BRB No. 02-0432 BLA

GLENN O. MORGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, 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 on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Stanley S. Dawson (Fulton & Devlin), Louisville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (99-BLA-01140) of Administrative Law Judge Joseph E. Kane 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). This case has been before the Board previously. In the original decision, Administrative Law Judge Donald W. Mosser found eighteen years of coal mine employment. Decision and Order dated May 19, 2000 at 3-4. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that claimant[1] established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b) (2000).[2]

[1]Claimant, Glenn O. Morgan, filed his claim for benefits on April 28, 1998. Director's Exhibit 1.

[2]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

Decision and Order dated May 19, 2000 at 12-15. The administrative law judge further found that the record evidence was also sufficient to establish that claimant suffered from a totally disabling respiratory impairment but concluded that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Decision and Order dated May 19, 2000 at 15-18. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(b) (2000). The Board vacated, however, the administrative law judge's disability causation findings pursuant to 20 C.F.R. §718.204(b) (2000) and remanded the case for further consideration of the relevant evidence of record.[3] *Morgan v. Lodestar Energy, Inc.*, BRB No. 00-0915 BLA (June 28, 2001)(unpublished).

On remand, the case was reassigned to Administrative Law Judge Joseph E. Kane due to Judge Mosser's unavailability. The administrative law judge considered the medical opinions of record and concluded that they were sufficient to establish that the miner's disability was due to pneumoconiosis. Decision and Order on Remand at 3-10. Accordingly, benefits were awarded commencing April, 1998. Decision and Order on Remand at 10-11. In this appeal, employer contends that the administrative law judge erred in finding that claimant established that his totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not 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).

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.

[3]The regulation concerning disability causation, previously set forth in 20 C.F.R. §718.204(b), is now set forth in 20 C.F.R. §718.204(c).

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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, 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 and that there is no reversible error contained therein. The administrative law judge, within his discretion as fact-finder, rationally determined that the evidence of record was sufficient to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis.[4] *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Employer contends that the administrative law judge erred in finding that claimant established that his total disability was due to pneumoconiosis as he failed to properly weigh the evidence of record. Employer's Brief at 2-5. Specifically, employer contends that the administrative law judge erred in finding disability causation established pursuant to Section 718.204(c) as he impermissibly accorded greater weight to the opinions supportive of claimant's position. 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). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

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

Initially, we disagree with employer's contention that the administrative law judge erred in considering the opinion of Dr. Joyce sufficient to support claimant's burden.[5] Employer's Brief at 3. Contrary to employer's argument, the administrative law judge did not rely solely on the opinion of Dr. Joyce to find entitlement established or ignore any equivocation contained therein but rather considered the opinion as a whole in light of all the relevant evidence.[6] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 5, 9-10; Director's Exhibit 29. The administrative law judge acted within his discretion in according weight to Dr. Joyce's opinion since he was fully aware of the physician's statements with respect to disability causation and it is within the administrative law judge's scope of authority as fact-finder to assign weight to the evidence of record. *Mabe, supra; Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra*; Decision and Order on Remand at 5, 9; Director's Exhibit 29. Further, the administrative law judge acted within his discretion in finding that Dr. Joyce's opinion, when considered with the opinions of Drs. Houser and Simpao, constitutes substantial evidence in support of claimant's burden. *Id*. Inasmuch as employer makes no other specific challenge to the administrative law judge's findings with respect to Dr. Joyce, we affirm the administrative law judge's credibility determination. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe, supra; Hutchens, supra*; *Kuchwara, supra*; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Employer further asserts that the administrative law judge erred in failing to give less weight to the opinion of Dr. Simpao as the physician has inferior qualifications. Employer's Brief at 3. We specifically reject employer's assertion that, because the physician's credentials are not in the record, the administrative law judge cannot credit the opinion. Employer's Brief at 4. Although an administrative law judge may accord more weight to a physician's opinion based on his qualifications, the administrative law judge must address the credibility of the evidence, as in this case, prior to assigning it appropriate weight. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*)*; Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985). Contrary to employer's assertion, substantial evidence supports the administrative law judge's credibility determination as the administrative law judge rationally reviewed the opinion of Dr. Simpao and acted within his discretion, as fact-finder,

[5]The administrative law judge's credibility determinations with respect to the opinions of Drs. Younes, Myers and Broudy, as well as his onset findings, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6]Dr. Joyce stated that the miner has "a moderate obstructive ventilatory defect which is most likely due to his tobacco abuse. However, I cannot rule out coal dust exposure as a contributing factor." Director's Exhibit 29. She further stated that the miner no longer retains the pulmonary function capacity to do his usual coal mine work. *Id.*

in finding this opinion to be well reasoned and documented. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, supra; Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Mabe, supra*; *Gee, supra*; *Perry, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order on Remand at 9; Director's Exhibit 12.

Additionally, employer's contention, that the opinion of Dr. Simpao should be rejected as the physician's opinion is "boilerplate" and thus is nothing more than a "rubber stamp," is without merit. Employer's Brief at 4. Employer's allegation of bias is not supported by the evidence of record as the physician examined claimant, relied upon his coal mine employment, smoking and medical histories as well as an x-ray, pulmonary function and blood gas studies. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Zamora v. C.F.&I. Steel Corp.*, 7 BLR 1-568 (1984); Director's Exhibit 12.

Employer finally contends that the administrative law judge erred in failing to consider that Dr. Powell performed the most recent examination and therefore his opinion should be accorded greater weight than the contrary opinions, supportive of claimant's position, on this basis. Employer's Brief at 4-5. We disagree. The record, in the instant case, indicates that Dr. Powell examined claimant on December 11, 1998 and that Dr. Houser examined claimant on October 19, 1998. Director"s Exhibits 34, 40. While the chronology of the evidence maybe a relevant factor, an administrative law judge need not give greater weight to the most recent evidence, particularly when the evidence at issue is close in time, as in this case. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Stanley v. Director, OWCP*, 7 BLR 1-386 (1984); *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983); *Drenning v. Delta Mining Co.*, 6 BLR 1-60 (1983).

In considering whether claimant established whether his total disability was due to pneumoconiosis pursuant to Section 718.204(c), the administrative law judge reasonably determined that the preponderance of the medical opinion evidence was sufficient to establish claimant's burden as the opinion of Dr. Powell, that smoking was the sole cause of the respiratory impairment, was outweighed by the well reasoned and well supported contrary opinions of Drs. Houser, Joyce and Simpao, that claimant was totally disabled due to pneumoconiosis. *Adams, supra*; *Perry, supra*; *Fuller, supra*; Decision and Order at 9-10. 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 Clark, supra*; *Anderson, supra*; *Worley, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204 as it is supported by

substantial evidence and is in accordance with law. *See Adams, supra; Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge