BRB No. 03-0857 BLA

RICHARD N. KESLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARTINKA COAL COMPANY	)	DATE ISSUED: 06/24/2004
	)	
Employer-Respondent	)	
	)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

Claimant appeals the Decision and Order--Denying Benefits (2003-BLA-5104) of Administrative Law Judge Daniel L. Leland rendered 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 credited claimant with twenty-four and one-half years of coal mine employment[2] and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b). The administrative law judge also found that while claimant additionally established the existence of asbestosis, he did not establish that it arose out of coal mine employment. The administrative law judge further found, however, that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the issue of total disability because he improperly accorded greater weight to the opinion of Dr. Renn, who opined that the claimant has the pulmonary capacity to perform his usual coal mine work, than to the opinion of Dr. Rasmussen, that claimant is totally disabled from a respiratory standpoint. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

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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 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 record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The administrative law judge's findings that claimant has twenty-four and one-half years of coal mine employment, that his usual coal mine work was that of a shear operator, that he established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b), that he additionally established the existence of asbestosis but did not establish that it arose out of coal mine employment, and that he further failed to establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that the weight of the medical opinion evidence, represented by the opinion of Dr. Renn, was insufficient to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 8. Claimant initially contends that the administrative law judge erred in discrediting Dr. Rasmussen's opinion, that the oxygen uptake and breathing reserve values associated with Dr. Renn's November 19, 2002 exercise blood gas study actually demonstrate that claimant does not have the respiratory capacity to perform his usual coal mine work, for the "sole reason that this test did not meet the criteria for total disability" pursuant to Section 718.204(b)(2)(ii). Claimant's Brief at 13. Contrary to claimant's arguments, while the administrative law judge did note that the November 19, 2002 blood gas studies nonetheless yielded non-qualifying results, this was not the "sole" reason, or even the primary reason, for according less weight to Dr. Rasmussen's opinion and to his interpretation of these studies. Rather, the administrative law judge properly accorded less weight to Dr. Rasmussen's opinion for the additional reasons that it was based in large part on a December 10, 2001 qualifying exercise blood gas study which was disparately lower than subsequent studies, Dr. Rasmussen possesses lesser qualifications than Dr. Renn, and his opinion was based on a smaller portion of the medical evidence than the opinion of Dr. Renn. Decision and Order at 8; *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc recon.*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR at 1-113 (1988).

Claimant further asserts that the administrative law judge erred in crediting Dr. Renn's opinion as supportive of a finding of no respiratory disability. Claimant specifically asserts that Dr. Renn's determination regarding claimant's anaerobic threshold, as derived from his November 19, 2002 blood gas study results, as well as his opinion that claimant has a mild ventilatory impairment, when compared with the exertional requirements of claimant's usual coal mine work, actually support a finding that claimant is totally disabled from performing that work. Claimant's Brief at 17, 19. On reviewing Dr. Renn's opinion and the administrative law judge's findings, we conclude that the administrative law judge permissibly accorded determinative weight to the opinion of Dr. Renn. The administrative law judge noted that in his May 9, 2003

deposition, Dr. Renn specifically addressed Dr. Rasmussen's contention that, despite yielding non-qualifying values, the results of the November 19, 2002 blood gas study indicated pulmonary disability, and fully explained his contrary opinion that the tests results were normal and represented only that claimant was limited by cardiovascular deconditioning and not by gas exchange or pulmonary reserve. Decision and Order at 6; Employer's Exhibit 8 at 28-31. In addition, while Dr. Renn did opine that claimant has a mild ventilatory defect, he further opined that despite this, claimant had the respiratory capacity to perform his usual coal mine work as a shear operator. Decision and Order at 6, 8; Employer's Exhibit 8 at 25. Finally, as noted above, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Renn than to the opinion of Dr. Rasmussen based on his superior qualifications and his more thorough review of the evidence of record. *Scott*, 14 BLR at 1-37; *Dillon*, 11 BLR at 1-113.

The administrative law judge is empowered to weigh the medical evidence 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 if the administrative law judge's findings are supported by the record. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997)(it is the administrative law judge's duty to analyze the relevant evidence); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 951, 21 BLR 2-23, 2-28, 2-31 (4th Cir. 1997)(the administrative law judge is empowered to make credibility determinations, to weigh the evidence presented, and to draw his own conclusions therefrom); *Anderson*, 12 BLR 1-111. Considering Dr. Rasmussen's opinion, along with the other medical evidence of record, the administrative law judge properly found that claimant failed to establish a totally disabling respiratory impairment, *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge