BRB No. 04-0815 BLA

NICK L. BRANDOLINO Claimant-Petitioner v. WYOMING FUEL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/16/2005 DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Sisto J. Mazza, Trinidad, Colorado, for claimant.

Richard L. Fanyo and Michelle R. Brandt (Dufford & Brown, P.C.), Denver, Colorado, for employer.

Jeffrey S. Goldberg (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-0024) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) 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). This case has a lengthy history which is set forth by the administrative law judge in his decision.

That history dealt in large part with the resolution of the material change in conditions issue involved in this case. Employer, does not now, however, contest that a material change in conditions has occurred. The only issues contested by employer are the existence of pneumoconiosis, causal relationship, total disability, and causation. Considering all the evidence of record, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment and total disability established. The administrative law judge found, however, that disability causation was not established. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred by applying the newly promulgated regulation set forth in Section 718.204(c)(1) rather than applying the "contributing cause" standard articulated in *Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989), when addressing the issue of disability causation. Claimant also argues that, had the administrative law judge applied the correct standard, he would have found disability causation established by the opinion of Dr. Mapel, a Board-certified pulmonary specialist, retained by the Department of Labor (DOL), who opined that claimant had coal workers' pneumoconiosis which would have prevented him from performing his last coal mine job and who found that claimant's coal workers' pneumoconiosis contributed 100% to claimant's impairment. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director) responds, arguing that the administrative law judge properly applied the disability causation definition contained in Section 718.204(c)(1) because this regulation, one of the newly amended regulations implemented by the Secretary of Labor on December 20, 2000, became effective on January 19, 2001 and is immediately applicable to the instant claim which was pending as of January 19, 2001. The Director also argues that revised Section 718.204(c)(1) and the disability causation set forth by the Tenth Circuit in *Mangus* are consistent. Accordingly, the Director urges the Board to reject claimant's argument in this regard.[1]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] The administrative law judge's determinations regarding length of claimant's coal mine employment, the existence of pneumoconiosis, causal relationship, and total disability pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b) are affirmed as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2-4.

In order to establish entitlement to benefits in a miner's claim under 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. 20 C.F.R. §§718.3, 718.201, 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*).

Claimant argues that the administrative law judge erred by applying the newly promulgated regulation set forth in Section 718.204(c)(1) for determining whether claimant's total disability was due to pneumoconiosis because Section 718.204(c)(1) applies prospectively only, or more specifically, to claims filed after December 2000. Since the instant claim was filed on October 1, 1985,[2] claimant asserts that the *Mangus* standard, which provided that claimant need prove only that his pneumoconiosis was "at least a contributing cause" to his total disability, is controlling in this case, and therefore, the administrative law judge erred by requiring claimant to prove that his pneumoconiosis was a "substantial contributing cause" as mandated in Section 718.204(c)(1). Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
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> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

Citing Sections 718.2 and 725.2(c), employer and the Director argue that the administrative law judge properly applied the amended disability causation standard set forth in Section 718.204(c)(1) because the language regarding the applicability of the

[2] Claimant, Nick J. Brandolino, filed his first application for benefits on July 6, 1982, which was finally denied by the district director on July 31, 1981. Director's Exhibit 26. Claimant filed a second application for benefits on October 1, 1985, which is pending herein. Director's Exhibit 1.

revised regulations expressly provides that the provisions under Part 718, with the exception of regulations that are specifically delineated, are immediately applicable to any claim pending on January 19, 2001, regardless of when a claimant filed his/her application for benefits. Moreover, both employer and the Director assert that the disability causation standard contained in Section 718.204(c)(1) is, in any case, consistent with the prior regulation found at Section 718.204(b) (2000), because the preamble to the amended regulations explains that the intention of DOL was not to alter current law when revising the regulations but rather, to codify the various formulations of existing case law, as defined by several United States Courts of Appeals. One of the cases DOL cited is *Mangus*, a decision of the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises. In *Mangus* the court rejected the requirement that disability be described as "significant" or "substantial" insofar as these words implied that claimant must quantify or rank pneumoconiosis as a causative factor of his disability. Rather, the court explained the appropriate standard to be used as guidance is "if the pneumoconiosis is at least *a contributing cause*, there is a sufficient nexus between the pneumoconiosis and the total disability to satisfy claimant's burden of proof." 882 F.2d at 1531, 13 BLR at 2-19 [emphasis in original].

We agree with employer and the Director that the revised regulation at Section 718.204(c)(1) is applicable in this case because the claim was pending on January 19, 2001. 20 C.F.R. §§718.2; 725.2(c); *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003). We need not reach the argument as to whether the contributing cause standard set forth in *Mangus* and the substantially contributing cause standard set forth in Section 718.204(c) are in conflict, however, since the physician's opinion at issue, which was found by the administrative law judge to be unreasoned, could not meet either standard.

Claimant avers that because the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability established, disability causation "would have been easily established" based on the opinion of Dr. Mapel, a Board-certified pulmonary specialist who examined claimant on behalf of DOL, and who found that claimant had coal workers' pneumoconiosis which would prevent him from performing his last coal mine employment and that the coal workers' pneumoconiosis contributed 100% to claimant's impairment. Claimant's Brief in Support of Petition for Review at 5.

In evaluating whether the medical opinion evidence was sufficient to demonstrate total disability due to pneumoconiosis at Section 718.204(c), however, the administrative law judge found that Dr. Mapel's diagnosis of totally disabling coal workers' pneumoconiosis, expressed through entries on a single DOL black lung examination form, was entitled to little weight because Dr. Mapel provided only a very limited explanation for his conclusion that claimant's total disability was due to pneumoconiosis and he was not subject to cross-examination. Further, the administrative law judge found

that there was no indication that the doctor had reviewed any additional evidence other than that associated with his own pulmonary evaluation of claimant. Instead, the administrative law judge accorded determinative weight to the opinion of Dr. Repsher, who found the existence of pneumoconiosis, but in a well-reasoned and better documented report, based on evidence gathered between 1992 and 1998, concluded that claimant's disability was due to his heart disease, rather than pneumoconiosis. This was rational. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *see also North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Carpeta v. Mathies Coal Co.,* 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 4-5. Furthermore, claimant alleges no error in the administrative law judge's discrediting of Dr. Mapel's opinion or crediting of Dr. Repsher's opinion. The administrative law judge's determination that the opinion of Dr. Repsher is more reliable than those of the other physicians of record, particularly, in comparison with that of Dr. Mapel, is, therefore, rational and supported by substantial evidence and we affirm his crediting of Dr. Repsher's opinion and his finding that claimant failed to establish disability causation pursuant to Section 718.204(c)(1). *See Kennellis Energies v. Director, OWCP* [*Ray*], 333 F.3d 822, 826, 22 BLR 2-591, 2-598 (7th Cir. 2003) (making credibility determinations and resolving inconsistencies in evidence is within sole province of administrative law judge); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (crediting of physician's report as reasoned is credibility determination within purview of administrative law judge).

Consequently, because the administrative law judge's determination that claimant failed to establish total disability due to pneumoconiosis, a requisite element of entitlement under Part 718, is rational and supported by substantial evidence, we affirm the administrative law judge's determination that claimant's entitlement to benefits is precluded. *See Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1. Because the administrative law judge found the opinion of Dr. Mapel regarding disability causation to be less reasoned than the opinion of Dr. Repsher, who found that claimant's disability was entirely due to heart disease, we need not address claimant's argument as to whether there is a conflict in the disability causation standard set forth by the Tenth Circuit in *Mangus* and the revised standard set forth in revised Section 718.204(c). The administrative law judge's analysis of the medical opinion evidence, in this case, would preclude a finding of disability causation under either standard.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge