BRB No. 98-1378 BLA

ALBERT R. KNIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	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 of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Richard A. Dean (Arter & Hadden), Washington, D.C., for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1563) of Administrative Law Judge J. Michael O'Neill 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). Based on the date of filing, the administrative law judge adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge concluded that the newly submitted evidence of

[1] Claimant filed his first claim for benefits on February 7, 1991, which was denied by the Department of Labor on August 6, 1991 and September 27, 1991. Director's Exhibit 28. The claim was administratively closed at an informal conference on March 17, 1992. Director's Exhibit 28. Claimant filed the instant

record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.§718.202(a) (1), and thus claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge then considered both the prior and new evidence of record and concluded that it was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the evidence of record sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and total disability due to pneumoconiosis pursuant to Section 718.204(b), (c)(4). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.[2]

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).

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claim on July 25, 1996. Director's Exhibit 1.

[2] The administrative law judge's findings that claimant established a material change in conditions pursuant to Section 725.309; that the presumption at Section 718.203(b) was not rebutted; and that the evidence was sufficient to establish total respiratory disability at Section 718.204(c)(1), but insufficient to establish total respiratory disability at Section 718.204(c)(2), (3), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer initially contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(1) based on a numerical preponderance of positive interpretations of the two most recent films by physicians with superior qualifications. Employer argues that in view of the fact that claimant stopped working in 1989, the totality of the x-ray interpretations should be weighed, not just the interpretations of the most recent films. Employer's arguments are without merit. The administrative law judge accurately reviewed all of the x-ray interpretations of record and the qualifications of the readers. In light of the progressive nature of pneumoconiosis, it was reasonable for the administrative law judge to determine that the films taken on October 2, 1997, and January 18, 1998, were the most probative of claimant's current condition, as they post-dated a September 12, 1996 film by over a year,[3] and the films submitted in conjunction with the original claim were taken between March 7, 1988 and March 22, 1991. Decision and Order at 5-8; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Inasmuch as the most recent films were interpreted as positive by 2 dually-qualified Board-certified radiologists and B- readers, and as negative by one B-reader and one physician with no special radiological qualifications, the administrative law judge permissibly concluded that the weight of the x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(1). *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). We, therefore, affirm the administrative law judge's findings pursuant to Section 718.202(a)(1), as supported by substantial evidence.

[3] The administrative law judge acknowledged that the September 12, 1996 film was interpreted as negative by three Board-certified radiologists and B-readers, and as positive by one physician with no special radiological qualifications. Although a majority of interpretations of the three most recent films were negative for pneumoconiosis, the administrative law judge acted within his discretion in finding that the positive interpretations by two dually-qualified readers of the two films taken over a year later were more probative. Decision and Order at 6-7.

Employer next contends that the administrative law judge erred in finding total respiratory disability established pursuant to Section 718.204(c). Specifically, employer maintains that Dr. Simpao's opinion is equivocal and insufficient to support a finding of total respiratory disability at Section 718.204(c)(4), and that the administrative law judge failed to weigh all of the evidence together, like and unlike, and to explain the weight he assigned to the evidence prior to finding total disability established at Section 718.204(c). Employer's arguments are without support in the record. In evaluating the evidence at Section 718.204(c)(4), the administrative law judge determined that Drs. Gallo and Selby did not offer opinions on the issue of disability. Decision and Order at 9-10; Director's Exhibit 28; Employer's Exhibits 3, 4. The administrative law judge also found that the opinion of Dr. Traughber, that claimant was totally disabled, was conclusory and thus entitled to little weight. Decision and Order at 9-10; Director's Exhibit 28; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Although Dr. Myers opined in 1990 that claimant was not totally disabled but would be limited given his pulmonary impairment, Director's Exhibit 28, the administrative law judge acted within his discretion as trier-of-fact in finding that the 1996 opinion of claimant's treating physician, Dr. Simpao, that claimant did not have the respiratory capacity to perform the work of a coal miner, was more probative of claimant's current condition, fully supported by the objective evidence, and entitled to determinative weight.[4] Decision and Order at 10-11; Director's Exhibits 9, 10; *see generally Zimmerman v. Director, OWCP*, 871 F.2d 564,567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Lucostic*, *supra*. The administrative law judge then permissibly found that the medical opinions and the qualifying pulmonary

[4] We reject employer's assertion that because Dr. Simpao's report does not contain an analysis of whether claimant is physically able to perform the specific duties of his last coal mine employment, the opinion cannot support a finding of total respiratory disability. Although a physician who opines that a miner has the pulmonary capacity to perform his usual coal mine employment must demonstrate familiarity with the physical requirements of the miner's specific job, *see generally Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991), under the facts of this case, the administrative law judge could properly consider Dr. Simpao's assessment of claimant's ability to do general mining work, along with claimant's qualifying pulmonary function studies, interpreted as showing severe obstructive airways disease, and his finding that claimant's job as a face foreman required extensive walking, and conclude that claimant was totally disabled. Decision and Order at 3, 11; Director's Exhibits 9, 10, 28; *see generally Daniel v. Westmoreland Coal Co.*, 5 BLR 1-196 (1982).

function studies of record substantially outweighed the contrary probative evidence, and established total respiratory disability pursuant to Section 718.204(c). Decision and Order at 11; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Fields*, *supra*.

Lastly, employer contends that the administrative law judge erred in relying solely on Dr. Simpao's opinion to find disability causation established pursuant to Section 718.204(b), without weighing the contrary opinion of Dr. Selby or any other evidence of record relevant to this issue. While we reject employer's assertion that Dr. Simpao's opinion is equivocal and insufficient to establish disability causation,[5] we agree with employer's argument that all evidence of record relevant to the issue must be weighed. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(b), and remand this case for reconsideration of the evidence thereunder pursuant to *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

[5] Employer maintains that Dr. Simpao's opinion is ambiguous and equivocal because he responded "yes" to the printed question "if the miner has a pulmonary impairment, is such impairment related to pneumoconiosis or does it have another etiology?" Director's Exhibit 10. A review of the record, however, reveals that Dr. Simpao also indicated that the extent to which claimant's pneumoconiosis contributed to his impairment was "moderate to total." Director's Exhibit 9.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge