BRB No. 06-0571 BLA

MELVIN WORKMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MCNAMEE RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/21/2007
	)	
Employer/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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Natalee A. Gilmore (Jackson & Kelly, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-6247) of Administrative Law Judge Richard A. Morgan awarding benefits 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). Initially, the administrative law judge addressed employer's motion requesting withdrawal of its waiver of its right to a hearing. Pursuant to the requirements of 20 C.F.R. §725.461, the administrative law judge determined that employer failed to establish good cause for the request and addressed the merits of the case based upon the record before him. Decision and Order at 3-4. With respect to the merits, the administrative law judge found twenty-seven and one-half years of coal mine employment and that employer was the responsible operator. *Id*. at 5. After determining that the present claim is a subsequent claim, the administrative law judge noted the proper standard and found that the newly submitted evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204 and, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[1] *Id*. at 2, 11-15; Director's Exhibits 1-3, 5. Considering the record *de novo*, the administrative law judge concluded that claimant established that he has pneumoconiosis arising out of coal mine employment and is totally disabled by it pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204. *Id*. at 16-19. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in denying its request to withdraw the hearing waiver and in finding the newly submitted medical opinion evidence sufficient to establish total disability and total disability due to pneumoconiosis. Claimant responds, asserting that substantial evidence supports the administrative law judge's award of benefits. The Director, Office of Workers'

[1] Claimant filed his initial claim for benefits on September 11, 1985. Director's Exhibit 1. The district director denied this claim on January 22, 1986, as claimant failed to establish any element of entitlement. *Id*. Claimant filed a second claim on November 18, 1997, which was denied by Administrative Law Judge Robert J. Lesnick on July 19, 2000, as claimant established the existence of pneumoconiosis, but failed to establish that he was totally disabled and that his total disability was due to pneumoconiosis. Director's Exhibit 2. Claimant filed a third claim on September 13, 2001, which was denied by the district director on June 13, 2002, as claimant failed to establish that he was totally disabled and that his total disability was due to pneumoconiosis. Director's Exhibit 3. Claimant took no further action until he filed the present claim on July 28, 2003. Director's Exhibit 5. The district director denied benefits because claimant failed to establish total disability or that his total disability was caused by pneumoconiosis. Director's Exhibits 5, 15. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 17.

Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[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); *''Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[3] Initially, we reject employer's contention that the administrative law judge erred in denying employer's request to withdraw its waiver of its right to a hearing. Employer's Brief at 6-7. This claim was scheduled for a hearing on February 15, 2005, at claimant's request. In light of claimant's failure to appear, the administrative law judge issued an Order to Show Cause in which he required claimant to state why the claim should not be dismissed. Claimant responded that he did not appear at the hearing because he had not been able to retain counsel or acquire a medical examination. The administrative law judge issued an Order of Continuance and subsequently issued an Order scheduling a hearing for October 19, 2005. On October 17, 2005, claimant requested a waiver of the hearing and indicated that employer's counsel did not object to the case being decided on the record. The administrative law judge issued an Order dated October 18, 2005, granting claimant's request. On March 22, 2006, new counsel for employer filed a motion asking the administrative law judge to withdraw employer's waiver of its right to a hearing.

Employer asserts that the administrative law judge should have determined that it established good cause for requesting withdrawal of its waiver of its right to a hearing. We disagree. An administrative law judge is granted broad discretion in resolving

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[2] The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§718.202(a) and 718.203 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record indicates that the miner was last employed in the coal mine industry in West Virginia. Director's Exhibits 1-4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

procedural issues. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1989); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). In this case, the administrative law judge rationally found that employer's change of counsel did not constitute good cause, as required under Section 725.461, on the grounds that employer did not identify any specific harm caused by its waiver, employer was represented by competent counsel when claimant filed his request to waive the hearing, and current counsel waited for over two months after being retained before making the request to withdraw its waiver of its right to a hearing.[4] Decision and Order at 3-4. Because we discern no abuse of discretion in the administrative law judge's determination, we affirm the administrative law judge's refusal to grant withdrawal of employer's waiver. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Pursuant to Section 718.204(b) - (c), the administrative law judge found that Dr. Rasmussen's opinion, that claimant is totally disabled due to pneumoconiosis, is entitled to the greatest weight, as it is well-supported by the objective evidence of record. Decision and Order at 14-15, 18-19; Claimant's Exhibit 1. The administrative law judge further found that the opinion in which Dr. Hussain stated that claimant is not totally disabled is entitled to little weight under Section 718.204(b)(2)(iv) because Dr. Hussain did not explain how the medical data supported his determination. *Id*.; Director's Exhibit 10. The administrative law judge also discredited the opinion in which Dr. Zaldivar stated that claimant is not totally disabled and does not suffer from any lung disease related to dust exposure on the ground that Dr. Zaldivar did not sufficiently document his diagnoses. *Id*. at 14, 18; Employer's Exhibit 2.

Employer contends that the administrative law judge erred in finding that the opinions of Drs. Hussain and Zaldivar were not adequately documented and reasoned. Employer also asserts that the administrative law judge should have discredited Dr. Rasmussen's diagnosis of a totally disabling pulmonary impairment under Section

[4] The regulation at 20 C.F.R. §725.461 provides, in relevant part, that:

> If all parties waive their right to appear before the administrative law judge, it shall not be necessary for the administrative law judge to give notice of, or conduct, an oral hearing...Such waiver may be withdrawn by a party for good cause shown at any time prior to the mailing of the decision in the claim.

20 C.F.R. §725.461(a).

718.204(b)(2)(iv), as the objective studies upon which the doctor relied produced non-qualifying values. Employer further maintains that because Dr. Rasmussen relied upon an inaccurate history of coal mine employment, the administrative law judge erred in according this opinion great weight on the issue of total disability causation at Section 718.204(c). These contentions are without merit.

The administrative law judge acted within his discretion in according little weight to Dr. Hussain's opinion pursuant to Section 718.204(b)(2)(iv), as Dr. Hussain did not explain how the objective data supported his diagnosis of a moderate impairment that is not totally disabling.[5] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge rationally accorded little weight to the opinion of Dr. Zaldivar pursuant to Section 718.204(b)(2)(iv)-(c), as the physician relied upon documentation relevant to the issue of total disability that was several years older than that relied upon by Dr. Rasmussen and, contrary to the administrative law judge's finding at Section 718.202(a), Dr. Zaldivar determined that claimant does not have pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Fagg*, 12 BLR 1-77; *Hutchens*, 8 BLR 1-16.

The administrative law judge permissibly found that Dr. Rasmussen's opinion, that claimant could not perform the work of a beltman due to his pneumoconiosis, was entitled to greater weight than the opinions of Drs. Hussain and Zaldivar. The administrative law judge acted rationally in finding that Dr. Rasmussen's diagnosis of total disability was well-supported by the doctor's comparison of the results of claimant's October 15, 2003 exercise blood gas study to the oxygen uptake level of claimant's usual coal mine employment. *See Trumbo*, 17 BLR 1-85; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Fagg*, 12 BLR 1-77; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; *Kuchwara*, 7 BLR 1-167. The administrative law judge also rationally determined that Dr. Rasmussen's attribution of claimant's totally disabling impairment to coal dust exposure was well-

[5]The administrative law judge noted correctly that because Dr. Hussain stated that pneumoconiosis was a significant contributing cause of the moderate impairment that he diagnosed, his opinion did not contradict a finding of total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). 20 C.F.R. §718.204(c); *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); Decision and Order at 18; Director's Exhibit 10.

supported by the doctor's reference to objective test results that he explained were consistent with lung disease related to coal dust exposure. *Id*.

Contrary to employer's assertion, the administrative law judge was not required to discredit Dr. Rasmussen's opinion on the issue of total disability because the doctor relied upon pulmonary function and blood gas studies that did not produce qualifying values.[6] *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190; *Estep v. Director, OWCP*, 7 BLR 1-904 (1985). Moreover, employer is incorrect in alleging that Dr. Rasmussen's overestimation of the length of claimant's coal mine employment rendered his opinion regarding total disability causation unreasoned. The administrative law judge credited claimant with twenty-seven and one-half years of coal mine employment. Decision and Order at 5. Dr. Rasmussen recorded a coal mine employment history of forty-two and one-half years. Claimant's Exhibit 1. However, the presence of this conflict does not bear upon the validity of the administrative law judge's rationale for according greatest weight to Dr. Rasmussen's opinion under Section 718.204(c), *i.e.*, the fact that Dr. Rasmussen explained how his disability causation opinion was supported by specific objective data. *See Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fagg*, 12 BLR 1-77; Decision and Order at 18; Claimant's Exhibit 1.

We affirm, therefore, the administrative law judge's findings that claimant established that he is totally disabled pursuant to Section 718.204(b)(2) and that pneumoconiosis is a substantially contributing cause of his total disability pursuant to Section 718.204(c), based upon a weighing of the newly submitted evidence and a weighing of the evidence of record as a whole. Thus, we also affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement under Section 725.309(d) and the award of benefits under Part 718. *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *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).

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

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge