BRB No. 00-0888 BLA

CHARLES V. REED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES,	)	DATE ISSUED:
INCORPORATED	)	
	)	
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 - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Sexton, Cullen & Jones, P.C.), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer

Barry H. Joyner (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

Employer appeals the Decision and Order - Awarding Benefits (99-BLA-1058) 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] The administrative law judge found at least twenty-six years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4. The administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. 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 arising out of coal mine employment and that claimant was totally disabled thereby. Claimant responds, contending that the administrative law judge's Decision and Order awarding benefits should be affirmed. The Director, Office of Workers' Compensation Programs, responds to the legal argument made by employer but takes "no position on the ultimate question of claimant's entitlement to benefits." Director's Brief at 1. The Director contends that employer's argument regarding the pulmonary function and blood gas study evidence is without merit inasmuch as it is not relevant to a consideration of the existence of pneumoconiosis. The Director further contends that employer offers no basis for its contention that the negative x-ray evidence should be credited over the medical reports relied upon by the administrative law judge, which appears irrational, as x-ray evidence addresses the existence of clinical pneumoconiosis while medical reports in question address the existence of legal pneumoconiosis.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which the Director and claimant have responded. Employer contends that the new regulations will affect the

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[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 65 Fed. Reg. 80,045-80, 107 (2000)(to be codified at 20 C.F.R. parts 718, 722,725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

outcome of this case and therefore objects to the adjudication of this claim using the new regulations. Specifically, employer contends that 20 C.F.R. §103 relating to pulmonary function studies, 20 C.F.R. §718.104 relating to the report of physician examinations, 20 C.F.R. §718.105 relating to arterial blood gas studies, 20 C.F.R. §718.201 relating to the definition of pneumoconiosis, 20 C.F.R. §718.204 relating to total disability and disability causation, 20 C.F.R. §718.205 relating to death due to pneumoconiosis, and Section 725 as revised will alter the outcome of this case. Claimant and the Director contend that the regulations at issue in the lawsuit will not affect the outcome of this case. Based on the responses of the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Contrary to employer's contention, the regulations at Sections 718.103, 104 and 105 apply only to evidence developed after January 19, 2001. Regarding Section 718.201, relating to the definition of pneumoconiosis, we note that the regulation as revised, broadening the definition of pneumoconiosis to include both "clinical" and "legal" pneumoconiosis and recognizing the progressive nature of pneumoconiosis, merely codifies existing circuit law, *see Bradberry v. Director, OWCP*, 117 F.3d 1361, 1368, 21 BLR 2-166 (11th Cir. 1997); *Curse v. Director, OWCP*, 843 F.3d 456, 457, 11 BLR 2-139, 140 (11th Cir. 1988). Likewise, Section 718.205(c)(5) merely codifies existing law setting forth the "hastening death" standard. *See Bradberry*, *supra*. Additionally, contrary to employer's argument, the revised regulation at Section 718.204 does not substantially change the requirements for establishing a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b)(i)-(iv), and for all intensive purposes merely implements the disability causation standard applied by the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1267, 13 BLR 2-277, 2-282 (11th Cir. 1989). Therefore, the Board will proceed to adjudicate the merits of 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 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).

Employer first contends that the administrative law judge erred in failing to weigh all the relevant medical evidence on the issue of pneumoconiosis. In considering the evidence relevant to the existence of pneumoconiosis, the administrative law judge correctly found that the existence of pneumoconiosis was not established by x-ray evidence as the readings of dually-qualified physicians, who were both board-certified radiologists and B-readers, did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1). Turning to the medical opinion evidence, the administrative law judge found that, inasmuch as two of the three physicians who examined claimant, including claimant's treating pulmonologist, rendered well-reasoned and documented opinions finding that claimant suffered from a

respiratory or pulmonary disease resulting in impairment, caused at least in part, by his coal mine dust exposure, claimant established the existence of pneumoconiosis.[2] This was rational. 20 C.F.R. §§718.201, 718.202(a)(4); *McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988). Contrary to employer's argument, the administrative law judge did not err in crediting the opinions of Drs. Krishnamurthy and Hasson. Although, as employer points out, Dr. Krishnamurthy merely found "moderately severe chronic obstructive pulmonary disease, possibly superimposed by exposure to coal dust," in a letter dated April 15, 1997, Director's Exhibit 8, in a medical evaluation form dated April 15, 1997, Dr. Krishnamurthy unequivocally opined that claimant's chronic obstructive pulmonary disease was due to a combination of cigarette smoking and coal dust exposure. Director's Exhibit 8. Likewise, contrary to employer's argument, the administrative law judge is not required to weigh together, separate categories of evidence pursuant to Section 718.202(a)(1)-(4). Rather, Section 718.202(a) provides for separate, distinct methods of establishing the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4); *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Compare Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis. Employer's argument that the pulmonary function studies and blood gas studies of record are relevant in establishing the existence of pneumoconiosis lacks merit as pulmonary function and blood gas studies are not diagnostic of the presence or absence of pneumoconiosis. *Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984); *Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983).

Employer contends generally that the administrative law judge's finding of total disability is not supported by substantial evidence and that the administrative law judge failed to consider all contrary, probative evidence in determining that claimant was totally disabled. Contrary to employer's argument, however, the administrative law judge citing *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), noted that he was required to weigh like and unlike evidence on the issue of total disability, and correctly determined, after considering all the relevant evidence, that the preponderance of the evidence established total disability.[3]

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[2] Dr. Krishnamurthy, a pulmonary specialist, diagnosed chronic obstructive pulmonary arising from a combination of smoking and coal mine dust exposure, Director's Exhibit 8, Dr. Hasson diagnosed, in addition to simple pneumoconiosis, chronic bronchitis caused by both coal mining and cigarettes, Director's Exhibit 9. Dr. Goldstein diagnosed chronic bronchitis and chronic obstructive pulmonary disease mostly related to smoking. Employer's Exhibit 1.

[3] We need not address employer's general contention that the administrative law judge erred in finding the pulmonary function studies of record sufficient to establish total

Employer next contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's pneumoconiosis was a substantial contributing factor in the cause of his total pulmonary disability pursuant to the standard set forth in *Lollar*, *supra*. Specifically, employer contends that both Drs. Krishnamurthy and Hasson found that claimant's condition was likely caused by his thirty year smoking history. In finding that causation was established, the administrative law judge found that the opinions of Drs. Krishnamurthy and Hasson, that disability was due to a combination of cigarette smoking and coal mine employment, were sufficient to establish that pneumoconiosis was a substantial contributor to claimant's total disability. The administrative law judge noted that he accorded great weight to Dr. Krishnamurthy's opinion inasmuch as Dr. Krishnamurthy was claimant's treating pulmonologist and Dr. Hasson's opinion supported the opinion of Dr. Krishnamurthy. Turning to the opinion of Dr. Goldstein, that most of claimant's problem was related to smoking, the administrative law judge noted that it did not affirmatively rule out coal mine employment as a cause of claimant's total disability. Moreover, contrary to employer's argument, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Krishnamurthy and Hasson as better reasoned, documented, and supported by the objective evidence of record. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), and greater weight to Dr. Krishnamurthy because he was a treating physician. *Onderko*, *supra*. Further, contrary to employer's contention, the administrative law judge is not required to discredit an opinion diagnosing pneumoconiosis that is partially based on a positive x-ray when the weight of the x-ray evidence is negative for pneumoconiosis. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). These findings are rational. 20 C.F.R. §718.204(c); *see Lollar*, *supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is sufficient to establish disability causation.

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disability as it is not sufficiently briefed. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge