BRB No. 04-0303 BLA

RICHARD KUHN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KANAWHA COAL COMPANY	)	
	)	DATE ISSUED: 12/22/2004
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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (02-BLA-5463) of Administrative Law Judge Richard A. Morgan 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] This case involves a subsequent claim, which claimant

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

filed on February 14, 2001.[2] After crediting claimant with at least seventeen years of coal mine employment based upon the stipulation of the parties, the administrative law judge found the evidence submitted in connection with the subsequent claim sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an element of entitlement previously adjudicated against claimant in his prior, February 25, 1994 claim. The administrative law judge thus found claimant established that an applicable condition of entitlement changed since the previous denial of benefits pursuant to 20 C.F.R. §725.309, and considered the claim on the merits under the applicable regulations at 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and, consequently, total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), and disability causation under Section 718.204(c). Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.[3]

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed a previous claim on February 25, 1994. Director's Exhibit 1. This claim was denied on August 4, 1994 by the district director, who found that claimant did not establish any of the elements of entitlement pursuant to 20 C.F.R. Part 718 (2000). *Id*. Claimant took no further action in pursuit of benefits until filing the instant subsequent claim on February 14, 2001. Director's Exhibit 1.

[3]We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least seventeen years of coal mine employment, that the evidence submitted in connection with the subsequent claim is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), and that claimant thus established that an applicable condition of entitlement changed pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 14-16. In addition, we affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3). *Skrack*, 6 BLR at 1-711; Decision and Order at 16-17.

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).

In challenging the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), claimant contends that the administrative law judge erred in discounting Dr. Cohen's opinion that claimant has pneumoconiosis, and improperly credited the contrary opinions of Drs. Zaldivar and Altmeyer. In addition, claimant generally contends that the opinions of Drs. Ranavaya and D'Brot, which include a diagnosis of pneumoconiosis, should have been credited as supportive of Dr. Cohen's opinion.

Dr. Cohen reviewed the medical records in this case, and diagnosed pneumoconiosis, stating that claimant's chronic respiratory condition is substantially related to his eighteen to twenty years of coal mine employment and a twenty-five to forty-five pack year history of tobacco smoke exposure. Claimant's Exhibit 4. Dr. Ranavaya, who examined claimant on April 1, 1994 and May 8, 2001, concluded that claimant has pneumoconiosis based on claimant's coal dust exposure history and positive x-rays. Director's Exhibits 1, 8. Dr. D'Brot, who treated claimant on numerous occasions from July 1999 until February 2001 for chest discomfort and respiratory symptoms, diagnosed claimant with coal workers' pneumoconiosis, chronic obstructive pulmonary disease and coronary artery disease. Claimant's Exhibit 1. In contrast, Dr. Zaldivar examined claimant on December 19, 2001, and indicated that claimant does not have pneumoconiosis based upon an absence of radiological evidence of the disease and a high carboxyhemoglobin level typical of a current heavy smoker. Director's Exhibit 24. Dr. Altmeyer, who reviewed the evidence of record, stated that claimant does not have pneumoconiosis in light of x-ray evidence in the record showing no changes consistent with pneumoconiosis, as well as physiologic findings and physical examination findings which Dr. Altmeyer explained were consistent not with coal workers' pneumoconiosis, but rather with chronic obstructive lung disease attributable to smoking. Employer's Exhibit 2.

Claimant contends that the administrative law judge erred in failing to credit Dr. Cohen's findings as sufficient to support a finding that claimant established the presence of legal pneumoconiosis.[4] Claimant argues that the administrative law judge erred in

[4]A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Legal pneumoconiosis" includes

failing to credit Dr. Cohen's opinion as well-reasoned and documented, improperly questioned whether Dr. Cohen had an adequate understanding of claimant's smoking history, and should have given Dr. Cohen's opinion greater weight because it is supported by the opinions of Drs. Ranavaya and D'Brot. Claimant's contentions lack merit. Whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *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*). While Dr. Cohen's opinion would support, if credited, a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.201, the administrative law judge properly discounted Dr. Cohen's opinion that claimant has legal pneumoconiosis on the ground that Dr. Cohen relied on medical publications to support his conclusion that coal dust can cause obstructive lung disease, without adequately explaining why claimant's specific lung condition is caused by his coal dust exposure. *Clark*, 12 BLR at 1-155; Decision and Order at 19; Claimant's Exhibit 4. Because the administrative law judge properly discounted Dr. Cohen's opinion on that basis, we need not address claimant's argument that the administrative law judge erred in discounting Dr. Cohen's opinion for the additional reason that Dr. Cohen did not adequately address claimant's smoking history. Furthermore, contrary to claimant's general suggestion, the administrative law judge did not err in failing to find Dr. Cohen's opinion reasoned and documented because his opinion is supported by the reports of Drs. Ranavaya and D'Brot. The administrative law judge properly considered the merits of Dr. Cohen's report itself, and was not constrained to credit the report simply because the record contains other medical opinions indicating a diagnosis of pneumoconiosis. The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Moreover, claimant's mere reference to the opinions of Drs. Ranavaya and D'Brot, without a specific allegation of error on the administrative law judge's part in his consideration of them, provides no basis for review of the administrative law judge's reasons for discounting the opinions of Drs. Ranavaya and D'Brot. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Claimant also contends that the administrative law judge erred in relying upon the opinions of Drs. Zaldivar and Altmeyer in determining that the evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). Contrary to claimant's contention, the administrative law judge properly credited Dr. Zaldivar's opinion on the ground that Dr. Zaldivar provided a well-reasoned basis for his finding that claimant does not have pneumoconiosis. *Clark*, 12 BLR at 1-155; Decision and Order at 20; Director's Exhibit 24. The administrative law judge found specifically that

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any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Dr. Zaldivar examined claimant and reviewed the medical evidence of record, discussed how each aspect of claimant's history affected his breathing difficulties, explained how claimant's extensive smoking history caused his deterioration of his breathing capacity, and explained how claimant's coronary artery disease caused his shortness of breath during exercise. *Id.* The administrative law judge also properly credited Dr. Altmeyer's opinion that claimant does not have pneumoconiosis because Dr. Altmeyer explained how claimant's symptoms and physiogical condition are not consistent with pneumoconiosis, but rather chronic obstructive lung disease attributable to smoking. *Clark*, 12 BLR at 1-155; Decision and Order at 20; Employer's Exhibit 4. We affirm, therefore, the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). In addition, as discussed *supra*, we affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 18.

Because the administrative law judge properly found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), a requisite element of entitlement under Part 718, he properly denied benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We need not address, therefore, the administrative law judge's disability causation findings under Section 718.204(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

_____
ROY P. SMITH
Administrative Appeals Judge

I concur in the result only.

_____
REGINA C. McGRANERY
Administrative Appeals Judge