BRB No. 98-0775 BLA

MEMPHIS VANDYKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VANDYKE BROTHERS 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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise III (Vinyard & Moise), Abingdon, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-226) of Administrative Law Judge Stuart A. Levin denying benefits on a request for modification in 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). In the original Decision and Order dated August 29, 1990, Administrative Law Judge Giles J. McCarthy credited claimant with twenty-eight years and six months of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied. Claimant appealed the denial of benefits to the Board and in *Vandyke v. Vandyke Brothers*

Coal Co., BRB No. 90-2319 BLA (Nov. 19, 1992) (unpub.), the Board affirmed the denial of benefits. Claimant appealed to the United States Court of Appeals for the Fourth Circuit which vacated the Board's decision and remanded the case for further consideration. On remand, Administrative Law Judge Charles P. Rippey found that the evidence failed to establish the existence of a totally disabling pulmonary impairment, *see* 20 C.F.R. §718.204(c)(1)-(4), and denied benefits. Claimant appealed the denial of benefits to the Board, but requested modification while the appeal was pending at the Board. By Order dated September 28, 1995, the Board dismissed claimant's appeal and remanded the case to the district director for initiation of modification proceedings. The district director denied modification and the case was referred to the Office of Administrative Law Judges. The case was reassigned to Administrative Law Judge McCarthy who held a hearing and issued a Decision and Order on modification. The administrative law judge found that, based upon a review of the entire record, there were no mistakes of fact in the previous denials that justified modification of the denial of benefits. The administrative law judge also considered the newly submitted evidence and found that although it was sufficient to establish a change in conditions in that the evidence established a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(c), total disability due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's length of coal mine employment finding and his finding pursuant to 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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 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 under Part 718 in a living miner's claim, 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. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Initially, we reject claimant's assertion that the administrative law judge erred in concluding that there was no mistake of fact in Judge McCarthy's prior finding that claimant had twenty-eight years and six months of coal mine employment. The

administrative law judge correctly noted that the Social Security Administration earnings record, Claimant's Exhibit 2, was not a part of the record at the time Judge McCarthy issued his decision, but that claimant subsequently substantiated his alleged employment with the earnings record which confirmed his coal mine employment from 1949 through 1960. Decision and Order at 18 n. 13; *see* Hearing Transcript at 6-7. The administrative law judge thus implicitly credited claimant with the additional years of coal mine employment reflected in the Social Security Administration earnings record.

With respect to the merits, the administrative law judge considered the entirety of the medical opinion evidence and acted within his discretion in concluding that although claimant was totally disabled, *see* 20 C.F.R. §718.204(c), claimant's totally disabling respiratory impairment was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Claimant's assertions that the administrative law judge applied an erroneous standard and that he erred in relying upon the opinions of Drs. Castle and Fino are without merit. The administrative law judge properly reviewed the evidence of record pursuant to the applicable standard enunciated by the United States Court of Appeals for the Fourth Circuit and permissibly concluded that the medical opinion evidence of record failed to establish total disability due to pneumoconiosis, *see* 20 C.F.R. §718.204(b), since none of the credible physicians' opinions of record opined the claimant's coal mine employment caused or contributed to his respiratory impairment. *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), *see also Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990). The administrative law judge permissibly gave greatest weight to the opinions of Drs. Castle and Fino, who found that claimant's respiratory impairment was not related to coal mine employment, but instead was due to smoking. Decision and Order at 20-23; Director's Exhibit 78; Employer's Exhibits 5, 7. In so finding, the administrative law judge rationally concluded that these opinions were well-documented, well-reasoned and supported by the objective medical evidence of record. *Scott*, *supra*; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 23. In addition, the administrative law judge rationally found Dr. Robinette's opinion regarding the etiology of claimant's impairment unreliable since the x-ray Dr. Robinette relied on to diagnose pneumoconiosis was the only positive reading among the twenty-seven x-ray readings submitted on modification. Decision and Order at 20. The administrative law judge thus permissibly gave diminished weight to Dr. Robinette's opinion that claimant's respiratory impairment was related to coal mine employment. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); Decision and Order at 22-23; Director's Exhibit 75; Claimant's Exhibits 1, 3. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as the administrative law judge could rationally rely on the medical opinions he found most probative and could reasonably accord diminished weight to the

opinions of the remaining physicians, we affirm his finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b). Inasmuch as claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), an essential element of entitlement under Part 718, entitlement thereunder is precluded. *Anderson*, *supra*; *Trent*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge