BRB No. 98-0868 BLA

BUD REARICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
CANTERBURY COAL COMPANY	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

Hilary S. Zakowitz (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0878) of Administrative Law Judge Michael P. Lesniak denying 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). The administrative law judge credited claimant with thirty-five years of coal mine employment and adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R. Part 718. The

[1]Claimant filed his initial claim on September 4, 1980. Director's Exhibit 45. This claim was denied by the Department of Labor (DOL) on December 11, 1980

administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge found that claimant failed to establish a material change in

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because claimant failed to establish a totally disabling respiratory impairment due to pneumoconiosis. *Id*. On July 30, 1981, the DOL notified claimant that his claim would be administratively closed unless good cause is shown within fourteen days indicating why the claim should remain open. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim in February 1987. Director's Exhibit 44. The DOL denied this claim on July 29, 1987 and September 6, 1988 based on claimant's failure to establish a totally disabling respiratory impairment due to pneumoconiosis. *Id*. Since claimant did not pursue this claim any further, the denial became final. On April 23, 1991, claimant filed his third claim. Director's Exhibit 43. The DOL denied this claim in September and November 1991. *Id*. Although claimant requested a hearing on December 2, 1991, claimant subsequently requested the withdrawal of his claim. *Id*. Administrative Law Judge Daniel L. Leland issued an Order Granting Withdrawal of Claim, which was filed with the Office of the District Director in November 1992. *Id*. Claimant filed his most recent claim in July 1996. Director's Exhibit 1.

conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant also contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to 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); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The previous claim was denied because claimant failed to establish the existence of pneumoconiosis and total disability.[3] The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has adopted the standard that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

[3]The administrative law judge stated that "[i]n determining whether a change in conditions has occurred, evidence is considered since the denial of the second claim as the third claim was withdrawn." Decision and Order at 4 n.2.

Initially, claimant contends that administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Whereas Drs. Schaaf and Srivastava opined that claimant suffers from coal workers' pneumoconiosis, Director's Exhibit 38; Employer's Exhibits 5, 6, Drs. Branscomb, Bush, Fino, Strother and Tuteur opined that claimant does not suffer from coal workers' pneumoconiosis, Director's Exhibits 42, 43; Employer's Exhibits 8, 10, 14, 16. The administrative law judge stated that Dr. Eligator "did not conclude in his report that pneumoconiosis is one of the Claimant's respiratory impairments." Decision and Order at 13; Director's Exhibit 43. The administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb, Fino and Strother than to the contrary opinion of Dr. Srivastava because of their superior qualifications.[4] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge permissibly discredited the opinion of Dr. Schaaf because the administrative law judge found Dr. Schaaf's opinion to be not well reasoned.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Claimant asserts that the administrative law judge mischaracterized Dr. Casaday's opinion. The administrative law judge stated that "Dr. Casaday, the Claimant's treating physician, determined that the Claimant does not suffer from pneumoconiosis and is disabled due to his heart condition and not coal workers' pneumoconiosis." Decision and Order at 12. The administrative law judge further stated that he "accord[ed] great weight to the opinion of Dr. Casaday as he is Claimant's treating physician and is more likely to be familiar with the Claimant's condition." *Id*. However, Dr. Casaday did not render an opinion with regard to

[4]The administrative law judge correctly observed that Drs. Branscomb, Fino and Strother are Board-certified in internal medicine and pulmonary medicine. Decision and Order at 7, 10; Director's Exhibit 42; Employer's Exhibits 7, 11, 15, 16. The administrative law judge also correctly stated that Dr. Srivastava's "qualifications are not of record." Decision and Order at 13.

[5]The administrative law judge observed that "Dr. Schaaf concluded that the Claimant's shortness of breath was due to pneumoconiosis as there was no other illness present which could cause his shortness of breath." Decision and Order at 12. The administrative law judge found that "Dr. Schaaf's conclusion is not well reasoned and accord[ed] it less weight in light of the extensive evidence of Claimant's heart condition and accompanying problems." *Id*.

whether claimant suffers from pneumoconiosis or a totally disabling respiratory impairment.[6] Director's Exhibits 9, 12. Nonetheless, since the administrative law judge provided valid bases for discrediting the opinions of Drs. Schaaf and Srivastava, the only opinions of record that could support a finding of pneumoconiosis, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), we hold that the administrative law judge's mischaracterization of Dr. Casaday's opinion is harmless error, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Claimant does not raise any other contentions of error by the administrative law judge with respect to the issue of pneumoconiosis by medical opinion evidence. Therefore, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

[6]Dr. Casaday, in a report dated May 20, 1996, advised claimant not to undergo pulmonary function testing. Director's Exhibit 9. In a subsequent report dated August 5, 1996, Dr. Casaday diagnosed severe dilated cardiomyopathy with history of sustained ventricular tachycardia and opined that it is not wise for claimant to undergo exercise testing or pulmonary function testing unless it is imperative to improve his cardiac status. Director's Exhibit 12.

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Specifically, claimant asserts that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), by failing to specifically identify all of the relevant newly submitted medical opinions of record with respect to the issue of total disability. The administrative law judge stated that "[o]f the nine physicians [of record], only two of them, Dr. Srivastava and Schaaf determined that the Claimant is totally disabled due to a pulmonary condition." Decision and Order at 13-14. The administrative law judge stated that "[t]he other physicians, including Claimant's treating physician Dr. Casaday, determined that any disability from which the Claimant suffers is being caused by his severe and chronic cardiac conditions."[7] *Id*. The administrative law judge properly discredited the opinions of Drs. Schaaf and Srivastava because "their opinions are not supported by the objective medical data of record."[8] Decision and Order at 14; *see Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel, supra*; *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Hence, since the administrative law judge properly discredited the only opinions of record that could support a finding of total disability, we hold that any error by the administrative law judge in failing to specifically identify all of the relevant newly submitted medical opinions of record with respect to the issue of total disability is harmless. *See Larioni, supra*. Further, since the administrative law judge provided a valid basis for discrediting the only opinions of record that could support a finding of total disability, *see Kozele, supra*, we hold that the administrative law judge's mischaracterization of Dr. Casaday's opinion is harmless error.[9] *See Larioni, supra*. Moreover, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

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[7]Whereas Drs. Schaaf and Srivastava opined that claimant suffers from a totally disabling respiratory impairment, Director's Exhibit 38; Employer's Exhibits 5, 6, Drs. Branscomb, Bush, Eligator, Fino, Strother and Tuteur opined that claimant does not suffer from a totally disabling respiratory impairment, Director's Exhibits 42, 43; Employer's Exhibits 8, 10, 14, 16.

[8]None of the six newly submitted pulmonary function studies yielded qualifying values. Director's Exhibits 11, 14, 38, 42, 43. Similarly, the newly submitted arterial blood gas study did not yield qualifying values. Director's Exhibit 43.

[9]As previously noted, Dr. Casaday did not render an opinion with regard to whether claimant suffers from a totally disabling respiratory impairment. Director's Exhibits 9, 12.

Since the administrative law judge properly found that the newly submitted evidence did not establish either the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(c), we hold that the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See Swarrow, supra*. Therefore, we affirm the administrative law judge's denial of benefits. *See Swarrow, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge