thus, the administrative law judge rationally found Dr. Cohen's report was not reasoned. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Claimant also argues that the administrative law judge erred in finding Dr. Aquilina's opinion insufficient to support a finding of total disability. As the administrative law judge noted, Dr. Aquilina stated that he relied on his knowledge of claimant, his status as claimant's treating physician, and on review of three other physicians' reports. Director's Exhibit 17. The administrative law judge permissibly found Dr. Aquilina's opinion, that the ventilatory testing was consistently abnormal, erroneous because the valid pulmonary function studies performed on December 6, 1994, May 31, 1995, and September 12, 1996 contained normal values[2] and were non-qualifying under the regulatory criteria at 20 C.F.R. 718.204(c)(1), Appendix B. Director's Exhibits 6, 7, 9. Thus the administrative law judge permissibly determined that Dr. Aquilina's opinion was not supported by the objective evidence. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Likewise, the administrative law judge acted within his discretion when he found the medical opinion of Dr. Aquilina not to be reasoned since Dr. Aquilina stated that he relied on his knowledge of claimant, his involvement with claimant's medical management over fifteen years and on his review of the opinions of Drs. Weiss and Peters, and Fasciana. The administrative law judge determined that the opinions of Drs. Weiss and Peters had been previously discredited, and Dr. Fasciana's opinion was accorded little weight *See Carson, supra; Church, supra; Fields, supra.* Consequently, we affirm the administrative law judge's finding that claimant failed to establish a totally disabling respiratory impairment pursuant to Section 718.204(c)(4) as this finding is supported by substantial evidence.[3]

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[2] The administrative law judge stated that pulmonary function study results are considered to be normal when the values of the FEV1, the FVC, and the MVV all exceed 80% of the predicted normal standard, as was the case with the May 31, 1995 study. Director's Exhibit 7. In addition, the administrative law judge noted that Dr. Weiss found the result of the December 6, 1994 study was normal, and Dr. Spagnolo found both the May 31, 1995 and September 12, 1996 studies were normal. Director's Exhibit 34.

[3]Claimant also raises arguments regarding the administrative law judge's acceptance of the opinions of Drs. Spagnolo and Talati. As the administrative law judge permissibly discredited all of the evidence supportive of claimant's burden to established total respiratory disability, we need not address these arguments, as any error contained therein would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Further, in light of his findings at Section 718.204(c)(4), the administrative law judge properly found that claimant failed to establish a material change in conditions at Section 725.309. *See Labelle Processing Co. v. Swarrow*, 72 F. 3d 308, 20 BLR 2-76 (3d Cir. 1995) We, therefore, affirm the administrative law judge's denial of benefits in the instant case, as it is supported by substantial evidence.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge