BRB No. 03-0536 BLA

MILLARD W. DYE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAT CONTRACTORS	)	DATE ISSUED: 02/26/2004
	)	
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 on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Millard W. Dye, Oakwood, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (99-BLA-00526) of Administrative Law Judge Stuart A. Levin denying 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] This case has been before the Board previously. Initially, Administrative Law Judge Lawrence P. Donnelly found that claimant[2] established at least fourteen years of qualifying coal mine employment and total disability due to pneumoconiosis which arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204 (2000). Decision and Order dated April 17, 2000 at 2-11. Accordingly, benefits were awarded. On appeal, the Board affirmed Judge Donnelly's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203 and 718.204(c)(1)-(3) (2000). The Board vacated, however, his findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b), (c)(4) (2000) and remanded the case for further consideration of the relevant evidence of record. *Dye v. Rat Contractors*, BRB No. 00-0860 BLA (June 27, 2001)(unpublished).

On remand, Administrative Law Judge Stuart A. Levin (the administrative law judge), after noting the Board's remand instructions, found that the relevant evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000) but insufficient to establish the existence of pneumoconiosis or that the total disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b) (2000). Decision and Order on Remand at 2-3. Accordingly, benefits were denied.

In the instant appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, (the Director), has filed a Motion to Remand asserting that the administrative law judge must further consider the credibility of Dr. Koenig's opinion.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

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

[2]Claimant is Millard W. Dye, the miner, who filed a claim for benefits on August 26, 1997. Director's Exhibit 1.

[3]The Director has filed a Motion to Remand in this case. The Board accepts the Director's Motion to Remand as his response brief, and herein decides this case on its merits.

If the findings of fact and conclusions of law of the administrative law judge 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement.[4] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Dr. Koenig diagnosed "coal workers' pneumoconiosis," based upon chest x-ray and CT scan results that were negative for the existence of pneumoconiosis, and the surgical note of Dr. Hannon, who observed changes consistent with pneumoconiosis but stated that he was no expert and would defer to Dr. Koenig's opinion. Director's Exhibits 8, 13, 14, 28, 29; Claimant's Exhibit 9; Employer's Exhibit 7. The administrative law judge considered this diagnosis and rationally determined that Dr. Koenig's opinion is not supported by the underlying documentation. *Milburn Colliery Co. v. Hicks*, 138 F. 3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara*, 7 BLR 1-167; Decision and Order at 2-3. We, therefore, affirm the administrative law judge's finding with respect to Dr. Koenig's diagnosis of "coal workers' pneumoconiosis" pursuant to Section 718.202(a)(4) as it is supported by substantial evidence.

The record reflects that Dr. Koenig, also diagnosed "bronchitis/obstructive lung disease due to coal dust." Director's Exhibit 8. The Director, correctly argues that the administrative law judge erred in failing to consider if this additional diagnosis by Dr. Koenig is sufficient to establish the existence of "legal" pneumoconiosis under the Act and regulations. Director's Brief at 3-4. The Act and its implementing regulations recognize both "clinical" and "legal" pneumoconiosis. *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th

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[4]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Cir. 1995); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-106 (1998). Legal pneumoconiosis, as defined in 20 C.F.R. §718.201, is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis. *Id.* The administrative law judge, did not address Dr. Koenig's additional diagnosis of bronchitis/obstructive lung disease due to coal dust, a finding which, if credited, satisfies the definition of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2).[5] *See Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); Director's Exhibit 8. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of Dr. Koenig's diagnosis of bronchitis/obstructive lung disease.

On remand, should the administrative law judge find the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge is instructed to consider all the relevant evidence in determining whether claimant suffers from the disease in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[6] Consequently, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), then the administrative law judge, on remand, must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Compton*, 211 F.3d 203, 22 BLR 2-162.

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[5]Section 718.201(a)(2) provides that:

> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. §718.201(a)(2).

[6]The United States Court of Appeals for the Fourth Circuit held that although Section 718.202(a) (2000) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

In addition, inasmuch as we vacate the administrative law judge's Section 718.202(a)(4) determination, we must also vacate the administrative law judge's finding that claimant's total disability is not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *See* 20 C.F.R. §718.204(c); Decision and Order on Remand at 3. Should the administrative law judge find the evidence sufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he must weigh all the relevant evidence to determine if claimant has established by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Finally, employer contends, in its response brief, that the administrative law judge erred in finding total disability established based upon the medical opinion evidence of record. Employer's Brief at 9-11. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In this case, the administrative law judge rationally found that total disability was established based on a thorough and accurate consideration of the medical opinion evidence of record. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996): *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibits 8, 9, 36; Employer's Exhibit 3; Decision and Order on Remand at 3. Employer asserts that Dr. Fino's opinion is better reasoned and documented, but has not alleged any specific error in the administrative law judge's consideration of the medical evidence on total disability. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

In weighing the evidence on the presence or absence of a disabling pulmonary impairment at Section 718.204(c)(4) (2000), the administrative law judge acted within his discretion when he found it sufficient to support claimant's burden of proof. In finding that the opinions of Drs. Koenig, Michos and Naeye were sufficient to establish the existence of total disability, the administrative law judge noted that the physicians had reviewed the non-qualifying pulmonary test results, including the VO2 result, and had opined that these test results showed abnormalities which would prevent claimant from performing the physically strenuous work required in his coal mine employment. Decision and Order on Remand at 3; Director's Exhibits 8, 9; Employer's Exhibit 3. The administrative law judge further noted that Dr. Fino did not address the VO2 results in his opinion. Decision and Order on Remand at 3; Director's Exhibit 36.

A physician may diagnose total disability despite the non-qualifying results of objective tests since non-qualifying test results alone, do not establish the absence of a respiratory impairment. *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984). Moreover, the determination of whether a medical report is reasoned is within the discretion of the administrative law judge as the finder-of-fact, *see generally Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1095, 17 BLR 2-123, 2-127 (4th Cir. 1993); and the administrative law judge may not independently evaluate claimant's objective test results. *Trumbo*, 17 BLR 1-85; *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Lucostic*, 8 BLR 1-46; *Hutchens*, 8 BLR 1-16; *Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sabett*, 7 BLR 1-299; *Fuller*, 6 BLR 1-1291. Consequently, the administrative law judge did not err when he accorded determinative weight to the opinions of Drs. Koenig, Michos and Naeye over the contrary opinion of Dr. Fino as the administrative law judge may credit medical opinions of total disability when, as in the instant case, the physicians explained how they diagnosed total disability despite non-qualifying objective tests. *See Smith v. Director, OWCP*, 8 BLR 1-258; *Sabett*, 7 BLR 1-299; *Fuller*, 6 BLR 1-1291. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Grizzle*, 994 F.2d at 1095, 17 BLR at 2-127; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the finding of the administrative law judge that the medical opinion evidence is sufficient to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4) (2000) as it is supported by substantial evidence and is in accordance with law.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge