BRB No. 99-0649 BLA

JOE GRACE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Sexton, Cullen & Jones, P.C.), Birmingham, Alabama, for claimant.

J. Alan Truit, Laura A. Woodruff, Carranza M. Pryor (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-BLA-266) of Administrative Law Judge Gerald M. Tierney on a request for modification 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). This case is before the Board for a second time. Claimant initially filed this claim with the district director in January 1990. *See* Director's Exhibit 1. Following a hearing on the merits, Administrative Law Judge A.A. Simpson, Jr. issued a Decision and Order - Denying Benefits dated September 25, 1991. Judge Simpson credited claimant with forty-one years of coal mine employment, and based on the filing date of the claim, applied the regulations at 20 C.F.R. Part 718. Judge Simpson found the

evidence of record sufficient to establish the existence of pneumoconiosis arising out coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b). Judge Simpson, however, found the evidence insufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c) or to establish complicated pneumoconiosis at 20 C.F.R. §718.304. Accordingly, benefits were denied. *See* Director's Exhibit 47. On appeal, the Board affirmed the findings of Judge Simpson at 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(c)(1)-(3), and 718.304 as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The Board also affirmed, as supported by substantial evidence, Judge Simpson's treatment of the medical opinion evidence at 20 C.F.R. §718.204(c)(4), his finding that claimant failed to demonstrate the presence of a totally disabling respiratory impairment, and his denial of benefits. *See* Director's Exhibit 54; *Grace v. Drummond Company, Inc.*, BRB No. 92-0219 BLA (June 16, 1993)(unpub.).

Claimant timely filed a request for modification on March 4, 1994 which the district director denied on August 15, 1994. *See* 20 C.F.R. §725.310; Director's Exhibits 56, 71. Claimant again timely requested modification on December 5, 1994 which the district director denied on May 16, 1995 and again on June 27, 1996. *Id.*; Director's Exhibit 91. By letter dated July 24, 1996, claimant requested a hearing and submitted new evidence. *See* Director's Exhibit 92. The district director treated the submission of this new evidence as a request for modification which was denied on October 7, 1997. *See* Director's Exhibit 105. Claimant timely requested a hearing which was held before Administrative Law Judge Gerald M. Tierney (the administrative law judge) on May 5, 1998. *See* Director's Exhibit 106; Decision and Order at 2.

The administrative law judge considered the newly submitted evidence in conjunction with the previously submitted evidence to determine whether claimant demonstrated the presence of a totally disabling respiratory impairment due to pneumoconiosis, an element of entitlement he had previously failed to establish. Decision and Order at 3. The administrative law judge found that the new evidence did not prove total disability due to pneumoconiosis by establishing the existence of complicated pneumoconiosis at Section 718.304; Decision and Order at 3; but that the new evidence did establish the presence of a totally disabling respiratory impairment due to pneumoconiosis, pursuant to Section 718.204(c), (b) and that claimant had therefore established a change in conditions at 20 C.F.R. §725.310.

In considering the evidence as a whole the administrative law judge found that even though "the latest chest x-ray evidence refutes the existence of pneumoconiosis, claimant established the existence of pneumoconiosis based on "the clear preponderance of the biopsy evidence," and "the preponderance of the physician opinion evidence," Decision and Order at 7-8, and that employer had not rebutted the presumption at Section 718.203(b) that claimant's pneumoconiosis arose out of coal mine employment. Finally, the administrative

law judge found "that the preponderance of the evidence overall establishes that claimant is totally disabled due to pneumoconiosis." Decision and Order at 9. *See* 20 C.F.R. §718.202(a)(2), (4). Accordingly, benefits were awarded.

In the appeal before us, employer challenges the findings of the administrative law judge at Section 718.204(c)(4), and 718.204(b). Employer also argues that the evidence does not support the administrative law judge's finding of pneumoconiosis or that pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §§718.202(a), 718.203(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.[1]

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*).

[1] We affirm the findings of the administrative law judge on the length of coal mine employment as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, we note that we can dispose of the first two issues employer raises. Because the administrative law judge found the biopsy evidence and the medical opinion evidence sufficient to establish the existence of pneumoconiosis, 20 C.F.R §718.202(a)(2), (4) and employer has not raised any arguments concerning these findings, we need not address employer's argument regarding the x-ray evidence, 20 C.F.R. §718.202(a)(1) and can affirm the finding of the administrative law judge regarding the existence of pneumoconiosis at Section 718.202(a)(2) as unchallenged on appeal. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm the findings of the administrative law judge at Section 718.203(b) as employer has not raised any specific arguments regarding the findings of the administrative law judge. *Sarf, supra*. Employer also contends that the administrative law judge erred in finding total disability established at Section 718.204(c)(4).[2] Specifically, employer argues that the administrative law judge failed to consider all relevant probative evidence, misconstrued Dr. Hasson's opinion of a significant disabling impairment as a diagnosis of total disability and relied on the conclusory opinions of Drs. Ladden and Mosley, which did not address sufficiently the nature and extent of claimant's impairment.

[2] After reviewing the newly submitted evidence, the administrative law judge properly concluded that the new pulmonary function study and blood gas study evidence was nonqualifying under the regulatory criteria, and, therefore, insufficient to demonstrate the presence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(c)(1) and (2), Appendices B and C; Decision and Order at 4; Director's Exhibits 60, 77, 79, 85, 97, 102; Claimant's Exhibit 1. Likewise, the administrative law judge correctly concluded that the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure and thus, total disability was not established on that basis. *See* 20 C.F.R. §718.204(c)(3); Decision and Order at 4. We, therefore, affirm the findings of the administrative law judge at Section 718.204(c)(1)-(3) as they are supported by substantial evidence.

In finding a totally disabling respiratory impairment established, the administrative law judge relied on the preponderance of the new medical opinion evidence of total disability. Specifically, the administrative law judge relied on the opinion of claimant's treating pulmonary specialist, Dr. Hasson, who had treated claimant on a regular basis from 1994. The administrative law judge noted that although Dr. Hasson acknowledged that "claimant's pulmonary function study and blood gas study did not support a finding of disability," Dr. Hasson, nonetheless, opined that claimant had a "significant disabling impairment related to the asthmatic component to his pneumoconiosis" and would require medication "to maintain him in a normal [respiratory] state." Decision and Order at 5. In light of the exertional requirements of claimant's usual coal mine employment as a supply jeep operator, *i.e.*, lifting weights up to 100 pounds and carrying them distances up to 50 feet, Decision and Order at 4, the administrative law judge found that "Dr. Hasson's conclusions of a significant disabling impairment [was] tantamount to a conclusion of total disability." Decision and Order at 5. The administrative law judge further noted that Drs. Johnson and Mosley, who had treated claimant for the past ten years, and whose "many pages of treatment records document claimant's complaints of and treatment for respiratory problems and included the results of chest x-rays and pulmonary function and arterial blood gas studies," Decision and Order at 5, concluded that claimant was "100% disabled by his respiratory condition[,]" Decision and Order at 5, and that Dr. Ladden, claimant's thoracic surgeon in 1994, opined that claimant was totally disabled by his lung condition. The administrative law judge also observed that Dr. Russakoff, although he did not independently assess the degree of claimant's impairment or his ability to perform usual coal mine employment, nonetheless, agreed with Dr. Mosley's April 27, 1998 report that claimant was totally disabled by his lung dysfunction, and that although Dr. Goldstein did not specifically assess the degree of claimant's disability, his statement that claimant was being treated for obstructive airways disease and had significant shortness of breath when trying to walk only 50 feet, was sufficient to show that claimant could not perform the duties of his job as a supply jeep operator. The administrative law judge accorded less weight to the opinion of Dr. Naeye, that claimant was not totally disabled, as Dr. Naeye was a pathologist who had not examined claimant and had reviewed only the evidence developed prior to his 1995 report.

Contrary to employer's argument, the administrative law judge citing *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987), *aff'g on recon*. 9 BLR 1-195 (1986) did consider the like and unlike evidence, including nonqualifying pulmonary function studies and blood gas studies, in reaching his determination on total disability. Decision and Order at 6. Further, contrary to employer's argument, the administrative law judge acted properly in finding that Dr. Hasson's diagnosis of "a significant disabling impairment," was "tantamount to a conclusion of total disability," when compared to the exertional requirements of claimant's usual coal mine employment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984).

Moreover, contrary to employer's argument, the administrative law judge found that the opinions of Drs. Johnson and Mosley, claimant's treating physicians, were supported by underlying documentation and noted the underlying bases of the opinions in according their opinions great weight. "Their many pages of treatment records document [c]laimant's complaints of and treatment for respiratory problems and included the results of chest x-rays and pulmonary function and blood gas studies." Decision and Order at 5. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, the administrative law judge properly concluded that claimant's usual coal mine employment was as a supply jeep operator and that his duties required him to lift up to 100 pounds and carry this weight 50 feet. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon*. 9 BLR 1-104 (1986)(*en banc*); Decision and Order at 4. Contrary to employer's assertion, the administrative law judge permissibly considered the exertional requirements of claimant's usual coal mine employment in deciding that the reports of Drs. Hasson and Goldstein were sufficient to establish the presence of a totally disabling respiratory impairment. *Id*. Accordingly, we affirm the administrative law judge's finding that claimant has established a totally disabling respiratory impairment.[3]

[3] We affirm, as unchallenged on appeal, the administrative law judge's decision to accord less weight to the medical opinion of Dr. Naeye at 20 C.F.R. §718.204(c)(4). *Skrack*, *supra*.

Finally, turning to Section 718.204(b), employer contends that claimant failed to show that his pneumoconiosis contributes substantially to his totally disabling respiratory impairment, citing to *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990) and that the administrative law judge erred in finding causation established at Section 718.204(b) pursuant to the standard set forth in *Lollar*. Specifically, employer asserts that the medical opinion of Dr. Russakoff should carry the greatest weight on the issue of the relationship between claimant's purported disability and his coal mine employment because his was the only opinion which explained how claimant's present respiratory impairment, *i.e.*, his bronchospastic lung condition, an asthmatic condition, which was not present when claimant retired from coal mine employment in 1990, developed after he left the coal mines.[4] In support of this position, employer asserts that Dr. Russakoff explained that since claimant had no respiratory impairment due to coal dust exposure at the time of his 1990 examination and since claimant had not worked in the coal mines since retiring in 1990, any subsequent respiratory impairment could not be due to coal dust exposure. Employer also argues that the administrative law judge erred in discounting Dr. Russakoff's opinion merely because he was not a treating physician, in light of the fact that he had reviewed the evidence over several years and was quite familiar with claimant's case. Furthermore, employer contends that the administrative law judge erred in discounting Dr. Russakoff's opinion because Dr. Russakoff stated that he agreed with Dr. Mosley, who had opined that claimant was totally disabled due to pneumoconiosis, inasmuch as Dr. Russakoff only agreed with Dr. Mosley's finding of a totally disabling respiratory impairment, not Dr. Mosley's determination that pneumoconiosis was the cause of this disability. In response, claimant contends that the administrative law judge properly found the requisite causal nexus pursuant to the standard set forth in *Lollar* based on the medical opinions of Drs. Mosley and Johnson, claimant's treating physicians, the opinion of Dr. Hasson, a treating physician and pulmonary specialist, and the opinion of Dr. Ladden, claimant's thoracic surgeon. Claimant therefore contends that the administrative law judge permissibly found the medical opinions of Drs. Russakoff and Goldstein unpersuasive and properly found the evidence sufficient to meet claimant's burden of proof on the issue of causation.

In finding the medical opinion evidence sufficient to establish that pneumoconiosis contributed substantially to claimant's respiratory impairment, the administrative law judge found credible the opinions of, Drs. Mosley and Johnson, who had treated claimant "throughout the past 10 years," Decision and Order at 5, the opinion of Dr. Hasson, a treating physician and a pulmonary specialist, who had treated claimant "on a regular basis from 1994 to the present," Decision and Order at 4, and the opinion of Dr. Ladden, a thoracic surgeon,

[4] Employer asserts that Dr. Russakoff expressly stated that claimant's "asthmatic condition is the cause of his disability" and that his asthmatic condition was not caused by coal mine employment.

who had performed two surgeries on claimant in 1994. *See* Decision and Order 6. The administrative law judge accorded less weight to the 1998 opinion of Dr. Russakoff, based on a review of claimant's medical evidence, that claimant's disability was unrelated to coal mine employment, because Dr. Russakoff had not examined claimant since 1990; he was not claimant's longtime treating physician, and his opinion was inconsistent with his statement of agreement with Dr. Mosley's April 27, 1998 assessment.

Drs. Mosley and Johnson, who treated claimant for pulmonary problems since 1984, opined that claimant was totally disabled from coal mine employment because of his moderately severe pulmonary impairment caused by his severe COPD and chronic bronchitis secondary to coal workers' pneumoconiosis, conditions which were diagnosed in 1991. *See* Director's Exhibits 57, 58, 60, 84, 92, 102; Claimant's Exhibits 1, 2. Dr. Hasson, who treated claimant for pulmonary problems on a regular basis since 1994, opined that claimant had a significant disabling respiratory impairment related to the asthmatic component of his pneumoconiosis. *See* Director's Exhibits 67, 94, 96. Dr. Ladden performed a left thoracoscopy in September 1994 and a right thoracoscopy in November 1994. Based on these procedures, he diagnosed dense fibrosis, anthracosis and silica type granulomata and opined that claimant had a horrible lung condition significantly caused by coal mine employment and that claimant's lung condition was totally and permanently disabling. *See* Director's Exhibits 65, 80, 85, 92. In his 1998 report, Dr. Russakoff diagnosed coal workers' pneumoconiosis and the presence of a pulmonary impairment, *see* Employer's Exhibit 1, but also opined that the cause of claimant's impairment was a bronchospastic lung condition, which was probably asthmatic bronchitis, and not coal workers' pneumoconiosis. *Id.* Dr. Russakoff further opined in his 1998 report that since claimant had normal pulmonary function studies in 1990 and had not had coal dust exposure since 1990, it was highly unlikely that coal workers' pneumoconiosis was the cause of claimant's impairment and that claimant's asthmatic condition was not caused by coal dust as it developed after claimant left the mines. *Id*. When asked if he agreed with Dr. Mosley's April 27, 1998 assessment of a totally disabling respiratory impairment, Claimant's Exhibit 2, Dr. Russakoff responded that he agreed with Dr. Mosley's report for the above reasons. *Id*.

Contrary to employer's arguments, the administrative law judge permissibly accorded greater weight to the opinions of claimant's treating physicians, Drs. Mosley and Johnson, who had treated claimant for the past ten years, his thoracic surgeon, Dr. Ladden, who had performed two surgeries on claimant in 1994, and his pulmonary specialist, Dr. Hasson, who had treated claimant on a regular basis since 1994, all of whom linked claimant's disabling respiratory impairment to pneumoconiosis. The administrative law judge permissibly accorded little weight to Dr. Russakoff's opinion because he had not examined claimant since 1990 and was not a longtime treating physician like Drs. Mosley and Johnson and the pulmonary specialist, Dr. Hasson. Further, the administrative law judge noted that Dr. Mosley's April 27, 1998 report supported a conclusion of total disability due to

pneumoconiosis.[5] We, therefore, affirm the administrative law judge's finding at Section 718.204(b). *See Lollar, supra*; *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988) *aff'd* 865 F.2d 916 (7th Cir. 1989); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[5] As employer has not challenged the administrative law judge's treatment of the medical opinion of Dr. Goldstein at 20 C.F.R. §718.204(b), we affirm his finding regarding Dr. Goldstein's opinion as unchallenged on appeal. *Skrack, supra*.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge