BRB No. 02-0727 BLA

ERNEST WORKMAN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/31/2003
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (1997-BLA-0259) of Administrative Law Judge Gerald M. Tierney 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 is before the Board for the fourth time.[2] In its prior Decision and Order issued on August 22, 2001, the Board vacated the administrative law judge=s award of benefits and remanded the case for further consideration of the medical evidence of record.[3] *Workman v. Eastern Associated Coal Corp.*, BRB No. 00-1157 BLA (Aug. 22, 2001)(unpub.). In particular, the Board vacated

[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] This case has a lengthy procedural history as set forth in the Board=s previous decisions. *Workman v. Eastern Associated Coal Corp.*, BRB Nos. 95-2212 and 98-1438 BLA (Oct. 29, 1999)(unpub.); *Workman v. Eastern Associated Coal Corp*., BRB No. 00-1157 BLA (Aug. 22, 2001)(unpub.).

[3] The Board affirmed the administrative law judge=s findings pursuant to 20 C.F.R. ''718.202(a)(1)-(3), 718.203 and 718.204(c)(1)-(3) (2000), as unchallenged on appeal. *Workman v. Eastern Associated Coal Corp*., BRB No. 00-1157 BLA, slip op. at 3, n.3 (Aug. 22, 2001)(unpub.). In addition, the Board affirmed the administrative law judge=s finding that the evidence was sufficient to establish total respiratory disability pursuant to Section 718.204(c)(4) (2000). *Id*. at 5-6.

the administrative law judge=s weighing of the medical opinion evidence pursuant to 20 C.F.R. ' '718.202(a)(4) and 718.204(b) (2000)[4] and instructed the administrative law judge to first determine whether the medical opinion evidence was reasoned and documented. The administrative law judge was instructed to then reassess the credibility of the medical opinion evidence in determining whether claimant has met his burden to establish the existence of pneumoconiosis, 20 C.F.R. '718.202, and the cause of his totally disabling respiratory or pulmonary impairment at 20 C.F.R. '718.204(c).

On remand, the administrative law judge initially found that the pre-modification medical evidence, in and of itself, was insufficient to establish the existence of pneumoconiosis. Decision and Order on Remand at 6. However, the administrative law judge found that the newly submitted medical opinion evidence, particularly the medical opinion of Dr. Rasmussen, was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 10-12. Moreover, citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge found that notwithstanding claimant=s failure to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1), the medical evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a). Decision and Order on Remand at 13. In addition, noting the requirements of *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987) and *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff=d on recon.*, 9 BLR 1-236 (1987)(*en banc*), the administrative law judge found that despite non-qualifying clinical test results, the medical opinion evidence, in conjunction with abnormal pulmonary function studies and the heavy nature of claimant=s last coal mine employment, is sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment. Decision and Order on Remand at 13. The administrative law judge further found that claimant has met his burden of establishing that his legal pneumoconiosis is a substantially contributing cause of his total respiratory or pulmonary disability. Decision and Order on Remand at 14. Accordingly, the administrative law judge awarded benefits, commencing as of March 1996, the month in which claimant filed his modification request.

[4] The provision pertaining to disability causation, previously set out at 20 C.F.R. '718.204(b) (2000), is now found at 20 C.F.R. '718.204(c).

On appeal, employer challenges the administrative law judge=s Decision and Order awarding benefits, arguing that the administrative law judge erred in his weighing of the medical evidence of record. Employer contends that the administrative law judge erred in relying on the most recent medical evidence of record. In addition, employer contends that the administrative law judge failed to follow the Board=s remand instructions, as set forth in the Board=s prior Decision and Order. Lastly, employer contends that claimant is not entitled to benefits under the Act, as he is totally disabled by a back injury which precludes entitlement as a matter-of-law. Claimant responds, urging affirmance of the administrative law judge=s award of benefits as supported by substantial evidence. The Director, Office of Workers= Compensation Programs (the Director), has submitted a limited response, contending that the administrative law judge=s acceptance of the later evidence was rational and consistent with the Director=s position in *Nat=l Mining Ass=n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), and also the case law of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. The Director also contends that the administrative law judge=s findings concerning claimant=s back injury are consistent with circuit court law and, therefore, employer=s contention that these non-pulmonary conditions preclude entitlement is without merit. Employer, in a Reply brief, reiterates its position that it was error for the administrative law judge to rely on the most recent evidence based on the assumption that pneumoconiosis is always progressive. Employer also reiterates its position that claimant is not entitled to benefits, as a matter-of-law, because of his pre-existing back injury.[5]

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

Employer, in challenging the administrative law judge=s award of benefits, contends that the administrative law judge erred in relying on the most recent medical

[5] The parties do not challenge the administrative law judge=s finding that the preponderance of the medical evidence, like and unlike, is sufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. '718.204(b), or his determination of the date of onset of total respiratory disability. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

opinion evidence, arguing that the administrative law judge applied a presumption that pneumoconiosis is always progressive which employer asserts violates controlling authority as well as precludes consideration of all of the relevant evidence. Employer=s contention lacks merit.

Contrary to employer=s contention, the administrative law judge reasonably found the later medical evidence to be more probative than the pre-modification evidence, in this case, as the administrative law judge found initially that the evidence submitted prior to claimant=s modification request did not establish the existence of pneumoconiosis. Decision and Order on Remand at 6. The administrative law judge, therefore, primarily considered the new medical evidence and found that the weight of the newer evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 11-12. Since the Fourth Circuit, within whose jurisdiction this case arises, has long recognized the progressive and irreversible nature of pneumoconiosis, it was not irrational for the administrative law judge to accord primary weight to the more recent evidence after determining that the pre-modification evidence was insufficient to establish the existence of pneumoconiosis. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also* 20 C.F.R. ' 718.201(c); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh=g denied*, 484 U.S. 1047 (1988). Therefore, the administrative law judge=s focus on the more recent evidence of record is not irrational. *Id*.

Employer further contends that the administrative law judge erred in failing to follow the Board=s instructions on remand, arguing that the administrative law judge did not determine whether the medical opinions were reasoned and documented. In asserting that the administrative law judge erred in failing to comply with the Board=s remand instructions, employer raises numerous allegations of error in the administrative law judge=s weighing of the medical evidence of record.

Initially, we reject employer=s contention that the administrative law judge erred in failing to follow the Board=s remand instructions. Contrary to employer=s contention, the administrative law judge adequately set forth the medical opinion evidence and concluded that the medical opinion of Dr. Rasmussen was better reasoned and documented than the opinions of Drs. Zaldivar, Tuteur and Fino. Decision and Order on Remand at 12. The administrative law judge, within a reasonable exercise of his discretion as trier-of-fact, found that Dr. Rasmussen=s opinion was most consistent with

the credible pulmonary function study results which reveal a significant respiratory impairment, as well as the abnormal findings on physical examination and claimant=s extensive coal mine employment history and his extensive smoking history. Decision and Order on Remand at 12; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In addition, we reject employer=s contention that the administrative law judge erred in finding that Dr. Rasmussen had superior credentials in the specific area of coal workers= pneumoconiosis, despite the fact that Drs. Zaldivar, Tuteur and Fino are Board-certified pulmonologists. Decision and Order on Remand at 12. As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Because the administrative law judge considered the relative qualifications of the physicians, we hold that it was not inherently unreasonable for the administrative law judge to accord more weight to the qualifications of Dr. Rasmussen based on his concentration in treating black lung over the more general pulmonary specialties of the other physicians. *Lafferty*, 12 BLR 1-190; *Kuchwara*, 7 BLR 1-167; *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978).

The remainder of employer=s contentions assert that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that claimant=s total disability was due to pneumoconiosis pursuant to Section 718.204(c) because the administrative law judge failed to properly weigh the evidence of record. Employer=s Brief at 14-23. Specifically, employer contends that the administrative law judge impermissibly accorded less weight to the opinions of Drs. Zaldivar, Tuteur and Fino 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 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). It is the duty of the administrative law judge, as the trier-of-fact, to 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); *see also Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

In finding the evidence sufficient to establish the existence of pneumoconiosis at

Section 718.202(a)(4), the administrative law judge found Dr. Rasmussen=s opinion to be the most persuasive based on its documentation and reasoning and also based on Dr. Rasmussen=s superior qualifications in the area of black lung medicine. Decision and Order on Remand at 12. As discussed above, the administrative law judge reasonably found that Dr. Rasmussen=s diagnosis of a respiratory impairment related to coal dust exposure and smoking is well-reasoned and documented. Decision and Order on Remand at 12; Director=s Exhibit 58; Claimant=s Exhibit 2; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Collins*, 21 BLR 1-181; *Clark*, 12 BLR 1-149. The administrative law judge rationally accorded Dr. Rasmussen=s opinion greater weight than the contrary opinions of Drs. Zaldivar, Tuteur and Fino, which he found not persuasive in establishing that claimant was not suffering from either clinical or legal pneumoconiosis. Decision and Order on Remand at 12; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Collins*, 21 BLR 1-181; *Kuchwara*, 7 BLR 1-167. Because the administrative law judge has considered all of the relevant evidence and his determination that Dr. Rasmussen=s opinion is better reasoned and documented is not inherently irrational, we affirm his finding that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Moreover, since employer does not challenge the administrative law judge=s consideration of all of the medical evidence of record pursuant to *Compton*, we affirm his finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a), as within a reasonable exercise of his discretion as trier-of-fact. *Compton*, 211 F.3d 203, 22 BLR 2-162; *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer further contends that the administrative law judge erred in finding that claimant=s back injury was not relevant pursuant to Section 718.204(c). Employer argues that the administrative law judge=s finding that claimant=s back injury, as well as his other non-pulmonary impairments, were not relevant to the inquiry at Section 718.204(c), was based on a misapplication of the Fourth Circuit=s holding in *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). In particular, employer contends that the Fourth Circuit, in *Hicks* and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), adopted the holdings of the United States Court of Appeals for the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), that a claimant cannot satisfy his burden of establishing total disability due to pneumoconiosis if he is totally disabled from a pre-existing non-respiratory disability. We disagree.

Contrary to employer=s contention, the administrative law judge did not err in

finding that claimant=s back injury, which caused a non-pulmonary disabling impairment, was not relevant to the inquiry at Section 718.204(c), as the Fourth Circuit has not adopted the holdings of the Seventh Circuit in *Foster* and *Vigna*. Rather, the Fourth Circuit has consistently held that the predominant inquiry is whether claimant has established a totally disabling respiratory or pulmonary impairment without regard to other possible non-pulmonary disabilities, except to the extent that these non-pulmonary impairments impact claimant=s respiratory or pulmonary disability. *Street*, 42 F.3d 241, 19 BLR 2-1; *see also Hicks*, 138 F.3d 524, 21 BLR 2-323; *Ballard*, 65 F.3d 1189, 19 BLR 2-304. Consequently, we reject employer=s assertion that if claimant suffers from a pre-existing non-respiratory disability, he is prohibited from establishing entitlement to benefits, even if he is able to establish total disability due to pulmonary problems. *Id.*

Moreover, based on the affirmance of the administrative law judge=s general weighing of the medical evidence of record, *see* discussion, *supra*, and because employer does not otherwise challenge the administrative law judge=s finding that the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner=s total respiratory disability, we affirm his findings pursuant to Section 718.204(c). Decision and Order on Remand at 14; 20 C.F.R. ' 718.204(c); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *see also Street*, 42 F.3d 241, 19 BLR 2-1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge