BRB No. 99-1151 BLA

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

Appeal of the Decision and Order - Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Paul K. Paterson (Mascelli & Paterson), Scranton, Pennsylvania, for claimant.

Timothy S. Williams (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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (98-BLA-1097) of Administrative Law Judge Ainsworth H. Brown 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with more than ten but less than sixteen years of qualifying coal mine employment. The administrative law judge found that the evidence of record taken as a whole established the existence of pneumoconiosis arising out of coal mine

[1] Claimant, John R. Vinskofski, the miner, filed his application for benefits on November 14, 1997. Director's Exhibit 1.

employment pursuant to 20 C.F.R. §718.202(a), as conceded by the Director, Office of Workers' Compensation Programs (the Director), but found that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to find total respiratory disability at Section 718.204(c)(4). The Director responds, urging affirmance of the denial.[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 the 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).

[2] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a) and 718.204(c)(1)-(3) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3-5.

With respect to Section 718.204(c)(4), claimant argues that the administrative law judge erroneously credited the opinion of Dr. Levinson, who rendered two contradictory opinions, because Dr. Levinson failed to conclusively state which of his two reports he considered to be valid.[3] Claimant asserts that the administrative law judge should have credited the opinion of Dr. Cali, who opined that pneumoconiosis precluded claimant from performing his usual coal mine employment. We disagree. After considering all of the medical opinions of Drs. Levinson and Cali, the administrative law judge, within a permissible exercise of discretion, found that Dr. Levinson's March 31, 1999 letter in which he explained the reasons for his change in opinion concerning claimant's disability to be "plausible."[4] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 5; Director's Exhibit 26. The administrative law judge rationally discounted Dr. Cali's opinion because Dr. Cali failed to account for the improvement in claimant's blood gas study values as noted by Dr. Levinson and to provide an explanation for his total disability opinion aside from a recommendation that claimant avoid further coal dust exposure.[5] *See Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985);

[3] Dr. Levinson conducted two pulmonary evaluations of claimant. Pursuant to the first examination on February 3, 1998, he opined that claimant's pulmonary impairment is mild "and would in and of itself preclude him from performing work that would be comparable to his prior coal mine employment." Director's Exhibit 6. However, on January 22, 1999, he opined that claimant's "pulmonary impairment in and of itself would not appear to be sufficient to disable him from work comparable to his prior coal mine employment." Director's Exhibit 19.

[4] On March 31, 1999, Dr. Levinson compared the pulmonary function and blood gas study values from both examinations and explained that claimant "could produce higher ventilatory study results with a better effort" than those obtained on January 22, 1999 and that the resting blood gas study obtained on this same date "was also substantially higher" than that obtained on February 3, 1998. Director's Exhibit 26. He explained, therefore, "That would leave me to believe that he does not have any hypoxemia of a significant degree that would be caused by prior coal mine employment." *Ibid.*

[5] On March 5, 1999, Dr. Cali concluded that a "combination of reactive airways disease or asthma, simple coal workers' pneumoconiosis based on chest x-ray and history, and obesity would preclude him form [sic] doing mine work." Claimant's Exhibit 2. In a supplemental letter dated June 8, 1999, Dr. Cali opined that claimant "would not be able to perform coal mine work because of his pulmonary conditions and because of the level of activity that it would require." Claimant's Exhibit 7. He summarized this opinion by stating "that the original report provides significant detail and objective evidence including the diagnosis and requires no additional information." *Ibid.*

Carpeta v. Mathies Coal Co., 7 BLR 1-145, 1-147 n.2 (1984); *see also Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11, 1-14 (1991); *Hopton v. U. S. Steel Corp.*, 7 BLR 1-12, 1-14 (1984); Decision and Order at 5; Claimant's Exhibits 2, 7. Inasmuch as Dr. Cali discussed claimant's non-qualifying pulmonary function and blood gas studies, but failed to provide a rationale for his opinion that claimant's pulmonary condition precludes him from performing coal mine work, we affirm the administrative law judge's determination that Dr. Cali's June 8, 1999 statement failed to undermine Dr. Levinson's March 31, 1999 letter. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986); Decision and Order at 5.

Inasmuch as claimant has not otherwise challenged the administrative law judge's total disability finding pursuant to Section 718.204(c)(4), we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability under Section 718.204(c), a requisite element of entitlement pursuant to 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge