BRB No. 01-0397 BLA

HERMAN MANNINGS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
JIM WALTERS RESOURCES, INC.	)	
	)	
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 of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura & Quinn & Walls LLP), Birmingham, Alabama, for claimant.

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

Edward Waldman (Howard M. Radzely, Acting 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2000-BLA-0070) of Administrative Law Judge Robert J. Lesnick 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] Based on the filing date of November 18, 1998,[2] the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718. Director's Exhibit 1. The

[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, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CVO3086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

[2]Claimant filed an application for benefits on November 18, 1998. Director's Exhibit 1. The district director found claimant entitled to benefits on May 5, 1999, and again on September 1, 1999. Director's Exhibits 26, 34. Employer requested a formal hearing on September 15, 1999. Director's Exhibit 35.

administrative law judge accepted employer's stipulation and credited claimant with eighteen years of coal mine employment. ALJ's Exhibit 2. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b) (2000), and also sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1) (2000). Accordingly, benefits were awarded.

On appeal, employer challenges the findings of the administrative law judge that claimant established the presence of pneumoconiosis at Section 718.202(a)(4) (2000), and the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to Section 718.204(b), (c)(1) (2000). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in the merits of this appeal, but asserts that the newly implemented regulations do not affect the outcome of this case.

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 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence in the record considered as a whole, and that there is no reversible error contained therein. Employer contends that, while the administrative law judge properly found the weight of the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3) (2000), he erred in crediting the opinion of Dr. Hasson, that claimant has pneumoconiosis, over the contrary opinion of Dr. Goldstein at Section 718.202(a)(4) (2000). We disagree. The administrative law judge rationally accorded little weight to Dr. Goldstein's diagnosis that claimant did not suffer from pneumoconiosis, since this physician discounted the effect of the claimant's coal dust exposure without explanation and stated that he was unable to reach a firm conclusion regarding claimant's condition without reviewing additional medical evidence. Director's Exhibit 32; Decision and Order at 5-6, 8; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, it was within the administrative law judge's discretion to credit Dr. Hasson's diagnosis of pneumoconiosis, on the grounds that it was well documented and reasoned and better supported by the objective evidence of record. Director's Exhibit 13; Decision and Order at 6, 8; *McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988); *Trumbo, supra;*

Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989).[3]

In addition, we reject employer's argument that the administrative law judge erred in failing to weigh all types of relevant evidence together at Section 718.202(a)(1)-(4) (2000) pursuant to the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22BLR 2-162 (4th Cir. 2000), as the present case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has not adopted this requirement. Further, the administrative law judge was not required to weigh separately the evidence regarding claimant's history of pneumonia, as this information was included in the medical reports of Drs. Hasson and Goldstein. Director's Exhibits 13, 32. Essentially, employer challenges the administrative law judge's finding that claimant established the existence of pneumoconiosis by confusing that issue with disability causation. Thus, employer argues: "Because Dr. Hasson found that simple pneumoconiosis *and* pneumonia *equally* contributed to the claimant's impairment, Dr. Hasson's diagnosis should not be given any greater weight over Dr. Goldstein's well reasoned medical opinion that the claimant had not established the existence of pneumoconiosis." (Emphasis in original). Brief for Employer at 15. Employer's argument has no bearing on the credibility of Dr. Hasson's diagnosis of pneumoconiosis or on the reasonableness of the administrative law judge's decision to credit it. Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). We also affirm the administrative law judge's findings pursuant to Section 718.203(b) (2000), as claimant is entitled to the presumption that his pneumoconiosis arose out of his coal mine employment, and employer did not introduce evidence to rebut the presumption. Decision and Order at 8-9; *McClendon, supra.*

[3]The instant case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit inasmuch as claimant's coal mine employment occurred in the State of Alabama. Director's Exhibits 2, 13, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc).*

Employer next generally challenges the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1) (2000),[4] arguing that the administrative law judge failed to take into account the contrary test results and diagnoses.[5] Employer's arguments are without merit. While the administrative law judge determined that a preponderance of the blood gas studies of record was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(2) (2000), that the record contained no evidence of cor pulmonale with right sided congestive heart failure pursuant to Section 718.204(c)(3) (2000), and that no physician of record opined that claimant was totally disabled pursuant to Section 718.204(c)(4) (2000),[6] the administrative law judge permissibly found total respiratory disability established at Section 718.204(c)(1) (2000), based on the qualifying results of the pulmonary function study dated December 15, 1998.[7] Director's Exhibits 10, 14; Decision and Order at 4, 9. As

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) (2001), while the provision pertaining to disability causation previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) (2001).

[5]Although employer also argues that the administrative law judge failed to consider claimant's history of viral pneumonia with respiratory failure, this is not relevant to the issue of total respiratory disability.

[6]Claimant accurately notes that although the resting values of the blood gas studies performed on December 15, 1998 and May 25, 1999 produced non-qualifying results, the qualifying values on exercise of the December 15, 1998 blood gas study demonstrate that claimant is unable to perform his usual coal mine employment, which the administrative law judge determined involved very heavy work. Director's Exhibits 14, 32; Decision and Order at 5, 9. Claimant additionally notes that Dr. Goldstein did not assess the severity of claimant's impairment, and that Dr. Hasson's finding of a moderate respiratory impairment would preclude claimant from performing very heavy labor. Director's Exhibits 13, 32; Decision and Order at 9-10; *see generally Black Diamond Coal Mining Co. v. Benefits Review Board,* 758 F.2d 1532, 7 BLR 2-209, *reh'g denied,* 768 F.2d 1353 (11th Cir. 1985); *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48 (1986).

[7]A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718 (2000). A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(2) (2000). In the present case, the administrative law judge properly accorded little weight to the qualifying results of the pulmonary function study obtained on May 25, 1999, because the administering physician found them to be invalid. Director's Exhibit 32; Decision and Order at 9; *see generally Street v. Consolidation Coal Co.,* 7 BLR 1-65 (1984).

the administrative law judge has thoroughly considered and weighed all the evidence relevant to the issue of total disability, we affirm his finding that claimant satisfied his affirmative burden of establishing the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c) (2000). *See generally Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994)*; Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*), *aff'd sub nom. Director, OWCP v. v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989) (unpub.); *Clark, supra; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Lastly, employer maintains that the evidence of record is insufficient to satisfy claimant's burden of establishing disability causation pursuant to Section 718.204(b) (2000), but instead shows that claimant's respiratory impairment was caused by viral pneumonia. Employer's arguments are without merit. The administrative law judge accurately determined that Dr. Goldstein did not address the extent of claimant's respiratory disability or its cause because he concluded that he needed to review more evidence before rendering an unequivocal diagnosis. Director's Exhibit 32; Decision and Order at 10. The administrative law judge then acted within his discretion in finding that the opinion of Dr. Hasson, that claimant's respiratory impairment was primarily due to both coal workers' pneumoconiosis and claimant's history of pneumonia, was sufficient to establish that claimant's pneumoconiosis was a substantial contributing cause of claimant's total respiratory disability. Director's Exhibit 13; Decision and Order at 10; *Black Diamond Coal Mining Co. v. Director, OWCP [Marcum]*, 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Contrary to employer's arguments, pneumoconiosis need not be the sole cause of claimant's disability, but merely a substantial contributing cause thereof. *See generally Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). We therefore affirm the administrative law judge's findings pursuant to Section 718.204(b) (2000), as supported by substantial evidence, and affirm his award of benefits.[8]

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[8]Our disposition of this case renders it unnecessary for us to specifically address claimant's contentions regarding Section 718.202(a) (2000), and Section 718.204(c)(2000).

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge