BRB No. 03-0783 BLA

MICHAEL I. ADAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAGNET COAL, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 05/27/2004
	)	
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 – Awarding Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund, Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

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

PER CURIAM:

West Virginia Coal Workers' Pneumoconiosis Fund (carrier) appeals the Decision and Order – Awarding Benefits (2003-BLA-5022) of Administrative Law Judge Robert J.

Lesnick 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] Initially, the administrative law judge found that this case involves the filing of a subsequent claim dated January 22, 2001, pursuant to 20 C.F.R. §725.309.[2] Decision and Order at 2, 6. Finding that employer did not contest the issue of length of coal mine employment, the administrative law judge credited claimant with at least fifteen years of coal mine employment. Decision and Order at 3. In addition, the administrative law judge found that employer conceded that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and, thus, sufficient to establish a material change in conditions. Decision and Order at 6. Weighing all of the evidence, old and newly submitted, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment. Decision and Order at 14. In addition, the administrative law judge found that the medical evidence was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Decision and Order at 16, 17. Accordingly, the administrative law judge awarded benefits, commencing as of January 1, 2001.

On appeal, carrier contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish a totally disabling respiratory impairment and, thus, entitlement to benefits. In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The

[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.

[2] The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, BLR , BRB No. 03-0367 BLA (Jan. 22, 2004).

In this case, claimant's initial application for benefits, filed on September 20, 1996, was denied by the district director on January 23, 1997, based on the determination that claimant did not establish any of the elements of entitlement under 20 C.F.R. Part 718. Decision and Order at 2; Director's Exhibit 1.

Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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, 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; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order, the issues 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. The administrative law judge, within his discretion as fact-finder, rationally determined that the medical evidence of record was sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis. Decision and Order at 16-17. In particular, the administrative law judge found that the medical opinions of Drs. Ranavaya and Baker, that claimant was totally disabled from performing his last coal mine employment, were more consistent with the objective medical evidence of record, claimant's history of coal mine employment as well as the actual physical requirements of claimant's last coal mine employment, than the contrary opinion of Dr. Zaldivar. Decision and Order at 16; Director's Exhibits 15, 30; Claimant's Exhibit 1. Consequently, the administrative law judge found that claimant has established total disability pursuant to Section 718.204(b)(2).

On appeal, carrier contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish total respiratory disability. In particular, carrier contends that Dr. Baker's opinion, that claimant suffers from a total

[3] The parties do not challenge the administrative law judge's decision to credit claimant with at least fifteen years of coal mine employment, his finding that employer is the properly named responsible operator, or his findings pursuant to 20 C.F.R. §§725.309(d), 718.202(a), 718.203(b) and 718.204(b)(2)(i)-(iii). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

respiratory disability, is not well-reasoned because the physician based his opinion on a non-qualifying pulmonary function study. Carrier's Brief at 3. Carrier further contends that the administrative law judge erred in according little weight to the contrary opinion of Dr. Zaldivar, arguing that Dr. Zaldivar's opinion is consistent with the objective medical evidence and is therefore well-reasoned and should have been credited. *Id*. These contentions lack merit.

Contrary to carrier's contention, the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding the medical opinion evidence sufficient to establish a totally disabling respiratory impairment. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge was not required to discredit Dr. Baker's medical opinion of total respiratory disability merely because the pulmonary function study accompanying the report yielded non-qualifying values. Decision and Order at 12-13, 16; *see Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Rather, the administrative law judge properly considered the entirety of Dr. Baker's opinion, including the physician's discussion of the spirometry report and his conclusions regarding the degree of impairment. Decision and Order at 16; Claimant's Exhibit 1; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999).

Furthermore, we reject carrier's contention that the administrative law judge erred in failing to credit the medical opinion of Dr. Zaldivar, arguing that his report was supported by its underlying documentation and, therefore, was well-reasoned. The administrative law judge, within a reasonable exercise of his discretion as trier-of-fact, found that Dr. Zaldivar's opinion was not supported by the underlying documentation as a whole. Decision and Order at 16. Moreover, the administrative law judge reasonably found that the credibility of Dr. Zaldivar's opinion, that claimant was capable of performing his usual coal mine employment, was undermined because the physician relied on an inaccurate description of claimant's last coal mine employment, one that utilized less strenuous physical requirements. Decision and Order at 5, 11-12, 16; Director's Exhibit 30; *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Consequently, the administrative law judge reasonably accorded less weight to the medical opinion of Dr. Zaldivar. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. In addition, contrary to carrier's contention, the administrative law judge is not required to accord greater weight to Dr. Zaldivar's opinion over the opinion of Dr. Ranavaya based on his more advanced professional credentials. Although the administrative law judge considered the physician's credentials, he rationally found Dr. Zaldivar's opinion not credible and, therefore, not entitled to greater weight. *See Hicks*,

138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Consequently, contrary to carrier's contention, the administrative law judge properly evaluated the relevant medical opinion evidence of record based on the terms of their written diagnoses. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the evidence of record is sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2) as it is supported by substantial evidence. Moreover, as carrier does not otherwise challenge the administrative law judge's award of benefits, it is affirmed. *See generally Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge