

BRB No. 04-0596 BLA

STANFORD LUH)
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 Claimant-Respondent)
)
 v.)
)
 DEER RUN MINING COMPANY)
)
 and)
)
 W-P COAL COMPANY/OMAR DIVISION)
)
 and) DATE ISSUED: 01/18/2005
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits upon Remand of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

George L. Partain, Logan, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Carrier appeals the Decision and Order-Awarding Benefits upon Remand (2001-BLA-00375) of Administrative Law Judge Robert J. Lesnick rendered on a duplicate 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. In *Luh v. Deer Run Mining Co.*, BRB No. 02-0823 BLA-A (Sep. 16, 2003)(unpub.), the Board affirmed the administrative law judge's findings of the existence of pneumoconiosis and a material change in conditions pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4), and 20 C.F.R. §725.309(d) (2000).² The Board also affirmed the administrative law judge's determination that the opinions of Drs. Thavaradhara and Zaldivar were insufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c), but remanded the case for him to reconsider Dr. Ranavaya's opinion³ and to consider a report by the West Virginia Occupational Pneumoconiosis Board. On remand, the administrative law judge found that the opinions by Dr. Ranavaya and the West Virginia Occupational Pneumoconiosis Board established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). The administrative law judge awarded benefits commencing as of May 2000, the month in which claimant filed this claim.

On appeal, carrier contends that the administrative law judge erred in his consideration of the evidence on remand. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has indicated that he will not participate in this appeal.

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 Carrier did not challenge the finding that claimant established total respiratory disability.

³ The Board held that the administrative law judge erroneously rejected Dr. Ranavaya's opinion that pneumoconiosis contributes to claimant's moderate pulmonary impairment solely because Dr. Ranavaya did not diagnose total disability.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1980); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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. Carrier contends that the administrative law judge erred in finding that Dr. Ranavaya's opinion was that claimant's moderate impairment precludes him from performing his previous coal mine employment, when the physician actually stated that claimant's moderate impairment in and of itself would not prevent claimant from returning to his usual coal mine employment. Carrier's Petition for Review at 2-3; Director's Exhibit 11. Carrier then refers to exertional requirements listed in another medical opinion in the record and argues that Dr. Ranavaya's opinion is insufficient to establish total disability. Carrier's Petition for Review at 3. Carrier additionally contends that the West Virginia Occupational Pneumoconiosis Board's finding of a twenty percent functional impairment due to pneumoconiosis is insufficient to establish total disability. Carrier's Petition for Review at 4.

These contentions are without merit. As we stated in our prior decision in this case, the fact that Dr. Ranavaya found that claimant's moderate pulmonary impairment would not in and of itself preclude him from performing his usual coal mine employment does not necessarily undermine Dr. Ranavaya's opinion regarding the cause of claimant's moderate pulmonary impairment. *See generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). The administrative law judge properly considered the issue of disability causation on remand, as instructed by the Board, and not that of total respiratory disability, a finding made previously by the administrative law judge in claimant's favor and unchallenged by carrier. *See* 20 C.F.R. §718.204(b), (c).

In considering the issue of disability causation, the administrative law judge on remand rationally determined that he had previously wrongly discredited Dr. Ranavaya's opinion on the cause of claimant's impairment,⁴ and that in light of Dr. Ranavaya's credentials as a board-certified pulmonologist, his opinion was entitled to weight. *McMath v. Director*, OWCP, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 3. The administrative law judge also permissibly found that the West Virginia Occupational Pneumoconiosis Board report, although not binding on the administrative law judge, "weigh[ed] in favor of a finding that the Claimant's pneumoconiosis contributes to his total disability." *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director*, OWCP, 7 BLR 1-167 (1984). Decision and Order at 3. Thus, contrary to employer's contentions, the administrative law judge made proper findings on remand that were in compliance with the Board's instructions.

In sum, the administrative law judge properly found that claimant established that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). See *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Consequently, as claimant established the final element of entitlement, *Anderson*, 12 BLR at 1-112, we affirm the award of benefits. We also affirm the administrative law judge's determination that benefits will commence as of May 2000, as this finding is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ Dr. Ranavaya opined that claimant's pneumoconiosis, left pneumonectomy, and hypertension all contributed "to a major extent" to his moderate pulmonary impairment. Director's Exhibit 11.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits upon Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge