BRB No. 02-0299 BLA

WILLIAM H. FRYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	DATE ISSUED:
	)	
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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0041) of Administrative Law Judge Richard T. Stansell-Gamm 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 is before the Board for the third time.[2] On remand, 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, 722, 725 and 726. All citations to

administrative law judge found that the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were awarded.

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the regulations, unless otherwise noted, refer to the amended regulations.

[2]In *Frye v. Cannelton Industries, Inc.*, BRB No. 00-0132 BLA (Nov. 29, 2000)(unpub.), the Board held that since it had previously rejected employer's contentions regarding the x-ray evidence, *see Frye v. Cannelton Industries, Inc.* BRB No. 98-0693 BLA (April 21, 1999)(unpub.), the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) (2000) constituted the law of the case. The Board however vacated the finding regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and remanded the case for the administrative law judge to weigh all of the evidence relevant to Section 718.202(a)(1)-(4) (2000) together to determine whether claimant suffers from pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The Board then affirmed the administrative law judge's determination that the arterial blood gas study and medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(c) (2000). Lastly, the Board vacated the finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000), and remanded the case to the administrative law judge for reconsideration of the evidence.

On appeal, employer challenges the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) (2000), total disability due to pneumoconiosis pursuant to Section 718.204(b), (c)(4) (2000). Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 into the Act 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 on appeal, and the evidence of record, we conclude that the Decision and Order on Remand by the administrative law judge is supported by substantial evidence and contains no reversible error. Initially, we decline to consider employer's arguments regarding the finding of pneumoconiosis by x-ray evidence, Employer's Brief at 12-17, and the finding of total disability by medical opinion evidence, Employer's Brief at 20-28, as the Board previously rejected these contentions and, therefore, the administrative law judge's findings constitute the law of the case. *See Frye Cannelton Industries, Inc.* BRB No. 00-0132 BLA (Nov. 29, 2000)(unpub.); *Frye v. Cannelton Industries, Inc.* BRB No. 98-0693 BLA (April 21, 1999)(unpub.); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer contends that the administrative law judge erred in his determination that claimant established the existence of pneumoconiosis. Employer first contends that the administrative law judge misconstrued the CT scan evidence.[3] Employer's Brief at 17-18.

[3] Dr. Abramowitz considered the April 1996 CT scan and found that it indicated that there is nonspecific interstitial lung disease. He also found no definite hilar mediastinal adenopathy and no discrete parenchymal nodule. The physician found pleural plaque along the anterior aspect of the right mid lung zone and mild pleural thickening at the posterior lung bases. Lastly, Dr. Abramowitz opined that there is mild generalized increase in interstitial marking throughout both lung zones. Employer's Exhibit 2.

Regarding the April 1997 CT scan, Dr. Abramowitz noted similar findings as in 1996, but also found a less than 1 centimeter in size low density nodule in the peripheral aspect of the right lower lung zone which was not apparent on the prior exams. Dr. Abramowitz found that while this could represent a granuloma, he could not exclude the possibility of an early neoplastic process. Employer's Exhibit 2.

The administrative law judge quoted his prior finding regarding the CT scans from his January 15, 1998 Decision and Order, in which he found that the physician's observations are relevant and probative as to whether the most recent x-ray, dated March 17, 1997, which was read as positive by three physicians, revealed pneumoconiosis. Decision and Order on Remand at 15. Specifically, the administrative law judge found that Dr. Abramowitz's findings of interstitial markings on the1996 CT scan corroborate the 1988-1996 x-ray interpretations that some type of opacities were present in claimant's lungs. The administrative law judge further found that in his report regarding the second CT scan dated April 1997, taken within one month of the most recent x-ray, Dr. Abramowitz no longer characterized the interstitial markings as "mild," which the administrative law judge found to provide some corroboration for the readings of the March 17, 1997 x-ray by Drs. Ahmed, Pathak, and Cappiello that the profusion was now sufficient for a positive finding of pneumoconiosis. Decision and Order at 15. Contrary to employer's contention, the administrative law judge did not err in determining that the CT scans are "tangentially supportive of a finding of pneumoconiosis," *see* Decision and Order on Remand at 15, and we defer to the administrative law judge's discretion in his role as fact-finder. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Employer specifically contends that the administrative law judge violated the holding of the United States Court of Appeals for the Fourth Circuit in *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994) by crediting Dr. Rasmussen's opinion because he was a non-examining physician who diagnosed a condition not diagnosed by an examining physician. Employer's Brief at 19. We disagree. An administrative law judge may rely on a non-examining physician's opinion, which attributes the miner's disability to a causal factor that has been sufficiently addressed by an examining physician. *Johnson v. Old Ben Coal Co.*, 19 BLR 1-103 (1995)(analyzing the Fourth Circuit's decision in *Malcomb*). The record in the instant case indicates that Dr. Zaldivar, an examining physician, sufficiently addressed the issue of the existence of pneumoconiosis and whether such a condition played a role in claimant's total disability. Director's Exhibit 28. Therefore, the administrative law judge's reliance on Dr. Rasmussen's opinion does not violate the Fourth Circuit's holding in *Malcomb*. *See Johnson, supra*.

While employer states that Dr. Rasmussen's opinion is unreasoned, employer raises no additional reviewable allegation of error. The Board is not empowered to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as the review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Lastly, employer challenges the administrative law judge's weighing of the evidence at Section 718.204(c), in particular, the administrative law judge's decision to accord little probative weight to the opinions of Drs Fino, Forehand and Zaldivar because they did not diagnose the presence of pneumoconiosis. Employer also identifies as error the administrative law judge's failure to closely scrutinize Dr. Rasmussen's opinion. Employer's Brief at 28-31. Employer's contentions lack merit. The administrative law judge acted within his discretion in according little probative weight to the opinions that failed to diagnose the existence of pneumoconiosis. *Scott v. Mason Coal Co.*, 289 F.3d 263, BLR (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Thus, as the administrative law judge permissibly determined that claimant established the existence of pneumoconiosis, he rationally relied upon his previous analysis in according diminished weight to the opinions by Drs. Zaldivar, Fino and Forehand, and in relying upon Dr. Rasmussen's opinion, which he found to be the best reasoned and documented in the record.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see 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 Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's findings pursuant to Sections 718.202(a) and 718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand from the Benefits Review Board-Award of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge