BRB No. 03-0660 BLA

JOSEPH G. HROBAK	)	
	)	
Claimant-Petitioner	)	
	)	
ABC COAL COMPANY	)	DATE ISSUED: 06/23/2004
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits (Upon Remand By The Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Richard J. Orloski, (Orloski, Hinga, Pandaleon & Orloski) Allentown, Pennsylvania, for claimant.

William E. Wyatt, Jr. and John J. Notarianni (Fine, Wyatt and Carey, P.C.), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (Upon Remand By The Benefits Review Board)(01-BLA-0225) of Administrative Law Judge Robert D. Kaplan on a request for modification of the denial of 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 judge found that the parties stipulated to fifteen years of coal mine employment and the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 based on the date of filing. The prior history of the case is set forth in the Board's most recent decision in *Hrobak v. ABC Coal Co.*, BRB No. 02-0308 BLA (Oct. 9, 2002)(unpub.). In that decision, the Board affirmed, in part,[2] and vacated, in part, the decision of the administrative law judge denying benefits. The Board remanded the case for reconsideration of the medical opinion evidence at Section 718.202(a)(4) to determine whether Dr. Aquilina qualified as claimant's treating physician, and if he did, whether Section 718.104(d) was applicable to Dr. Aquilina's July 11, 2001, deposition testimony. The Board further instructed the administrative law judge to consider all the relevant evidence together to determine whether claimant established the existence of pneumoconiosis pursuant to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The Board affirmed the administrative law judge's accordance of less weight to the opinion of Dr. Gacad, on the existence of pneumoconiosis, because it was unclear and contradictory. Additionally, the Board held that the administrative law judge erred in finding the new medical opinion evidence insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). The Board held that the administrative law judge impermissibly substituted his own opinion for those of Drs. Aquilina and Gacad and mischaracterized Dr. Levinson's opinion on the issue of total disability. The Board, therefore, remanded the case for the administrative law judge to reconsider the opinions of Drs. Aquilina, Gacad and Levinson pursuant to Section 718.204(b)(2)(iv).

On remand, the administrative law judge found that even though Dr. Aquilina qualified as claimant's treating physician, the current medical opinion evidence was nonetheless insufficient to establish the existence of pneumoconiosis; that the x-ray and medical opinion evidence when weighed together did not establish the existence of pneumoconiosis; and that claimant had not, therefore, established a basis for modification of the prior denial because the new evidence did not establish a change in conditions and claimant had not alleged that a mistake in a determination of fact had been made in the prior decision. Accordingly, the administrative law judge found that the existence of

[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] The Board affirmed the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a)(1)-(3) and 718.204(b)(2)(i)-(iii). *Hrobak v. ABC Coal Co.*, BRB No. 02-0308 BLA (Oct. 9, 2002)(unpub.).

pneumoconiosis, an essential element of entitlement, was not established based on all the evidence of record, and denied benefits.

On appeal, claimant contends that the opinion of Dr. Aquilina, which was documented and reasoned, should have been given controlling weight because Dr. Aquilina was claimant's treating physician. Claimant also contends that the administrative law judge should have credited the opinion of Dr. Gacad on total disability. Employer responds, urging affirmance of the denial of benefits. 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(a), 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*).

Claimant contends that the administrative law judge erred in not according controlling weight to the opinion of Dr. Aquilina, who was claimant's treating physician, on the issue of pneumoconiosis.

In weighing the medical opinions, the administrative law judge accorded greater weight to the opinion of Dr. Levinson, who found no pneumoconiosis, as he found it to be better reasoned and documented than the opinion of Dr. Aquilina. The administrative law judge placed substantial weight on Dr. Levinson's opinion because he relied, in part, on the reversibility exhibited on claimant's August 24, 2000 pulmonary function study to find that claimant did not have pneumoconiosis. The administrative law judge further found significant the fact that Dr. Aquilina agreed with Dr. Levinson that this was a clinical sign contraindicating the presence of pneumoconiosis. In addition, the administrative law judge accorded greater weight to the opinion of Dr. Levinson because, as a board-certified internist and pulmonologist, he was better-qualified than Dr. Aquilina, who was a board-certified anesthesiologist.[3]

[3] The record reveals that Dr. Levinson is Board certified in internal medicine and pulmonary disease, while Dr. Aquilina is Board certified in anesthesia. Director's Exhibit 86; Claimant's Exhibit 6.

Contrary to claimant's argument, the administrative law judge is not always required to accord greater weight to the opinion of a treating physician. 20 C.F.R. §718.104(d)(5). In this case, the administrative law judge recognized that Dr. Aquilina was claimant's treating physician, Decision and Order at 7, but nonetheless found that, despite his status as claimant's treating physician, Dr. Aquilina's diagnosis of pneumoconiosis was outweighed by the better reasoned and documented opinion of Dr. Levinson, who had better qualifications. The administrative law judge, therefore, accorded greater weight to the opinion of Dr. Levinson. This was proper. 20 C.F.R. §718.104(d)(5); *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002)(qualifications of competing physicians and the quality of their respective reasoning to be considered by administrative law judge); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997)(administrative law judge may permissibly require treating physician to provide more than a conclusory statement); *see also Eastover Mining Co. v. Williams*, 2003 WL 21756342 (6th Cir. July 31, 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Colleries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its inferences on appeal if the administrative law judge's findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the new medical opinion evidence failed to establish the existence of pneumoconiosis, and therefore a change in conditions. Accordingly, as the new evidence failed to establish the existence of pneumoconiosis and claimant did not contend that the finding of no pneumoconiosis was wrong in the prior decision, the administrative law judge properly found that modification was not established. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Hess v. Director, OWCP*, 21 BLR 1-141 (1998). Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, on the whole record, benefits were properly denied, *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1, and we need not address claimant's argument regarding total disability.

Accordingly, the administrative law judge's Decision and Order Denying Benefits (Upon Remand By the Benefits Review Board) is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge