BRB No. 01-0730 BLA

TRAVIS MARVIN LUSK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	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 Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-BLA-00643) of Administrative Law Judge Daniel F. Sutton 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).[1] This case has been before the Board previously. In 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 (2001). All

original decision, the administrative law judge found that claimant had at least thirty years of coal mine employment, based upon the parties' stipulation.[2] Decision and Order dated May 19, 1999 at 2; Hearing Transcript at 15. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b) (2000). Decision and Order dated May 19, 1999 at 5-6. The administrative law judge further found that the record evidence was also sufficient to establish that claimant suffered from a totally disabling respiratory impairment and that claimant's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). Decision and Order dated May 19, 1999 at 6-7. Accordingly, benefits were awarded. 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. §718.204(c) (2000). The Board vacated, however, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(b) (2000) and remanded the case for further consideration of the relevant evidence of record. *Lusk v. Eastern Associated Coal Corp.*, BRB No. 99-0969 BLA (Sept. 7, 2000)(unpublished).

On remand, the administrative law judge considered the x-ray evidence and medical opinions of record and concluded that they were sufficient to establish the existence of pneumoconiosis and that the miner's disability was due to pneumoconiosis. Decision and Order on Remand at 5-19. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4) (2000) and that the miner's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b) (2000). Claimant responds, urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. 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

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

[2]Claimant, Travis Marvin Lusk, filed his claim for benefits on May 6, 1997. Director's Exhibit 1.

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).

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.[3] Employer initially contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis. Employer's Brief at 14-17. After reviewing the x-ray readings of record, and the administrative law judge's discussion of this evidence on remand, we hold that the administrative law judge permissibly weighed the x-ray evidence. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The administrative law judge accurately noted that the record contained twenty-four x-ray interpretations, of which fourteen were negative, five were positive and five films were not properly classified under the ILO guidelines. Decision and Order on Remand at 5; Director's Exhibits 3, 11, 12, 22; Employer's Exhibits 1-3, 9; Claimant's Exhibits 1-3. The administrative law judge properly considered the B reader and Board-certified status of the readers as required by Section 718.202(a)(1) (2000), and noted that there was no reliable distinction to be made between the positive and negative readings on the basis of the qualifications of the readers. Decision and Order on Remand at 7-8. The administrative law judge, within a proper exercise of his discretion, concluded that he would not give mechanical deference to the numerical superiority of the x-ray interpretations and permissibly considered the experts' party affiliation only after he considered the quantity and quality of the x-ray evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Kuchwara, supra*; *Piccin, supra*; Decision and Order on Remand at 8. He correctly observed that employer's experts had provided uniformly negative readings, that claimant's experts had provided uniformly positive readings and the Department of Labor experts also provided positive readings. Contrary to employer's contention, the administrative law judge, within a clear exercise of his discretion and based upon the facts of this case, appropriately concluded that the x-ray interpretations by the Department of Labor physicians, as supported by the non-ILO interpretations, were sufficient to support claimant's case.[4] *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203 n.7, 22 BLR 2-162, 172 n.7 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Adkins, supra; Kuchwara, supra*; *Piccin, supra*; Decision and Order on Remand at 7-8. Finding no error in the administrative law judge's consideration of the experts' party affiliation in this context, we reject employer's allegation of error.

Employer contends further that the administrative law judge did not adequately consider the readers' radiological qualifications. Employer's Brief at 14-15. Contrary to employer's contention, however, the administrative law judge considered all of the properly classified interpretations in light of the readers' qualifications. Decision and Order on Remand at 5-8; *see Adkins, supra*. While noting that the fourteen negative readings outnumbered the five positive readings, the administrative law judge properly declined to defer to the numerical superiority of the negative readings. *See Adkins, supra*; *Woodward, supra*. Finding the competing experts' radiological qualifications to be comparable, the

[4]Contrary to employer's assertion, the administrative law judge did not rely upon the five x-ray interpretations that were not classified pursuant to the ILO requirements, but rather noted that the properly classified, positive x-ray interpretations that he was relying upon by Drs. Patel and Gaziano, were consistent with these findings. 20 C.F.R. §718.102(b) (2000); Decision and Order on Remand at 8.

administrative law judge then permissibly considered whether the party affiliation of the experts who read the x-rays as positive was a factor that supported claimant's case.

Employer insists that certain of its experts' negative readings should have received the greatest weight, in view of their status as professors of radiology. However, it is for the administrative law judge to assess the relative weight of the x-ray readings, *see Adkins*, *supra*, and the administrative law judge was not required to defer to the x-ray interpretations by readers who are professors of radiology. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993)(the administrative law judge *may* consider a physician's professorship in radiology as a factor relevant to his or her radiological competence)(emphasis added). Because the administrative law judge considered the x-ray readings in light of the readers' qualifications, provided valid reasons for the weight that he accorded to the x-ray evidence, *see Adkins*, *supra*, and because substantial evidence supports his finding, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1) (2000).

Employer further contends that the administrative law judge erred in finding the existence of pneumoconiosis and disability causation established by the medical opinion evidence of record as he failed to properly weigh this evidence. Employer's Brief at 17-30. Specifically, employer contends that the administrative law judge erred in finding the presence of pneumoconiosis and disability causation established pursuant to Sections 718.202(a)(4) and 718.204(b) (2000) as he impermissibly accorded less weight to the opinions of Drs. Zaldivar, Fino and Tuteur and greater weight to the opinion of Dr. Rasmussen. We find no 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 (1988). 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).

Initially, we disagree with employer's contention that in rejecting the medical opinions of Drs. Zaldivar, Fino and Tuteur at Sections 718.202(a)(4) and 718.204(b) (2000), the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The administrative law judge, in the instant case, discussed the evidence of record and articulated a valid reason for not relying on the conclusions of these doctors. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order on Remand at 8-19.

In its previous Decision and Order, the Board vacated the administrative law judge's weighing of the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(b) (2000) because the administrative law judge had not adequately considered the physicians'

reasoning when he discussed the medical opinions of Drs. Zaldivar, Fino and Tuteur; the Board specifically instructed the administrative law judge to discuss and compare the reasoning offered by these physicians and to reconsider this evidence together with the opinion of Dr. Rasmussen, giving consideration to the qualifications of the physicians, in determining whether claimant established the existence of pneumoconiosis and disability causation. *Lusk, supra*. Upon considering the medical reports pursuant to Section 718.202(a)(4) (2000) on remand, the administrative law judge concluded that the diagnosis of pneumoconiosis by Dr. Rasmussen was reasoned and documented. Decision and Order on Remand at 17. The administrative law judge further noted that the opinion of Dr. Rasmussen was supported by the other medical opinions of record dated between 1984 and 1997. Decision and Order on Remand at 17. The administrative law judge, after considering the relative qualifications of the physicians and the credibility of the opinions as instructed by the Board, concluded that the opinion of Dr. Rasmussen outweighed the contrary opinions from Drs. Zaldivar, Fino and Tuteur as the reports and testimony of these physicians reflect an inappropriately restrictive concept of pneumoconiosis "...which fails to recognize that pneumoconiosis, as defined by the Act and made explicit in the new regulations, 20 C.F.R.§718.201(a)(2), is any chronic pulmonary impairment, significantly related to or aggravated by dust exposure in the mines."[5] Decision and Order at 15-17. Having credited Dr. Rasmussen's diagnosis of pneumoconiosis as reasoned and documented, the administrative law judge concluded, therefore, that the weight of the medical opinion evidence supported a finding of pneumoconiosis under Section 718.202(a)(4) (2000). Decision and Order on Remand at 17. With respect to disability causation, the administrative law judge found that claimant met his burden of proof by a preponderance of the evidence as the opinions of Drs. Zaldivar, Fino and Tuteur had little probative value since their findings were at odds with the finding that claimant established the existence of pneumoconiosis and they provided nothing more than conclusory statements which do not explain why coal dust exposure could not have caused or aggravated claimant's respiratory ailments. Decision and Order on Remand at 18-19.

Employer contends that the administrative law judge erred in failing to follow the remand instructions of the Board in reconsidering the medical opinion evidence. In particular, employer contends that the administrative law judge failed to determine if Dr. Rasmussen's opinion was reasoned and documented and further subjected the opinions of Drs. Zaldivar, Fino and Tuteur to a much higher level of scrutiny. We disagree. Contrary to employer's contention, the administrative law judge did not fail to comply with the Board's

[5]The administrative law judge acknowledged that Drs. Zaldivar, Fino and Tuteur possess superior qualifications in pulmonary medicine. Decision and Order at 17.

remand instructions in his consideration of the medical evidence. Rather, the administrative law judge noted the specifics of the Board's holdings and reconsidered the evidence within the parameters of those instructions. Decision and Order on Remand at 2-19. Contrary to employer's assertion, only the opinions of Drs. Zaldivar, Fino and Tuteur were to be reviewed for a discussion of the reasoning offered by the physicians as the Board had affirmed the administrative law judge's determination that Dr. Rasmussen's opinion was documented and reasoned. The administrative law judge was instructed to review the qualifications of the physicians and to determine how the credentials may affect the weight to be accorded the evidence of record. *Lusk, supra*. While the administrative law judge again found that the medical opinions of Drs. Zaldivar, Fino and Tuteur to be of little probative value, he nonetheless properly considered these medical opinions in their entirety. The administrative law judge, within a reasonable exercise of his discretion, permissibly accorded less weight to the opinions of Drs. Zaldivar, Fino and Tuteur pursuant to Section 718.202(a)(4) as they failed to adequately address the possibility that coal dust exposure contributed to claimant's respiratory disability. *See Compton, supra*; *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Kuchwara, supra*; Decision and Order on Remand at 8-19; Director's Exhibits 3, 8, 9, 22; Employer's Exhibits 4-8. Furthermore, the Decision and Order indicates that the administrative law judge found Dr. Rasmussen's opinion more credible based on the fact that his report was well-documented and well-reasoned, that the report discussed pneumoconiosis as defined in 20 C.F.R. §718.201, dating and that the report is supported by the objective evidence and other medical opinions of record dating between 1984 and 1997. Accordingly, the administrative law judge credited this report over the reports of Drs. Zaldivar, Fino and Tuteur, despite their superior qualifications. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); *Kuchwara, supra*; Decision and Order on Remand at 9-19; Director's Exhibits 3, 8, 9, 22; Employer's Exhibits 4-8. We therefore affirm the administrative law judge's decision to accord greater weight to Dr. Rasmussen's opinion and his finding that the evidence established the existence of pneumoconiosis at Section 718.202(a)(4). *See* Decision and Order on Remand at 17; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-1445 (1984).

Finally, we affirm the administrative law judge's finding that the evidence is sufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(b) (2000). Contrary to employer's contention, the administrative law judge did not discredit the opinions of Drs. Zaldivar, Fino and Tuteur on the issue of causation solely because they did not diagnose pneumoconiosis when the administrative law judge found that it existed. Employer's Brief at 28. The administrative law judge plainly stated

that the opinions of Drs. Zaldivar, Fino and Tuteur were unpersuasive as they failed to consider pneumoconiosis in its broad statutory context and provided nothing more than conclusory statements which do not adequately explain why coal dust exposure could not have caused or aggravated claimant's respiratory ailments. *Compton, supra*; Decision and Order on Remand at 18. Furthermore, the administrative law judge found causation established based upon the opinion of Dr. Rasmussen, who concluded that the miner's impairment was due to both smoking and coal dust exposure, and that coal mine dust exposure was a "significant contributing factor." Director's Exhibit 9 at 4; Decision and Order on Remand at 18-19. Because the administrative law judge's consideration of the evidence is rational and supported by substantial evidence, we affirm the administrative law judge's finding and hold that claimant has established that his pneumoconiosis was a substantially contributing cause of his totally disabling pulmonary impairment pursuant to Section 718.204(c).[6] *See Roberts v. West Virginia CWP Fund*, 74 F. 3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Hobbs, supra*; *Toler v Eastern Assoc. Coal Co.*, 43 F. 3d 109, 19 BLR 2-70 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). 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 v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm 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 on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY

[6]The administrative law judge applied the disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After revision of the regulations, the disability causation regulation is now set forth at 20 C.F.R. §718.204(c).

Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge