BRB No. 99-0588 BLA

WILLIAM BARTOK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY)		DATE ISSUED:
	)	
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 George P. Morin, Administrative Law Judge, United States Department of Labor.

William Bartok, Adena, Ohio, *pro se*.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (98-BLA-0306) of Administrative Law Judge George P. Morin on a duplicate claim[1] 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 is before the Board for the third time. Claimant filed his initial application for

[1] Claimant is William Bartok, the miner, who filed his first application for benefits on November 16, 1979. Director's Exhibit 29. Claimant filed a duplicate application for benefits on July 13, 1994, which is the subject of the instant case. Director's Exhibit 1.

benefits on November 16, 1979 and Administrative Law Judge George P. Morin adjudicated this claim pursuant to 20 C.F.R. Part 727. Administrative Law Judge Morin found that, although claimant established invocation of the interim presumption of total disability due to pneumoconiosis under 20 C.F.R. §727.203(a)(1), employer established rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(2)-(4). Accordingly, he denied benefits. Claimant appealed and the Board affirmed the denial. *Bartok v. Consolidation Coal Co.*, BRB No. 87-2175 BLA (Jan. 31, 1989)(unpub.).

Thereafter, claimant filed a petition for modification on April 17, 1989 with supporting evidence, which the district director denied on December 19, 1989. Director's Exhibit 31. Administrative Law Judge Gerald M. Tierney held a formal hearing on modification on December 14, 1990 and, in his Decision and Order, found that claimant failed to demonstrate either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. Director's Exhibit 31.

Subsequently, claimant filed a duplicate application for benefits on July 13, 1994. Director's Exhibit 1. The district director denied benefits, claimant requested a formal hearing, and the case was assigned to Administrative Law Judge Tierney, who found that, although claimant established a material change in conditions at Section 725.309(d), he failed to establish the existence of pneumoconiosis at Section 718.202(a) and total disability pursuant to Section 718.204(c). Accordingly, benefits were denied. Claimant timely appealed and the Board affirmed the denial of benefits. *Bartok v. Consolidation Coal Co.*, BRB No. 96-1102 BLA (Nov. 22, 1996)(unpub.); Director's Exhibit 31. Claimant subsequently appealed the Board's decision to the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises. The court dismissed the case on January 7, 1997 due to claimant's failure to pay the requisite filing fees. Director's Exhibit 33.

On February 21, 1997, claimant filed another petition for modification accompanied by supporting evidence and a formal hearing was held before Administrative Law Judge Morin (administrative law judge) on May 28, 1998. Director's Exhibit 34. Inasmuch as employer stipulated to the existence of pneumoconiosis arising out of coal mine employment, elements that were previously adjudicated against claimant, the administrative law judge determined that claimant demonstrated a change in conditions under Section 725.310. Addressing the merits of entitlement, the administrative law judge found that claimant established total respiratory disability pursuant to Section 718.204(c)(4), but failed to establish that such disability was due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this appeal, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will not participate in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, 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).

With respect to Section 718.204(b), there are nine physicians' opinions of record. Dr. Del Vecchio conducted several pulmonary evaluations of claimant and opined that claimant suffers from an eighty/ninety percent disability due entirely to his exposure to coal dust in the mines. Director's Exhibits 23, 29, 31. Dr. Arakawa, who had been treating the miner since July 1975, diagnosed moderately severe coal workers' pneumoconiosis. Director's Exhibits 20, 36; Employer's Exhibit 6. Dr. Reddy, also an examining physician, opined that claimant was totally disabled due to pneumoconiosis because claimant had "practically no history of smoking" and there was a lack of clinical data indicating that the pulmonary condition was asthma. Director's Exhibit 3; Employer's Exhibits 7, 8. After conducting his pulmonary evaluation of claimant, Dr. Altmeyer diagnosed "very minimal degree of non-clinically significant simple coal workers' pneumoconiosis," fluctuating degree of respiratory impairment due to asthma, and total and permanent disability due to claimant's advanced age. Employer's Exhibits 11, 15. Dr. Long, reviewing a limited number of

[2] We affirm the administrative law judge's findings pursuant to Sections 718.202(a), 718.203(b), 718.204(c), and 725.310, which are not adverse to claimant, inasmuch as these determinations 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 3, 5.

medical records, diagnosed coal workers' pneumoconiosis, based on three positive x-ray interpretations by B-readers, and total disability, based on the qualifying April 22, 1991 pulmonary function study. Director's Exhibit 39. In her deposition, Dr. Long testified that she would defer to the opinion of a physician who had had an opportunity to examine all of the medical records before reaching a conclusion as to the cause of ventilatory impairment. Director's Exhibit 42 at 11. After conducting several pulmonary evaluations of claimant, Dr. Fino found insufficient evidence to diagnose simple coal workers' pneumoconiosis or an occupationally acquired pulmonary condition and instead diagnosed a totally disabling respiratory impairment due to asthma/asthmatic bronchitis. Director's Exhibits 21, 31, 41; Employer's Exhibits 9, 14. Dr. Morgan, opining that there was no objective evidence to justify a diagnosis of coal workers' pneumoconiosis, found that claimant had a mild to moderate respiratory impairment unrelated to coal mine employment. Employer's Exhibit 5. Dr. Morgan stated, "To talk of Mr. Bartok being completely disabled for work is somewhat inappropriate in that quite clearly Mr. Bartok is incapable of work because of his age." *Ibid*. Likewise, Dr. Kress, opining that claimant does not suffer from an impairment attributable to coal workers' pneumoconiosis or his former coal mine employment, found that claimant retained the respiratory or pulmonary capacity to perform his usual coal mine work, and was disabled for work considering his age, hypertension, and mitral valvular insufficiency. Director's Exhibit 29. Dr. Zaldivar, finding the records he reviewed insufficient and inconclusive due to lack of valid pulmonary function studies, did not render an opinion as to the presence of pulmonary disability. Employer's Exhibit 6.

We affirm the administrative law judge's determination that claimant failed to satisfy his burden of establishing total disability due to pneumoconiosis pursuant to Section 718.204(b). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-186 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge permissibly found Dr. Long's opinion insufficient to demonstrate total disability due to pneumoconiosis since Dr. Long was only Board-eligible in internal medicine, her opinion was based on a limited review of the evidence, and she acknowledged that she would defer to the opinion of a physician who had the opportunity to review records over time. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984); Decision and Order at 6. Likewise, the administrative law judge reasonably found that Dr. Arakawa's broad conclusion, that all of claimant's conditions were related to coal workers' pneumoconiosis, deserved little weight, notwithstanding his longtime treatment of claimant, because Dr. Arakawa is a general practitioner with no board-certification. The doctor testified at his deposition that he has no particular expertise in interpreting studies of lung function, and stated that he would also defer to the opinion of a pulmonologist. *See Griffith v. Director,*

OWCP, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Worley*, *supra*; Decision and Order at 6. The administrative law judge rationally discounted Dr. Reddy's opinion even though he was Board-certified in internal and pulmonary medicine, because he did not have an opportunity to review additional medical records or to observe the patterns of claimant's pulmonary condition over time. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716 (1983); Decision and Order at 6. Next, the administrative law judge permissibly discounted Dr. Del Vecchio's opinion that claimant was disabled due to pneumoconiosis because the record was devoid of evidence establishing Dr. Del Vecchio's medical qualifications and Dr. Del Vecchio noted that claimant's pulmonary status had improved, reducing the degree of claimant's pulmonary impairment from ninety percent in his March 1989 report to eighty percent in April 1992 report, which was contrary to the opinions of Drs. Fino and Altmeyer that improvement in pulmonary function is inconsistent with pneumoconiosis as the cause of claimant's respiratory impairment. *See Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); *see generally Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); Decision and Order at 7. The administrative law judge properly accorded "controlling weight" to the opinions of Drs. Altmeyer and Fino that claimant's total disability was not due to pneumoconiosis inasmuch as these physicians were Board-certified in internal and pulmonary medicine, had the opportunity to both examine claimant and observe the pattern of claimant's pulmonary impairment based on their review of the evidence developed over the years, and explained that pneumoconiosis can be present without causing an impairment. The administrative law judge reasonably found that even though Dr. Fino disagreed with Dr. Altmeyer's opinion that a chest x-ray revealed the presence of pneumoconiosis, he assumed that if pneumoconiosis were present, it would not be associated with claimant's respiratory or pulmonary impairment.[3] Decision and

[3] During his deposition on May 18, 1998, Dr. Fino was asked would he change his opinion as to the cause of claimant's pulmonary insufficiency, assuming that Dr. Altmeyer's positive x-ray reading showed simple coal workers' pneumoconiosis. Dr. Fino replied, "No. ... Because, again, the abnormalities noted in 1995 by me on the valid lung function study are not consistent with a coal mine dust related condition." Employer's Exhibit 14 at 26.

Order at 6.

The administrative law judge's determination that the opinions of Dr. Altmeyer and Fino were entitled to dispositive weight, based on these physicians' superior pulmonary expertise, examinations of claimant, and reviews of the medical records compiled over the years, is rational and contains no reversible error. *See Worley*, *supra*; *Stark*, *supra*; *Rickey*, *supra*; Decision and Order at 6-7. Inasmuch as the administrative law judge need not accept the opinion of any particular medical expert, but must weigh all of the evidence and draw his own conclusions and inferences, we affirm the administrative law judge's discrediting of the opinions of Drs. Long, Arakawa, Reddy, and Del Vecchio, that claimant's total disability is due to pneumoconiosis, inasmuch as this determination is supported by substantial evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Consequently, we affirm the administrative law judge's determination that claimant failed to establish total disability due to pneumoconiosis at Section 718.204(b), a requisite element of entitlement in this Part 718 case, and therefore, affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

Administrative Appeals Judge