BRB No. 02-0776 BLA

AMOS CURRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	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 - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Carranza M. Pryor (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (01-BLA-430) of Administrative Law Judge Gerald M. Tierney rendered on a duplicate 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

[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

judge found twelve and one-half years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on the date of filing.[2] Decision and Order at 2. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence established total disability, an element of entitlement previously adjudicated against claimant, and thus, found that a material change in conditions was established. The administrative law judge further found that, on considering all the evidence of record, the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis were established. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Employer also contends that the administrative law judge erred in applying the new regulations to this claim filed on March 24, 2000. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, is not participating 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 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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*).

At the outset, we reject employer's contention that the administrative law judge erred in applying the new regulations to the instant, duplicate claim which was filed March 24, 2000, prior to the January 19, 2001 effective date of the new regulations. The regulations at issue in this case are applicable to pending claims. *See* 20 C.F.R. §725.2; *National Mining Ass'n v. DOL*, 292 F.3d 849, 869 (D.C. Cir. 2002).

Employer next contends that the administrative law judge failed to

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otherwise noted, refer to the amended regulations.

[2] Claimant filed his first claim for benefits on August 20, 1997. That claim was denied on February 10, 1998. Director's Exhibits 28-1, 23-13. Claimant filed the instant, duplicate claim on March 20, 2000. Director's Exhibits 1, 26.

accord adequate weight to the negative chest x-ray evidence in determining that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. Contrary to employer's argument, however, the administrative law judge is not required to accord greater weight to negative x-ray evidence than to medical opinions in determining whether the existence of pneumoconiosis was established. Section 718.202(a)(1)-(4) provides distinct, alternative methods for establishing the existence of pneumoconiosis. *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226-227 (2002)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). Employer's argument is, accordingly, rejected.

Employer also contends that the administrative law judge erred in finding the medical opinion evidence of record sufficient to establish the existence of pneumoconiosis. Specifically, employer contends that the administrative law judge erred in according greater weight to the opinions of Drs. Cohen and Koenig, than to the opinions of Drs. Hasson, Rusakoff and Fino.[3] Instead, employer contends that Dr. Cohen's opinion should be accorded less weight because Dr. Cohen overstated claimant's coal mine employment history as eighteen years when he examined claimant in June of 2000 and continued to find the existence of pneumoconiosis in his December 2001 report despite the great weight of the negative x-ray evidence in June of 2000.

Employer acknowledges, however, that Dr. Cohen found that claimant had only a twelve to fourteen year coal mine employment history when examining claimant in December of 2001. Claimant's Exhibit 2. In crediting Dr. Cohen's opinion on the existence of pneumoconiosis, the administrative law judge found that Dr. Cohen ultimately relied on a coal mine employment history of twelve to fourteen years and found that the discrepancy between Dr. Cohen's finding of twelve to fourteen years of coal mine employment and his own finding of twelve and one-half years of coal mine employment was insignificant. Likewise, the administrative law judge found that Dr. Cohen's finding of a thirty to thirty-five pack year smoking history did not represent a significant discrepancy from the up to forty year smoking history reported.

[3] Dr. Cohen diagnosed coal workers' pneumoconiosis and chronic bronchitis, Director's Exhibits 7-12; Dr. Koenig found that both coal mine employment and cigarette smoking contributed to claimant's pulmonary impairment, Claimant's Exhibit 3; Dr. Hasson found no pneumoconiosis and diagnosed moderate chronic obstructive pulmonary disease in 1998, and severe chronic obstructive disease related to smoking in 2000, Director's Exhibits 24, 25, 28; Dr. Fino attributed claimant's impairment and disability to cigarette smoking, Employer's Exhibit 1; Dr. Rusakoff found no pneumoconiosis, but found chronic obstructive pulmonary disease caused by cigarette smoking, Employer's Exhibit 2.

Further, the administrative law judge noted that while Dr. Cohen recognized that a majority of x-ray readings did not establish the existence of pneumoconiosis, he nonetheless provided sufficient rationale, apart from x-ray, to support his finding of pneumoconiosis. Accordingly, the administrative law judge credited Dr. Cohen's opinion on the existence of pneumoconiosis. This was rational. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Gouge v. Director, OWCP*, 8 BLR 1-307 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Employer also contends that the administrative law judge erred in crediting Dr. Koenig's opinion as supportive of Dr. Cohen's opinion as Dr. Koenig failed to explicitly diagnose the existence of pneumoconiosis. Contrary to employer's contention, however, Dr. Koenig's finding that coal dust exposure alone, independent of smoking, accounted for or at least significantly contributed to Mr. Curry's chronic obstructive pulmonary disease, satisfies the definition of pneumoconiosis under the Act. Claimant's Exhibit 2 at 5; 20 C.F.R. §718.201(a)(2); *Stomps v. Director, OWCP*, 816 F.2d 1533, 10 BLR 2-107 (11th Cir. 1987). Employer's argument is, accordingly, rejected.

Regarding Dr. Hasson's opinion, the administrative law judge accorded it less weight as Dr. Hasson generally stated that there were no findings that showed that claimant's coal workers' pneumoconiosis caused claimant's chronic obstructive pulmonary disease, but provided no specific reasons for his conclusions, other than his statement that claimant had the classic findings of chronic obstructive pulmonary disease related to cigarette smoking based on his pulmonary function studies and physical examination. This was rational. *Clark*, *supra*; *see Cosaltar v. Mathies Coal Co.*, 6 BLR 1-1182 (1984). Nor, contrary to employer's contention is Dr. Hasson's opinion automatically entitled to greater weight than Dr. Cohen's opinion just because Dr. Hasson examined claimant twice as opposed to Dr. Cohen's single examination. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846, 1-850 (1985).

Likewise, the administrative law judge accorded less weight to the opinion of Dr. Fino, who, unlike Drs. Cohen and Koenig, did not provide specific references to the medical literature he relied on, but only generally referred to medical literature. The administrative law judge further accorded little weight to Dr. Fino's opinion because Dr. Fino's views on the link between chronic obstructive pulmonary disease and coal dust exposure were not in accord with the prevailing view of the Department of Labor. (Dr. Fino noted that claimant's relatively minimal coal mine employment of thirteen to fifteen years in coal mines after the implementation of federal dust regulation was not the type of coal dust exposure that would cause a clinically significant abnormality). The administrative law judge noted, however, that both Drs.

Cohen and Koenig reported that the length of claimant's coal dust exposure was sufficiently lengthy (over ten years) to cause a respiratory impairment and that the regulation at Section 718.203(b), providing a rebuttable presumption that pneumoconiosis arose out of coal mine employment based on ten years of coal mine employment, added further support for the opinions of Drs. Cohen and Koenig. *Clark*, *supra*. Thus, the administrative law judge rationally found Dr. Fino's opinion entitled to less weight. *Clark*, *supra*; *see* 65 Fed. Reg. 79938-79945 (Dec. 20, 2000). Moreover, while noting that all five physicians were board certified pulmonary specialists, the administrative law judge accorded greater weight to the opinion of Dr. Cohen, based on his curriculum vitae showing extensive experience in the area of coal workers' pneumoconiosis. This was rational. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-266, 2-280-81 (7th Cir. 2001)("It was rational to give great weight to Dr. Cohen's views, particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research."); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). We, therefore, affirm the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis as it was supported by substantial evidence and in accordance with law. *See Trumbo*, *supra*; *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Finally, employer contends that the evidence is insufficient to establish total disability due to pneumoconiosis. We disagree. Contrary to employer's contention, Dr. Cohen found claimant totally disabled due to pneumoconiosis and Dr. Koenig found that coal dust exposure significantly contributed to claimant's chronic obstructive pulmonary disease and resulting total disability. These opinions are, contrary to employer's contention, sufficient to establish that pneumoconiosis was a substantially contributing factor in claimant's total disability. 20 C.F.R. §718.204(c); *see Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Further, the administrative law judge permissibly found that the opinions of Drs. Koenig and Cohen outweighed the contrary opinions of Drs. Rusakoff, Fino and Hasson as they were better documented and reasoned. *Fields*, *supra*. Therefore, the administrative law judge's disability causation finding is rational and must be affirmed. 20 C.F.R. 718.204(c).

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *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 if the administrative law judge's findings are supported by substantial evidence, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 1223, 18 BLR 2-105, 2-109-110 (7th Cir.

1994). (It is the sole province of the administrative law judge to weigh the evidence and resolve conflicts therein). Consequently, we affirm the administrative law judge's finding that the evidence of record established entitlement to benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge