BRB No. 05-0162 BLA

ROY E. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 08/30/2005
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 on Remand Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Roy E. Ratliff, Grundy, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand Denying Benefits (99-BLA-0122) of Administrative Law Judge Daniel F. Sutton on claimant's request for modification of 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). This case involves claimant's second request for modification and has been before the Board previously.[1] In its most recent decision in this case, the Board

[1] The procedural history of this case is summarized in *Ratliff v. Dominion Coal Corp*., BRB No. 03-0143 BLA (Oct. 31, 2003)(unpub.).

affirmed the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1) – (a)(3), but vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c) and remanded the case for him to reconsider opinions by Drs. Fino and Dahhan that claimant does not suffer from legal pneumoconiosis. *Ratliff v. Dominion Coal Corp.*, BRB No. 03-0143 BLA (Oct. 31, 2003)(unpub.). On remand, the administrative law judge found that the preponderance of the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's consideration of the medical opinion evidence. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs has not responded to this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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*).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the better reasoned and supported medical opinions did not establish the existence of pneumoconiosis. Upon review, we conclude that substantial evidence supports this finding, which is in accordance with law.

Specifically, the administrative law judge considered Dr. Forehand's opinion, that claimant has an obstructive ventilatory impairment due to coal mine employment, an opinion that Dr. Forehand based in part on the absence of reversibility of claimant's obstructive impairment. Dr. Forehand ruled out asthma as a cause of the impairment because of the "lack of reversible obstruction to airflow . . . ." Claimant's Exhibit 3 at 2. The administrative law judge also considered that, in contrast, Drs. Dahhan and Fino observed that claimant demonstrates reversibility or partial reversibility of his obstructive

impairment, a factor they indicated was consistent with a diagnosis of asthma unrelated to coal mine employment. Director's Exhibit 151; Employer's Exhibits 3, 7. The administrative law judge additionally considered that he had previously found Dr. Dahhan's treatment of the issue of whether claimant's pulmonary function studies demonstrated reversibility to be more detailed and better supported by specific references to the test data than was Dr. Forehand's opinion. The administrative law judge found that, "[g]iven my crediting of Dr. Dahhan's findings regarding the extent of reversibility demonstrated by the pulmonary function test results . . . upon reconsideration . . . the medical opinions from Drs. Fino and Dahhan are better reasoned and better supported by the objective medical evidence tha[n] the contrary opinion from Dr. Forehand." Decision and Order on Remand at 9. The administrative law judge therefore concluded that the medical opinion evidence did not establish the existence of pneumoconiosis.

The administrative law judge was within his discretion to find the opinions of Drs. Dahhan and Fino better reasoned and supported than that of Dr. Forehand. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(4), which we must therefore affirm.

In claimant's "Statement in Support of Appeal," filed without the assistance of counsel, claimant alleges several errors in the administrative law judge's analysis of the medical evidence. Initially, we reject claimant's contention that the administrative law erred in failing to discuss on remand all of the evidence of record in this modification request. The administrative law judge reasonably emphasized the more recent opinions by Drs. Forehand, Fino and Dahhan, because claimant has demonstrated a change in conditions pursuant to Section 725.310 (2000), and the earlier opinions were found insufficient to establish the existence of pneumoconiosis. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order on Remand Awarding Benefits (Sep. 30, 2002) at 8. We also reject claimant's contention that the administrative law judge did not resolve the issue of whether claimant's obstructive impairment was partially reversible. As just discussed, the administrative law judge resolved this issue when he permissibly credited, as better supported by specific references to the test data, Dr. Dahhan's opinion that claimant has shown a variable response to bronchodilator therapy. Decision and Order on Remand Awarding Benefits (Sept. 30, 2002) at 10; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Additionally, claimant argues that Dr. Fino's opinion is hostile to the Act. However, claimant raised this allegation previously, and we rejected the argument. *Ratliff v. Dominion Coal Corp*., BRB No. 99-0981 BLA (Aug. 31, 2000)(unpub.).

Because claimant demonstrates no exception to the law of the case doctrine, nor is any apparent, the Board will not revisit its prior holding on this issue. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Lastly, claimant's contention that Dr. Dahhan's opinion should have been accorded diminished weight because he did not examine claimant lacks merit. Dr. Dahhan has examined claimant twice, in December 1986 and May 1990. Director's Exhibits 29, 60. Moreover, an administrative law judge may not accord less weight to a physician's opinion merely because the physician did not examine the miner. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Thus, claimant presents no reason to disturb the administrative law judge's findings.

Based on the foregoing, we affirm the administrative law judge's finding that "a preponderance of the physician opinion evidence does not establish the presence of either clinical or legal pneumoconiosis" pursuant to Section 718.202(a)(4). The administrative law judge also considered the previously affirmed findings that the existence of pneumoconiosis was not established at Section 718.202(a)(1)–(a)(3), along with his current finding at Section 718.202(a)(4), and properly concluded that claimant has not established a threshold element of entitlement. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), as it is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge