

BRB No. 97-0568 BLA

SYLVESTER ANTHONY)
)
 Claimant-Respondent)
)
 v.)
)
 BETHENERGY MINES, 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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Daniel J. Iler (Ceisler, Richman, Smith), Washington, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (91-BLA-1794) of Administrative Law Judge Mollie W. Neal 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 case is before the Board for the third time. The administrative law judge issued her initial Decision and Order awarding benefits in this case on September 17, 1992. The administrative law judge found that the evidence of record was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 and the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(c), (b). Accordingly, benefits were awarded. Employer appealed and the Board affirmed the administrative law judge's finding pursuant to Section 725.309, but vacated her findings pursuant to Sections 718.202(a) and 718.204 and remanded the case for further findings in light of subsequent changes in the law. See *Anthony v. Bethenergy Mines, Inc.*, BRB No. 93-0175 BLA (October 19, 1984)(unpublished).

On remand, the administrative law judge again found the evidence sufficient to establish entitlement pursuant to 20 C.F.R. Part 718. Employer again appealed and the Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(1), 718.203 and 718.204(c)(1)-(3). The Board, however, vacated the administrative law judge's findings pursuant to Section 718.204(c)(4) and (b) and remanded the case for further consideration. See *Anthony v. Bethenergy Mines, Inc.*, BRB No. 95-1774 BLA (March 22, 1996)(unpublished).

On remand, the administrative law judge found that the evidence of record was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits. In the instant appeal, employer challenges the administrative law judge's finding that the evidence establishes total respiratory disability pursuant to Section 718.204(c). Employer asserts that the administrative law judge erred in crediting the opinion of Dr. Lebovitz and in discounting Dr. Laman's contrary opinion. Employer also asserts that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at Section 718.204(b), (c) as the administrative law judge improperly credited the opinions of Drs. Lebovitz and Cander and improperly discounted Dr. Laman's opinion. Claimant¹, has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Employer initially contends that the administrative law judge erred in finding that the evidence establishes total respiratory disability pursuant to Section 718.204(c)(4). Employer challenges the administrative law judge's determination to

¹ Claimant is Sylvester Anthony, the miner, who filed an application for benefits with the Social Security Administration on July 14, 1972, which was finally denied by the Department of Labor (DOL). Director's Exhibit 32. Claimant then filed a second claim with DOL on May 13, 1990. Director's Exhibit 1.

credit the opinion of Dr. Lebovitz and discount Dr. Laman's opinion. With respect to employer's challenges to the opinion of Dr. Lebovitz at Section 718.204(c)(4), employer raises three separate challenges. First employer contends that the administrative law judge erred by stating that the physician's opinion was credible because he found reduced values on pulmonary function studies, without assessing the importance of these reduced values. We disagree. The administrative law judge credited the opinion of Dr. Lebovitz over that of Dr. Laman, in part, because he found it better supported and documented by the objective studies of record. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91(1988); *Cambell v. Director, OWCP*, 11 BLR 1-16 (1987). Next, employer asserts that it was error to credit Dr. Kaplan's opinion as supportive of Dr. Lebovitz's assessment of total disability. The administrative law judge found that Dr. Kaplan opined that claimant's total disability was due to asthma, and was supportive of Dr. Lebovitz's opinion at Section 718.204(c)(4). Decision and Order at 8-9. Under the regulations, Section 718.204(c)(4) requires the administrative law judge to determine if any respiratory or pulmonary conditions render claimant totally disabled. Asthma constitutes a respiratory impairment, thus, it was appropriate for the administrative law judge to consider Dr. Kaplan's opinion at Section 718.204(c)(4), and then consider whether pneumoconiosis was responsible for claimant's totally disabling condition at Section 718.204(b). See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Employer also contends that Dr. Lebovitz was unaware of the duties of claimant's usual coal mine employment. We note that, to the contrary, Dr. Lebovitz took an accurate occupational history, Claimant's Exhibit 1, and testified at his deposition consistent with claimant's description of his job duties. Claimant's Exhibit 6, pp. 10-12. Finally, employer contends that it was error for the administrative law judge to neglect to weigh Dr. Lebovitz's opinion against Dr. Alpern's. The administrative law judge had previously discounted Dr. Alpern's opinion at Section 718.204(c)(4) in the previous Decision and Order, 1995 Decision and Order at 9, a finding we previously affirmed as unchallenged. *Anthony, supra*, at 4, n.5. Thus, as there is no merit to these contentions, we reject employer's challenges with respect to Dr. Lebovitz's opinion.

Employer raises two challenges to the administrative law judge's consideration of Dr. Laman's opinion. First, employer asserts that it was error for the administrative law judge to discount Dr. Laman's opinion on the basis that his description of claimant's usual coal mine employment differed from the requirements of claimant's actual, usual coal mine employment. We disagree. It appears that employer takes the administrative law judge's words out of context, as that is not what she did. The administrative law judge accorded less weight to Dr. Laman's opinion, in part, because it was based on an erroneous assumption that rest and recovery periods were available in the regular course of claimant's daily work which indicated that the physician did not have a complete picture of the miner's employment duties and thus called into question Dr. Laman's disability assessment. Decision and Order at 3-4. Dr. Laman testified at deposition that claimant performed an exercise pulmonary function test at peak MET level of 4.1, which would be consistent with vigorous shoveling. Employer's Exhibit 11, p.70. He stated further that the test had to be terminated after eleven minutes because claimant became short of breath and experienced leg fatigue. *Id.*, p.109. Upon further cross-examination, Dr. Laman admitted that he

assumed claimant could perform his usual coal mine employment, based upon his assumption that claimant could vary MET levels throughout the work day. *Id.*, p.109-110. Claimant testified that he was required to lift 100 pounds and carry heavy materials on uneven terrain, Hearing Transcript at 24, as the administrative law judge found. Decision and Order at 3. Claimant testified further that it was difficult to carry heavy material because he became short of breath and could not make the effort to keep the pace that was required. *Id.*, p.27. The administrative law judge then found that there was no evidence to support Dr. Laman's statement that claimant could rest and recover (or vary the MET levels in Dr. Laman's terms), and, in fact, claimant's testimony was to the contrary. Thus, the administrative law judge's weighing of this opinion is supported by substantial evidence. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Second, employer challenges the administrative law judge's determination to discount Dr. Laman's opinion based upon Dr. Kaplan's opinion, which concluded that claimant had a moderately severe impairment based on his pulmonary function study, as Dr. Laman did not address Dr. Kaplan's pulmonary function study, which he reviewed, in his disability assessment. The administrative law judge properly accorded less weight to Dr. Laman's opinion because she found it not well reasoned. See Decision and Order at 3-4; *Justice, supra*; *Campbell, supra*. An administrative law judge may consider factors which tend to undermine the reliability of a physician's opinion. *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). We reject, therefore, all of employer's contentions with regard to the administrative law judge's finding at Section 718.204(c)(4), and we affirm this finding, as it is supported by substantial evidence.

Employer also challenges the administrative law judge's finding that the evidence establishes total disability due to pneumoconiosis at Section 718.204(b). Employer initially contends that the administrative law judge erred by according less weight to Dr. Laman's opinion at Section 718.204(b) because she found that Dr. Laman diagnosed no pneumoconiosis, when the administrative law judge found that the evidence established that claimant had pneumoconiosis. We disagree. The administrative law judge permissibly accorded less weight to Dr. Laman's opinion on the basis that one of its underlying premises, that claimant did not have pneumoconiosis, was incorrect. See *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Likewise, the administrative law judge's determination to accord less weight to Dr. Kaplan's opinion at Section 718.204(b) can be affirmed for the same reason. *Id.* Employer also challenges the administrative law judge's determination to credit Dr. Cander's opinion as supportive of Dr. Lebovitz's opinion at Section 718.204(b). Dr. Cander diagnosed the presence of disabling pneumoconiosis caused by the inhalation of coal mine dust. Director's Exhibit 23. Thus, Dr. Cander's opinion is supportive of Dr. Lebovitz's opinion. See *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Gee v. W.G. Moore and Sons*, 9 BLR 1-9 (1986). The administrative law judge is empowered to weigh the medical evidence and to draw her 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding pursuant to Section 718.204(b), and hence, the

administrative law judge's award of benefits as it is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge