BRB No. 06-0687 BLA

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| BRUCE POLLY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| TROJAN MINING & PROCESSING | ) | DATE ISSUED: 06/15/2007 |
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| and | ) | |
| | ) | |
| TRAVELERS INSURANCE 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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Bruce Polly, Jenkins, Kentucky, *pro se*.

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (02-BLA-5472) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), denying benefits on modification 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).[2] The parties stipulated to, and the administrative law judge found, at least seventeen years of coal mine employment. Decision and Order at 2-4; Hearing Transcript at 9-10, 17; Director's Exhibit 107. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 19. Pursuant to claimant's request for modification, *see* 20 C.F.R. §725.310 (2000), the administrative law judge reviewed all of the evidence of record to determine whether there was a mistake in a determination of fact in the prior denials and whether new evidence showed a change in conditions. Reviewing the prior denials, the administrative law judge found that a mistake in a determination of fact had not been made. However, the administrative law judge found that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and thus, established a change in conditions pursuant to Section 725.310 (2000). Decision and Order at 2-3, 19-23; Director's Exhibits 1, 19, 61, 68. Considering all of the evidence of record, the administrative law judge concluded that it was sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 23-28. The administrative law judge concluded, however, that the evidence was insufficient to

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant filed his claim for benefits with the Department of Labor on December 15, 1993. The claim was finally denied by the district director on November 10, 1994, as claimant failed to establish any element of entitlement. Director's Exhibits 1, 18. Claimant requested modification for the first time on February 28, 1995. That request was denied by the district director on October 27, 1995, as claimant failed to establish any element of entitlement. Director's Exhibits 19, 48. Claimant requested a hearing before the Office of Administrative Law Judges and Administrative Law Judge Robert L. Hillyard denied the claim on November 9, 1998, as claimant failed to establish any element of entitlement. Director's Exhibits 50, 60. Claimant filed his second request for modification on August 30, 1999. That request was denied by the district director on November 4, 1999, for failure to establish any element of entitlement. Director's Exhibits 61, 67, 68. On October 30, 2000, claimant filed his third request for modification, the denial of which is the subject of this appeal.

establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 28-30. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, asserting that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one 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*).

The administrative law judge, as trier-of-fact, must determine the credibility of the evidence of record and the weight to be accorded the evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The Board cannot reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's decision denying benefits is rational, supported by substantial evidence, and in accordance with law.[3] In considering whether the evidence established disability causation, the administrative law

[3] The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibits 2, 5-6, 28; Decision and Order at 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

judge permissibly accorded less weight to the medical opinions submitted prior to 1999 as they were not as probative as more recent evidence. Decision and Order at 24, 26, 29; *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

Turning to the medical opinions submitted since 1999, the administrative law judge discussed the opinions of Drs. Jarboe, Dahhan Broudy and Fino and permissibly concluded that they failed to establish disability causation pursuant to Section 718.204(c). Decision and Order at 29-30; Director's Exhibits 71, 76, 90; Employer's Exhibits 2-4, 11; *Cooley*, 845 F.2d at 624, 11 BLR at 2-148; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR at 1-155; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). The administrative law judge correctly noted that Dr. Fino did not find that claimant was totally disabled, and did not therefore offer an opinion as to disability causation. Decision and Order at 29. The administrative law judge rationally rejected the opinions of Drs. Jarboe and Dahhan, as those doctors did not diagnose the existence of pneumoconiosis.[4] *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989). Decision and Order at 29; Director's Exhibits 76, 90; Employer's Exhibits 2, 4, 11. The administrative law judge found that Dr. Broudy's opinion was the most probative of record, as he was the only physician to offer a clear diagnosis of both pneumoconiosis and total disability.[5] Decision and Order at 29. The administrative law judge rationally concluded, however, that because Dr. Broudy found claimant to be totally disabled due to his cigarette smoking, not coal workers' pneumoconiosis, claimant failed to prove disability causation by a preponderance of the evidence. *See* 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 506-507, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); Decision and Order at 29-30; Director's Exhibit 71; Employer's Exhibit 3.

[4] Drs. Jarboe and Dahhan found 1) that claimant did not have clinical pneumoconiosis and 2) that claimant's respiratory impairment was not due to coal mine employment. Employer's Exhibits 4, 11.

[5] Dr. Broudy acknowledged that claimant's x-ray showed simple pneumoconiosis, although he questioned whether claimant had pneumoconiosis. Dr. Broudy also found that claimant had a totally disabling respiratory impairment, but that it was not due to coal mine employment or coal workers' pneumoconiosis. Employer's Exhibit 3.

Claimant has an affirmative duty to establish that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis by competent medical evidence. *See Gee*, 9 BLR at 1-5; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. As claimant has failed to meet his burden, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish disability causation pursuant to Section 718.204(c).

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