BRB No. 02-0553 BLA

RONDAL HATFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MABEN ENERGY CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
SLAB FORK COAL COMPANY	)	
	)	
and	)	
	)	
WESTMORELAND COAL COMPANY)		
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employers/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Phemister (Legal Practice Clinic, Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Robert Weinberger (Employment Programs Litigation Unit; West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer, Slab Fork Coal Company.

Timothy S. Williams (Howard M. Radzely, Acting 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:

Carrier, on behalf of employer, Slab Fork Coal Company, appeals the Decision and Order-Awarding Benefits (01-BLA-0103) of Administrative Law Judge Daniel L. Leland (the administrative law judge) 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] In this case, a duplicate claim, claimant initially filed a claim for benefits on February 28, 1996. Director's Exhibit 28. Maben Energy Corporation (Maben), Slab Fork Coal Company (Slab Fork) and Westmoreland Coal Company (Westmoreland) were all named as responsible operators. Director's Exhibit 28. In a Decision and Order issued on March 3, 1998, Administrative Law Judge Stuart A. Levin credited claimant with thirty-one and three-quarter years of coal mine employment and found that, while Maben was the most recent employer who had employed claimant for at least one year, Maben's bankruptcy prevented it from being the responsible operator. Judge Levin, therefore, found Slab Fork, the next most recent employer, to be the responsible operator. Turning to the merits, however, Judge Levin found that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Accordingly, benefits were denied. Subsequent to claimant's appeal, the Board affirmed the denial of benefits. *Hatfield v. Westmoreland Coal Co.*, BRB No. 98-0813 BLA (Mar. 12, 1999)(unpub.). Claimant took no further action until filing the instant duplicate claim on April 6, 2002. Director's Exhibit 1. The administrative law judge found that claimant established a material change in conditions by demonstrating the existence of pneumoconiosis through newly submitted evidence, and further concluded that the weight of the evidence of record, *i.e.*, the newly submitted evidence and the previously submitted evidence supported a finding of pneumoconiosis, that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment, and that total disability due to pneumoconiosis was established. Accordingly, benefits were awarded.

[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.

On appeal, the West Virginia Coal Workers' Pneumoconiosis Fund (carrier), on behalf of Slab Fork, contends that the administrative law judge erred in excluding exhibits from the record proffered by Westmoreland, at the hearing. Carrier argues that the administrative law judge's exclusion of these exhibits violates 20 C.F.R. §725.456(d)(2000), *see* 20 C.F.R. §725.2, which states, in pertinent part, that all medical records and reports submitted by any party shall be considered by the administrative law judge in accordance with the quality standards. Thus, carrier contends that because these exhibits are clearly relevant to determining whether claimant is entitled to benefits, the administrative law judge's finding must be vacated and the case remanded for consideration of these exhibits. Carrier further contends that the administrative law judge erred in finding that the evidence of record supported a finding of total disability due to pneumoconiosis by crediting the opinion of Dr. Ranavaya, the only physician to find claimant totally disabled due to pneumoconiosis. Claimant, in response, urges that the award of benefits be affirmed, and specifically contends that employer is precluded from raising objections to the exclusion of Westmoreland's exhibits and the validity of the medical evidence as it did not raise these objections before the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, argues that carrier's assertions regarding the evidence proffered by Westmoreland were not made in a timely manner as carrier did not object to the administrative law judge's decision to exclude Westmoreland's exhibits if Westmoreland were dismissed as a party. The Director takes no position on the merits of entitlement.[2]

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).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that the newly submitted evidence established a material change in conditions. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm, as unchallenged, the administrative law judge' s finding that the weight of the evidence of record supports a finding of the existence of pneumoconiosis arising out of coal mine employment. *See Skrack, supra*.

Carrier contends that the administrative law judge must consider all evidence of record in addressing the merits of entitlement. Carrier thus argues that the administrative law judge erred in failing to address the evidence found at Employer's Exhibits 1-16, notwithstanding the fact that this evidence was developed by a party (Westmoreland) that was later dismissed from this case. Carrier contends that the clear regulatory language found at 20 C.F.R. §725.456(d)(2000) requires the administrative law judge to consider all medical records and reports submitted by any party.

At the hearing of February 20, 2002, the administrative law judge initially indicated that he would "conditionally admit all the evidence from the employers," but that he would later exclude from consideration "evidence from the employer that is not found to be the responsible operator." Hearing Transcript at 10. The administrative law judge noted that Slab Fork had no evidence to offer, but that Westmoreland sought to enter sixteen exhibits into the record. Hearing Transcript at 25. The administrative law judge stated that he would "conditionally admit" Westmoreland's exhibits, pending resolution of the responsible operator issue. Hearing Transcript at 25. The administrative law further stated, however, that if he were to determine that Westmoreland was not the responsible operator, he would "exclude" its exhibits. Hearing Transcript at 26. Carrier, on behalf of Slab Fork, raised no objection to the potential exclusion of Westmoreland's exhibits. Subsequently, in a post-hearing brief, carrier again raised no objection to the possibility that Westmoreland's evidence might be excluded. Thus, despite myriad opportunities to do so, carrier failed to challenge the potential exclusion of Westmoreland's exhibits. Subsequently, in the Decision and Order issued April 2, 2002, the administrative law judge found Slab Fork to be the responsible operator and, therefore, excluded from the record the exhibits submitted by Westmoreland which he had conditionally admitted pending resolution of the responsible operator issue. Carrier, on behalf of Slab Fork, did not file a Motion for Reconsideration.

We agree with claimant and the Director, therefore, that carrier's assertions regarding the administrative law judge's decision to exclude the evidence proffered by Westmoreland have not been properly raised before the Board because carrier failed to raise the issue below. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 75 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984); *Taylor v. 3D Coal Co.*, 3 BLR 1-350, 1-355 (1981); *see generally* 20 C.F.R. §§725.456; 725.414 (2000); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-359 (1985); *Somonick v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-892, 1-895 (1984); *Adams v. Island Creek Coal Co.*, 6 BLR 1-677, 1-680-682 (1983). Accordingly, we decline to address carrier's assertions regarding the excluded exhibits.

Carrier next contends that the administrative law judge erred in finding that claimant established total disability and total disability due to pneumoconiosis because the administrative law judge improperly accorded dispositive weight to the opinion of Dr. Ranavaya which was not well-reasoned.

Contrary to carrier's assertion, Dr. Ranavaya's opinion is not the only evidence supportive of total respiratory disability and Dr. Ranavaya's opinion is not unreasoned because he relied, in part, on a blood gas test which resulted in non-qualifying values. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

In finding that claimant established the existence of a totally disabling respiratory impairment, the administrative law judge found that all of the pulmonary function study evidence, Director's Exhibits 9, 28; Claimant's Exhibit 3, was qualifying,[3] that the majority of blood gas study evidence was qualifying, Director's Exhibits 12, 28; Claimant's Exhibit 5; 20 C.F.R. §718.204(b)(2)(i), (ii), and that the overwhelming majority of medical opinions supported a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered all the relevant evidence, and, in a permissible exercise of his discretion, concluded that the weight of such evidence supported a finding of total respiratory disability. This was rational. 20 C.F.R. §718.204(b)(2); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Accordingly, we affirm the administrative law judge's determination that the weight of the evidence of record supports a finding of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2).

In finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis, the administrative law judge accorded greatest weight to the report of claimant's treating physician, Dr. [R]oatsey, who found that pneumoconiosis was a major cause of claimant's pulmonary problems, which was supported by the recent opinion of Dr. Ranavaya and the opinions of Drs. Robbins, Rasmussen and Gaziano. This was rational. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *see Onderko v. Director, OWCP*, 14

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

BLR 1-2 (1989). The administrative law judge found the opinions of Drs. Castle, Fino, Jarboe, and Morgan attributing claimant's pulmonary disability to conditions other than pneumoconiosis, which were not as recent as the former opinions, were entitled to little weight as those doctors were unaware of the recent evidence demonstrating the existence of pneumoconiosis. *See Scott v. Mason Coal Co.*, 2002 WL 832020 (4th Cir. May 2, 2002); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). Accordingly, we affirm the administrative law judge's finding that pneumoconiosis was a substantially contributing factor to claimant's totally disabling respiratory impairment. 20 C.F.R. §718.204(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge