BRB No. 99-0342 BLA

EUGENE NAPIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JERICOL MINING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Douglass Law Office), Harlan, Kentucky, for claimant.

Richard A. Dean (Arter & Hadden, LLP), 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 on Remand (95-BLA-1170) of Administrative Law Judge Rudolf L. Jansen 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). This case has been before

the Board previously.[1] In the original Decision and Order, the administrative law judge found twenty years of coal mine employment and that modification was established pursuant to 20 C.F.R. §725.310. Administrative Law Judge Decision and Order dated May 9, 1996. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203 and 718.204(b), (c). Accordingly, benefits were awarded. Employer appealed and the Board affirmed the administrative law judge's modification finding but vacated his findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.204(b), (c)(4) as well as his onset determination and remanded the case for further consideration. *See Napier v. Jericol Mining, Inc.*, BRB No. 97-0291 BLA (February 27, 1998)(unpublished).

On remand, the administrative law judge concluded that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Decision and Order on Remand at 3-6. Accordingly, benefits were awarded beginning February 1, 1994, the month in which modification of the claim was filed. In the instant appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), that claimant established total disability pursuant to Section 718.204(c)(4) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to 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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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

[1]Claimant filed his application for benefits on March 8, 1993, which was denied by the district director on August 9, 1993. Director's Exhibits 1, 25; Administrative Law Judge Decision and Order dated May 9, 1996. Claimant requested modification on February 8, 1994. Director's Exhibit 32.

(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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Initially, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) as he impermissibly accorded less weight to the opinions of Drs. Broudy and Dahhan and greater weight to the opinions of Drs. Baker and Kabani. Employer argues that the administrative law judge mechanically applied the treating physician preference as his decision was based only on the status of the physicians. Employer's Brief at 15-21. 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).

In the instant case, the administrative law judge, within his discretion as fact-finder, permissibly determined that the report of Dr. Kabani was entitled to extra credibility on the basis that she was claimant's treating physician and that Dr. Baker's opinions were entitled to more weight than the opinions of Drs. Broudy and Dahhan due to the physician's extensive experience with claimant's medical history based on his examination of claimant on more than one occasion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order on Remand at 4; Director's Exhibits 16, 17, 45, 53, 72, 73; Claimant's Exhibit 2; Employer's Exhibit 2. Contrary to employer's contention, the administrative law judge rationally accorded more weight to the opinions of Drs. Baker and Kabani as the length of time a physician has treated a miner is an important factor in determining the value of the physician's opinion because of the correlative degree of the physician's familiarity with the patient. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Moreover, contrary to employer's contention, the administrative law judge did not

find the existence of pneumoconiosis establish pursuant to Section 718.202(a)(4) based solely on the status of the physicians but permissibly found the opinions of Drs. Broudy and Dahhan outweighed by the preponderance of the remaining medical opinions of record. Decision and Order on Remand at 4; Director's Exhibits 15, 16, 17, 45, 46, 53, 72, 73; Employer's Exhibit 2; Claimant's Exhibit 2; *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8 (1996); *Trumbo v. Reading Anthracite Company*, 17 BLR 1-85 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Perry*, *supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We therefore affirm the administrative law judge's finding that the evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to Section 718.204(c)(4). We disagree. The administrative law judge discussed the medical opinions of record and rationally found that Dr. Frank did not address disability, that Dr. Broudy stated that the miner "may" not be able to return to work, that Dr. Dahhan initially opined that the miner was not disabled but in a subsequent opinion stated that claimant does not retain the ability to perform his regular coal mine employment and that the remaining opinions of Drs. Baker, Miller and Kabani are unequivocal in stating that claimant is totally disabled. Decision and Order on Remand at 5; Director's Exhibits 15, 16, 17, 45, 46, 53, 72, 73; Employer's Exhibit 2; Claimant's Exhibit 2. Contrary to employer's contentions, the administrative law judge was aware of the exertional requirements of claimant's coal mine employment. The administrative law judge found that claimant's last coal mine employment for the last year was as a repairman and that the exertional requirements of this job were heavy. Decision and Order dated May 9, 1996; Decision and Order on Remand at 5. Additionally, four of the five physicians who addressed the issue of claimant's total disability specifically noted that claimant's last coal mine employment was as a repairman. Director's Exhibits 15, 16, 17, 45, 53, 72, 73; Employer's Exhibit 2; Claimant's Exhibit 2. Thus the administrative law judge reasonably found that the medical opinion evidence was sufficient to establish total disability pursuant to Section 718.204(c)(4). Decision and Order on Remand at 5; *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry, supra*; *Piccin, supra*. Furthermore, the administrative law judge noted the existence of contrary probative evidence in the record, but permissibly concluded that this evidence did not outweigh the evidence supportive of a total disability finding. *See Clark*, *supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order on Remand at 5. Consequently, inasmuch as the administrative law judge permissibly found that the pulmonary function study evidence and the medical

opinions of record were sufficient to establish total respiratory disability upon weighing all of the relevant evidence, we affirm the administrative law judge's finding of total disability pursuant to Section 718.204(c). See *Clark*, *supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock*, *supra*; *Gee, supra*.

Employer further asserts that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) in that he failed to accord appropriate weight to the opinions of Drs. Broudy and Dahhan. Employer contends that the administrative law judge erred in according greater weight to Dr. Baker's opinion based on the treating physician preference. Contrary to employer's contentions, the administrative law judge permissibly relied on Dr. Baker's opinion as the physician had an extensive history of examining the miner as well as the physician's opinion was supported by the medical evidence of record. Decision and Order on Remand at 6; *Tussey, supra*; *Onderko, supra*; *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King, supra*; *Wetzel, supra*; *Lucostic, supra*; *Revnack, supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Piccin, supra*. Additionally, the administrative law judge rationally accorded less weight to the opinions of Drs. Broudy and Dahhan as they were not consistent with the medical evidence of record because an administrative law judge may permissibly accord less weight to an opinion regarding causation where it is based on a faulty underlying premise regarding the presence or absence of pneumoconiosis. Decision and Order on Remand at 6; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). The administrative law judge is empowered to weigh the medical opinion evidence of record 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 finding that the medical opinions of record establish causation pursuant to Section 718.204(b) and the award of benefits.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge