BRB No. 02-0540 BLA

JERRY WARREN JONES	)	
	)	
Claimant-Respondent	)	
	)	
	)	
v.	)	DATE ISSUED:
	)	
JIM WALTER RESOURCES, INCORPORATED	)	
	)	
	)	
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 - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (01-BLA-0031) of Administrative Law Judge Gerald M. Tierney (the administrative law judge) awarding benefits 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] Claimant

[1]The Department of Labor has amended the regulations implementing the Federal

filed an initial claim for benefits on July 16, 1994. The claim was finally denied on December 28, 1994 by the district director, who found none of the elements of entitlement to benefits established under the applicable regulations at 20 C.F.R. Part 718 (2000). Claimant took no further action in pursuit of benefits until filing a duplicate claim on June 2, 1999. The district director denied benefits on September 27, 1999. On March 16, 2000, claimant filed a request for modification. The district director found claimant entitled to benefits in a Proposed Decision and Order dated August 23, 2000. Employer requested a hearing before the Office of Administrative Law Judges, and the claim was forwarded to the administrative law judge, who held a hearing on October 23, 2001.

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In his Decision and Order dated March 26, 2002, the administrative law judge credited claimant with fourteen years of coal mine employment and considered the claim on the merits under the applicable regulations at 20 C.F.R. Part 718.[2] The administrative law judge found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), but found the medical opinion evidence of record sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). The administrative law judge further found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b), and found that the evidence was insufficient to establish rebuttal of the presumption. The administrative law judge found the evidence of record insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii), but found the medical opinion evidence sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), and total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established under Section 718.202(a)(4), and total disability due to pneumoconiosis due to pneumoconiosis established under 20 C.F.R. §718.204(b), (c). Claimant responds in support of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, has filed a

[2]The miner sought modification of the denial of benefits *by the district director* in the instant duplicate claim, Director's Exhibits 19, 20, and it was thus not necessary for the administrative law judge to make a specific preliminary finding regarding the grounds for modification under 20 C.F.R. §725.310 (2000). *See Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); Decision and Order at 3. To the extent that the administrative law judge erred in conducting a modification analysis, any error is harmless as the administrative law judge properly reviewed the entire record. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).

response brief indicating he does not presently intend to participate in the proceedings on appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

[3]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, and findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 8-10.

On appeal, employer generally contends that the administrative law judge failed to weigh all of the relevant evidence together in finding the existence of pneumoconiosis established, and generally contends that the administrative law judge's finding is unsupported by substantial evidence. Employer's contentions lack merit. Contrary to employer's general contention, the administrative law judge properly considered the three medical opinions of record addressing whether claimant has pneumoconiosis – *i.e.*, the opinions of Drs. Cohen and Hinkamp, who opined that claimant has pneumoconiosis, and the contrary opinion of Dr. Goldstein. Decision and Order at 7-8; Director's Exhibits 11, 33; Claimant's Exhibits 1, 2; Employer's Exhibit 1. The administrative law judge properly considered the qualifications of the three physicians,[4] and the underlying documentation proffered by the physicians for their opinions, and acted within his discretion in finding that the opinions of Drs. Cohen and Hinkamp were more persuasive than Dr. Goldstein's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *id*. Employer's contention with regard to the administrative law judge's finding that claimant established the existence of pneumoconiosis amounts to a request for the Board to reweigh the evidence, which the Board is not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Employer merely states principles of law, refers to negative x-ray readings and Dr. Goldstein's opinion as supportive of a finding that claimant does not have pneumoconiosis. Employer does not assign specific error to the administrative law judge's stated bases for finding that the opinions of Drs. Cohen and Hinkamp were entitled to determinative weight under Section 718.202(a)(4). Furthermore, employer's contention that the administrative law judge erred because he failed to adequately weigh all like and unlike evidence together under Section 718.202(a)(1)-(4) is without merit. The Board has long held that Section 718.202(a)(1)-(4) provides four alternative means by which the existence of pneumoconiosis may be established.[5] *See Dixon v. North Camp Coal*

[4]The administrative law judge correctly stated that Drs. Cohen and Goldstein are Board-certified pulmonary specialists, and that Dr. Hinkamp is Board-certified in occupational medicine. Decision and Order at 7; Director's Exhibits 14, 18; Claimant's Exhibits 1, 2.

[5]Employer cites the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) in support of its contention that the administrative law judge erred by not weighing all of the different types of evidence together at 20 C.F.R. §718.202(a) before determining that claimant established the existence of pneumoconiosis. *See also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The United States Court of Appeals for the Eleventh Circuit has not adopted the holding of the court in *Compton*. We decline to extend the holding in *Compton* in this case, which arises within the jurisdiction of the Eleventh Circuit. The Board has long held that Section 718.202(a)(1)-(4) provides four alternative means by which the existence of pneumoconiosis may be established, as noted

Co., 8 BLR 1-344 (1985). Accordingly, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a).

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supra. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). We note that in the instant case, the administrative law judge stated that he found the opinions of Drs. Cohen and Hinkamp outweighed the negative x-ray evidence of record because the physicians took into account a totality of factors in rendering their opinions, whereas an x-ray reading is an isolated type of evidence. Decision and Order at 8. The administrative law judge's error in weighing the negative x-ray evidence against the medical opinion evidence supportive of a finding of pneumoconiosis is harmless, however, as it did not affect the administrative law judge's ultimate determination that the medical opinion evidence established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-710 (1983).

In challenging the administrative law judge's finding that claimant established the presence of a totally disabling respiratory impairment at Section 718.204(b)(2)(iv), employer argues that the administrative law judge should have accorded determinative weight to Dr. Goldstein's opinion that claimant does not have a totally disabling pulmonary or respiratory condition, but is totally disabled due to a back injury. Employer suggests that Dr. Goldstein was the only physician of record to consider claimant's history of a severe back injury, and thus provided the only well-reasoned and documented opinion of record. Employer is incorrect in stating that only Dr. Goldstein considered claimant's history of severe back problems.[6] Drs. Cohen and Hinkamp both noted that claimant suffered a severe back injury in 1982 and that claimant has had recurrent lumbar disc problems and degenerative joint disease. Director's Exhibit 11; Claimant's Exhibits 1, 2. Employer's contention that Dr. Goldstein's opinion should have been accorded greater weight is merely a request for the Board to reweigh the evidence, which the Board cannot do. *See Anderson, supra*. The administrative law judge properly accorded greater weight to the opinions of Drs. Cohen and Hinkamp, finding that these opinions are well-reasoned and documented because Drs. Cohen and Hinkamp based their conclusions upon a totality of factors, including specific consideration of the exertional requirements of claimant's strenuous coal mine employment as an inside laborer. *See Clark, supra; Tackett, supra;* Decision and Order at 10-11; Director's Exhibits 11; Claimant's Exhibits 1, 2. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).

Furthermore, the administrative law judge properly weighed the medical opinions of record against the contrary probative evidence regarding total disability under Section 718.204(b(2)(i)-(iv), and found the medical opinions of Drs. Cohen and Hinkamp more persuasive than the contrary evidence in light of the documentation underlying their opinions. 20 C.F.R. §718.204(b); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). We thus affirm the administrative law judge's finding that claimant established total disability under Section 718.204(b).

[6]Moreover, the relevant inquiry at 20 C.F.R. §718.204(b) is whether claimant suffers from a totally disabling pulmonary or respiratory impairment. *See* 20 C.F.R. §718.204(b).

With regard to disability causation under Section 718.204(c), employer merely asserts that, in light of the evidence in the record of claimant's back injury, the evidence of record is insufficient to support a finding that pneumoconiosis is a substantially contributing cause of claimant's total disability.[7] Contrary to employer's argument, the opinions of Drs. Cohen and Hinkamp support a finding that claimant's pneumoconiosis is a substantially contributing factor in his totally disabling respiratory impairment. 20 C.F.R. §718.204(c); *see Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Dr. Cohen stated that claimant's coal dust exposure was "significantly contributory" to the development of his totally disabling respiratory impairment. Claimant's Exhibit 1. Dr. Hinkamp stated that claimant's totally disabling respiratory impairment is "substantially related to coal dust exposure." Claimant's Exhibit 2. The administrative law judge properly credited these opinions as well-documented and reasoned, as discussed *supra*. Accordingly, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). *See* 20 C.F.R. §718.204(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

[7]20 C.F.R. §718.204(a) provides, in pertinent part:

> ...any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis.

20 C.F.R. §718.204(a). Thus, contrary to employer's assertion, claimant's back injury does not preclude a finding that claimant suffers from a totally disabling respiratory impairment arising out of coal mine employment. *Cf., Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994).

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge