BRB No. 97-1009 BLA

JAMES T. BRAHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
T & T FUELS, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lawrence E. Fraley, III (Fraley Legal Services), Reedsville, West Virginia, for claimant.

Stephen E. Crist (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier ("employer") appeals the Decision and Order on Modification - Awarding Benefits (96-BLA-0613) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge

credited claimant with thirty-five years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. In his original Decision and Order - Denying Benefits issued in June, 1995, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that claimant's pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), and that total disability was established at 20 C.F.R. §718.204(c)(4), but not at 20 C.F.R. §718.204(c)(1)-(3). The administrative law judge determined that the evidence did not establish that claimant was totally disabled due to pneumoconiosis. Accordingly, benefits were denied. Director's Exhibit 69.

Claimant requested reconsideration of this Decision and Order, Director's Exhibit 70, which the administrative law judge granted. The administrative law judge remanded the case to the district director for further development of the record. Director's Exhibit 72.

Following evidentiary development, the case was returned to the administrative law judge. Director's Exhibit 83. A hearing was held, and the administrative law judge issued his Decision and Order on Modification - Awarding Benefits in March, 1997. The administrative law judge determined that modification was established based on a mistake in fact in the 1995 Decision and Order. Accordingly, he reviewed and reconsidered all of the evidence and incorporated his earlier length of coal mine employment finding, in addition to his finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and that total disability was not demonstrated pursuant to Section 718.204(c)(1)-(3), but that it was demonstrated pursuant to Section 718.204(c)(4). After considering the medical opinion evidence, the administrative law judge determined that claimant's pneumoconiosis is a substantial contributing factor in his totally disabling respiratory impairment. Accordingly, the administrative law judge granted claimant's motion for reconsideration, vacated his Section 718.204(b) finding made in his 1995 Decision and Order, and awarded benefits.

On appeal, employer maintains that the administrative law judge's existence of pneumoconiosis finding is not supported by the preponderance of the evidence. Employer also asserts that the administrative law judge erred in discrediting the opinions of Drs. Renn, Hippensteel and Fino. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a brief in this appeal.[1]

[1] We affirm the administrative law judge's length of coal mine employment finding and his findings pursuant to Section 718.203(b) and Section 718.204(c)(1)-(3), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer maintains that the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) is not supported by substantial evidence. We disagree. The administrative law judge properly considered the qualifications of the physicians interpreting the x-ray films, 1995 Decision and Order at 11, and permissibly relied upon the preponderance of the films interpreted as positive for pneumoconiosis, 1995 Decision and Order at 12. *See Director, OWCP v. Greenwich Collieries* [Ondecko], 114 S.Ct. 2251, 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); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Dixon v. Director, OWCP*, 8 BLR 1-150 (1985). Consequently, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Employer additionally asserts that the administrative law judge erred by discrediting the opinions of Drs. Renn, Hippensteel and Fino. Specifically, employer asserts that the administrative law judge erred by discrediting these opinions because the physicians failed to consider claimant's correct smoking history. Employer also contends that these physicians' opinions should not be found to be without merit simply because the physicians did not diagnose pneumoconiosis. Further, employer asserts that the administrative law judge should not have discredited the opinions of Drs. Fino and Hippensteel simply because they did not examine claimant.

In finding the medical opinion evidence sufficient to demonstrate total disability pursuant to Section 718.204(c)(4), the administrative law judge considered the opinions of Dr. Jaworski, who examined claimant, and Dr. Rasmussen, claimant's treating physician, that claimant is totally disabled from a pulmonary standpoint. Director's Exhibits 11, 55. The administrative law judge also considered the opinions of Dr. Renn, who examined claimant, and Drs. Hippensteel and Fino, who reviewed the evidence, that claimant is not totally disabled from a pulmonary standpoint. Director's Exhibits 25, 40, 78. The administrative law judge relied upon the preponderance of the opinions from physicians who had examined claimant. 1995 Decision and Order at 13. We hold that the administrative law judge permissibly preferred the opinions of the physicians who examined claimant, 1995 Decision and Order at 13, *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993), and he rationally relied upon the opinion of Dr. Rasmussen, since he is claimant's treating physician, 1995 Decision and Order at 13, *see Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Wetzel v. Director, OWCP,* 8 BLR 1-138 (1985). Consequently, inasmuch as the administrative law judge based his finding on the preponderance of the evidence from physicians who examined claimant, *see Ondecko, supra,* we affirm the administrative law judge's finding that the evidence demonstrates total

disability pursuant to Section 718.204(c)(4).

We now review the administrative law judge's Section 718.204(b) findings.[2] We affirm the administrative law judge's reliance on Dr. Rasmussen's opinion and his finding that claimant has established that his pneumoconiosis contributes to his disabling respiratory impairment. 1997 Decision and Order at 6-7 (unpaginated). Contrary to employer's assertion, we hold that the administrative law judge permissibly relied upon the opinion of Dr. Rasmussen, based on his status as claimant's treating physician. *See Grigg, supra*; *Worley, supra*; *Wetzel, supra*. Moreover, inasmuch as the administrative law judge found that Dr. Rasmussen had a better understanding of claimant's overall condition, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*), and that his opinion is better supported by the evidence of record, *see Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985), it was proper for the administrative law judge to rely upon Dr. Rasmussen's opinion. Further, we reject employer's contention that the administrative law judge erred by according less weight to the opinions of Drs. Fino, Renn and Hippensteel. The administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and Hippensteel because they did not examine claimant, 1997 Decision and Order at 6-7 (unpaginated). *See Grizzle, supra.* In addition, we affirm the administrative law judge's permissible finding that Dr. Renn's opinion regarding causation is not persuasive since the administrative law judge properly determined that Dr. Renn based his causation opinion on two underlying premises, *i.e.,* that claimant does not have pneumoconiosis or a total respiratory disability, which conflict with the administrative law judge's findings.[3] *See Clark, supra*; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

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[2] In the 1995 Decision and Order, the administrative law judge found that claimant failed to establish that his pneumoconiosis was totally disabling pursuant to Section 718.204(b). However, on reconsideration/modification, the administrative law judge reconsidered this issue. In his 1997 Decision and Order, the administrative law judge vacated his earlier finding pursuant to Section 718.204(b). We therefore review the administrative law judge's Section 718.204(b) findings made in the 1997 Decision and Order.

[3] We also reject employer's assertion that the administrative law judge erred by discrediting the opinions of Drs. Renn, Hippensteel and Fino for failing to consider

Accordingly, we affirm the administrative law judge's Section 718.204(b) finding. We therefore affirm the administrative law judge's finding that modification is established based on a mistake in a determination of fact, and the administrative law judge's award of benefits.

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claimant's correct smoking history. The administrative law judge did not use this as a basis for discrediting these opinions in his 1997 Decision and Order.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge