BRB No. 03-0370 BLA

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| ROBERT L. TUCKER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| CANNELTON INDUSTRIES/ CYPRUS MAX | ) | |
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| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: 01/14/2004 |
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| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Jason E. Huber (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Kathy L. Snyder and Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (02-BLA-0039) of Administrative Law Judge Michael P. Lesniak 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] The administrative law judge denied claimant's request for

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

modification of the prior denial of benefits issued on March 13, 2000 by Administrative Law Judge Daniel F. Sutton.[2] Director's Exhibit 53. Specifically, the administrative law judge found that claimant failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b) and thus failed to establish a change in conditions at 20 C.F.R. §725.310 (2000). The administrative law judge also found that claimant failed to establish a mistake in a determination of fact in the prior denial pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge improperly discredited Dr. Cohen's opinion, and based his denial of benefits on medical opinions that are biased in favor of employer and are hostile to the Act. Claimant thus urges the Board to reverse the decision below. Employer responds, and urges affirmance of the decision below as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant relies on the opinions of Drs. Cohen, Rasmussen and Ranavaya to establish total disability due to pneumoconiosis, and summarily states that the administrative law judge improperly discredited Dr. Cohen's report. Claimant's Brief at 1. Claimant also asserts that the administrative law judge based his decision on medical opinions, authored by Drs. Zaldivar, Castle, Louden, Morgan and Rosenberg, which are biased, unreasoned, and/or hostile to the Act and should be given no weight. Specifically, claimant asserts that Dr. Zaldivar is "notorious" for rendering opinions that favor employer, Claimant's Brief at 4, and argues that Dr. Zaldivar's 1999 deposition testimony is hostile to the Act. Claimant also asserts that Dr. Zaldivar's 1999 deposition testimony shows that the physician assumed claimant could perform his usual coal mine work without understanding the actual exertional requirements of that work. Claimant further argues that Dr. Zaldivar's opinion regarding the cause of claimant's emphysema is equivocal. Claimant also contends that the opinions of Drs. Castle, Louden and Morgan are not credible because (1) while these physicians found

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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] Administrative Law Judge Daniel F. Sutton, in his Decision and Order dated March 13, 2000, found that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 53.

that claimant does not have pneumoconiosis, they failed to diagnose claimant's condition; (2) these physicians failed to provide "any reasoned and scientific basis to conclusively rule out the contribution of dust to [claimant's] impairment," Claimant's Brief at 5; and (3) these physicians failed to provide any reasoned explanation for discounting the positive x-ray interpretations. Claimant further states, "Dr. Rosenberg's consultative report merely parrots the other employer physicians and merely provides conclusory statements with no accompanying rationale." Claimant's Brief at 6.

We first address claimant's assertion that the administrative law judge erred in discrediting Dr. Cohen's February 20, 2001 opinion that claimant is totally disabled due to his moderate obstructive lung disease, diffusion impairment and abnormal gas exchange. Director's Exhibit 54. Contrary to claimant's assertion, the administrative law judge provided a rational basis for finding that Dr. Cohen's opinion was outweighed by Dr. Zaldivar's September 6, 2001 opinion that claimant is not disabled by his mild to moderate pulmonary impairment and can perform his usual coal mining work with intermittent bouts of heavy labor. Employer's Exhibit 1. Specifically, the administrative law judge correctly noted that Dr. Cohen's report was limited to a review of the medical evidence developed through 1999. *See* Director's Exhibit 54. The administrative law judge properly found that Dr. Cohen "did not have the opportunity to consider the results of Claimant's more recent June 2001 pulmonary exam. Dr. Zaldivar performed that exam, complete with a new round of pulmonary function and arterial blood gas testing," Decision and Order at 7. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). The administrative law judge also determined that it was not clear from Dr. Cohen's report whether he understood that claimant performed, as part of his usual coal mine employment, "heavy or "very heavy" labor only on an intermittent basis. *Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); Decision and Order at 7. In this regard, the administrative law judge permissibly found that Dr. Zaldivar's 2002 deposition testimony, that "claimant could do his usual [coal mine] work with intermittent bouts of heavy labor," Employer's Exhibit 9 at 19, revealed the most accurate understanding of claimant's usual coal mine work. *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); Decision and Order at 7.

Claimant's assertion that the administrative law judge based his finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b) on medical opinions that are hostile to the Act and that were rendered by "biased" physicians is rejected. Claimant specifically argues that Dr. Zaldivar's 1999 deposition testimony is hostile to the Act because, claimant asserts, Dr. Zaldivar testified that he requires a positive for pneumoconiosis x-ray reading before he will attribute a miner's impairment to exposure to coal dust, and because Dr. Zaldivar denied that claimant's coal dust exposure was a risk

factor in claimant's impairment.[3]

Claimant's argument that Dr. Zaldivar's opinion is hostile to the Act lacks merit. The United States Court of Appeals for the Fourth Circuit,[4] in *Lane*, 105 F.3d at 173, 21 BLR at 2-46, rejected claimant's contention that the administrative law judge erred in crediting a medical diagnosis of no total disability where the physician noted that early simple coal workers' pneumoconiosis would "not be expected" to cause pulmonary impairment. The Fourth Circuit noted that this statement demonstrated that the physician based his opinion on the evidence in the case and not upon any assumption "hostile" to the Act. The Fourth Circuit indicated that this medical diagnosis was unlike the medical opinion in *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24-25 (4th Cir. 1993) stating that "simple pneumoconiosis does not 'as a rule' cause total disability," which opinion the Fourth Circuit rejected in *Thorn* as based on a premise "antithetical" to the Act. *Lane*, 105 F.3d at 173, 21 BLR at 2-46. Further, the Fourth Circuit, in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 174-175, 19 BLR 2-265, 2-268-270 (4th Cir. 1995), held that certain physicians' opinions were undermined by erroneous assumptions that coal mine employment cannot cause obstructive lung disorders or that a diagnosis of pneumoconiosis cannot be made without radiological findings of nodular or linear infiltrates, or tissue examination.

In the instant case, Dr. Zaldivar opined, in his 2001 report and at his 2002 deposition, that claimant's mild to moderate smoking-related pulmonary impairment does not disable him from performing his usual coal mining work. Employer's Exhibits 1, 9. Claimant refers to the fact that Dr. Zaldivar testified, *at his October 9, 1999 deposition*,[5] that (1) claimant's exposure to coal mine dust was not a risk factor that could account for his shortness of breath

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[3] Claimant also argues that Dr. Zaldivar's opinion regarding the cause of claimant's emphysema is equivocal. The administrative law judge noted that claimant previously established the existence of pneumoconiosis arising out of claimant's coal mine employment, Decision and Order at 3; *see* Director's Exhibit 53, and made no findings on these issues. Accordingly, we need not address claimant's assertion that Dr. Zaldivar's opinion regarding the cause of claimant's emphysema is equivocal, as it cannot affect the outcome of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] Judge Sutton previously considered Dr. Zaldivar's 1999 deposition testimony in the March 13, 2000 prior denial of benefits. Director's Exhibit 53. This previously considered evidence cannot support claimant's request for modification in the instant case. 20 C.F.R. §725.310 (2000).

because "after you go through the entire history, physical examination and laboratory testing, it is not a risk factor in his case. But in general, it could be a risk factor for somebody else," Director's Exhibit 47 at 50; and that (2) "[t]he fact that [claimant] has an impairment pattern of emphysema, who has x-rays who (sic) have been read even by other individuals as showing emphysema, the fact that he smokes and smoking leads to emphysema allows me to conclude that he has emphysema from smoking," *Id.* at 59. A review of this 1999 deposition testimony reveals that Dr. Zaldivar explained his medical findings in terms of *this claimant's condition in 1999.* Director's Exhibit 47. Dr. Zaldivar did not testify that pneumoconiosis does not, as a rule, cause total disability, that coal mine employment cannot cause obstructive lung disorders, or that a diagnosis of pneumoconiosis cannot be made without radiological findings of nodular or linear infiltrates, or tissue examination. *Thorn*, 3 F.3d at 719, 18 BLR at 2-24-25; *Warth*, 60 F.3d at 174, 19 BLR at 2-268-270. Based on the foregoing, we reject claimant's argument that Dr. Zaldivar's opinion is hostile to the Act and the administrative law judge thus erred by relying on it at 20 C.F.R. §718.204(b).

Further, we find no merit in claimant's assertion of bias on the part of Dr. Zaldivar and employer's other medical experts in the absence of any supporting evidence. *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992), citing *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35 (1991)(*en banc*).

Lastly, it is the province of the administrative law judge to weigh the medical evidence. *Underwood*, 105 F.3d 946, 21 BLR 2-23. Claimant's assertions as to what evidence is credible and his recitations of favorable evidence, do not fulfill his duty to identify any error with specificity or to raise and brief any issue arising from the administrative law judge's findings. 20 C.F.R. §802.211(a), (b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 120 (1987).

Based on the foregoing, we affirm the administrative law judge's denial of claimant's request for modification at 20 C.F.R. §725.310 (2000) based on claimant's failure to establish a change in conditions or a mistake in a determination of fact in the prior denial. We further affirm the administrative law judge's denial of benefits in this case based on claimant's failure to establish total pulmonary or respiratory disability at 20 C.F.R. §718.204(b).[6]

[6] Substantial evidence supports the administrative law judge's finding that the newly submitted evidence fails to establish total disability. 20 C.F.R. §718.204(b). The newly submitted pulmonary function study and blood gas studies resulted in non-qualifying values. 20 C.F.R. §718.204(b)(2)(i), (ii). The administrative law judge also correctly found no newly submitted evidence showing that claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii). Further, the administrative law judge properly resolved the conflicting medical opinions in determining that they are insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

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

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge