BRB No. 98-1076 BLA

JAMES H. DICKENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY 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 on Remand - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Mary Zanolli Natkin (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (94-BLA-1106) of Administrative Law Judge Daniel L. Leland denying benefits on a duplicate 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). This case is before the Board for the third time. In the original Decision and Order dated May 12, 1995, the administrative law judge found that claimant's prior claim was finally denied on August 10, 1989, and that the present claim, which claimant filed on June 14, 1993,

was a duplicate claim subject to the provisions of 20 C.F.R. §725.309.[1] The administrative law judge credited claimant with forty-two years and three months of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge, without weighing all of the evidence, found that claimant established a material change in conditions pursuant to Section 725.309 based on a medical opinion submitted by claimant. The administrative law judge further found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), but was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied.

Claimant appealed the denial of benefits to the Board and in *Dickens v. Peabody Coal Co.*, BRB No. 95-1647 BLA (Feb. 27, 1996)(unpub.), the Board affirmed the administrative law judge's length of coal mine employment finding and his findings of a material change in conditions pursuant to 20 C.F.R. §725.309 and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). The Board also affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3), but vacated the administrative law judge's findings with respect to 20 C.F.R. §718.204(c)(4) and remanded the case to the administrative law judge for further consideration regarding claimant's usual coal mine employment and the medical opinions thereunder.

On remand, the administrative law judge, without independently determining the nature of claimant's usual coal mine employment, found that claimant's usual coal mine employment was his last underground job at the coal loading point. The administrative law judge then determined the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) and that the total disability was

[1] Claimant filed his initial claim for black lung on October 20, 1970, which the district director finally denied on January 13, 1981. Director's Exhibit 29. Claimant filed a second application for benefits on February 27, 1989, which the district director denied on August 10, 1989. Director's Exhibit 30. Claimant took no further action until he filed the present claim. Director's Exhibit 1.

due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. Employer appealed and in *Dickens v. Peabody Coal Co.*, BRB No. 96-1713 BLA (Sept. 19, 1997)(unpub.), the Board initially vacated the administrative law judge's finding that a material change in conditions was established pursuant to 20 C.F.R. §725.309 as the standard used by the administrative law judge did not comport with the standard articulated by the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). The Board also rejected employer's contentions regarding its affirmance of the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b), (c)(4) and remanded the case for the administrative law judge to explain his finding regarding claimant's usual coal mine employment and his crediting and weighing of the medical opinion evidence.

On remand, the administrative law judge initially found that claimant's last usual coal mine employment was as a bathhouse attendant, and that claimant was not totally disabled from performing his last coal mine employment from a respiratory standpoint. The administrative law judge thus found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c) and failed to establish a material change in conditions established pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in his finding regarding claimant's usual coal mine employment as well as the exertional requirements of his last coal mine employment. Claimant also challenges the administrative law judge's credibility determinations with respect to the medical opinion evidence relied on to find that the newly submitted evidence of record was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1)-(4). Employer responds, urging affirmance of the denial of benefits. Claimant replies, reasserting his position. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis;

that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order on Remand, 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 that there is no reversible error contained therein. Contrary to claimant's assertions, the administrative law judge, as instructed by the Board, thoroughly discussed and considered all of the evidence related to whether claimant's usual coal mine employment was his most recent job as a bathhouse attendant and whether he obtained this job because of an inability to perform his prior job from a respiratory standpoint. The administrative law judge correctly noted that the Board has defined an individual's usual coal mine work as "the most recent job the miner performed regularly and over a substantial period of time," *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), and that the mere fact that claimant changed jobs recently does not establish that his latest job is not his usual coal mine work, unless he changed jobs because of a respiratory inability to do his usual coal mine work. *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984).

The administrative law judge considered employment records, claimant's testimony, a letter dated September 24, 1976, from the Department of the Interior and work evaluations. Decision and Order on Remand at 2-3; Director's Exhibits 7, 29; Claimant's Exhibit 2; Hearing Transcript at 8-23. The administrative law judge relied on work records and claimant's testimony to find that claimant's most recent coal mine employment was as a bathhouse attendant from August 16, 1983 through January 1, 1989 and that prior to that, claimant was a boom operator from January 1, 1977 through August 16, 1983. Decision and Order on Remand at 2; Director's Exhibit 7; Hearing Transcript at 9, 18. The administrative law judge also noted that the letter from the Department of the Interior only stated that claimant had a sufficient degree of pneumoconiosis to elect a transfer to an area with low concentrations of dust. Decision and Order on Remand at 2; Claimant's Exhibit 2. The administrative law judge further noted that claimant's work evaluations from 1980 did not indicate that any problems claimant was experiencing in performing his job as loading machine operator or boom operator were totally disabling or due to a respiratory impairment. Decision and Order on Remand at 2-3; Director's Exhibit 29. Finally, the administrative law judge noted that claimant's testimony that he switched from his job as a boom operator to the job of bathhouse attendant because

he wasn't strong enough to do the job and would just get too weak to do it was not sufficient to establish that claimant obtained the job as bathhouse attendant because of an inability to perform the duties of his previous job from a respiratory standpoint. Decision and Order on Remand at 3. Based on a consideration of all the evidence, the administrative law judge reasonably concluded that there was no evidence that claimant's inability to perform the duties of boom operator was due to a respiratory impairment and permissibly found that claimant's last coal mine employment as a bathhouse attendant for six years was his usual coal mine employment and this finding is affirmed. *Shortridge*, *supra*; *Pifer*, *supra*; Decision and Order on Remand at 3.

After identifying the employment that was claimant's usual coal mine employment, the administrative law judge properly next determined whether the miner was able to perform his usual coal mine work by comparing the evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984); Decision and Order on Remand at 3. In weighing the medical opinion evidence, the administrative law judge relied on the opinion of Dr. Zaldivar, who found that claimant's impairment was mild and that he was capable of performing light to moderate duty work, but not heavy labor and opined that claimant was able to do his bathhouse duties, but not intermittent heavy labor. Decision and Order on Remand at 3; Employer's Exhibit 5. The administrative law judge reasonably gave greater weight to the opinion of Dr. Zaldivar based on the physician's qualifications, because his opinion was supported by the objective medical evidence and because of his accurate awareness of claimant's duties in light of claimant's own testimony. *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc* recon.); *McMath*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The administrative law judge next referenced his previous conclusion that claimant was not required to perform heavy labor as a bathhouse attendant since he had assistance and rationally found that claimant was not suffering from a totally disabling respiratory impairment that would preclude performance of his last coal mine employment.[2] The

[2] In his original Decision and Order issued May 12, 1995, the administrative law

administrative law judge, therefore, properly followed the Board's remand instructions to make a specific finding regarding the nature of claimant's usual coal mine employment based on the evidence of record and claimant's testimony and to compare the evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's ability to perform the work. *McMath*, *supra*; *Turner*, *supra*; *Parsons*, *supra*; *Laird*, *supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, the administrative law judge rationally found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Thus, we affirm the administrative law

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judge made the following conclusion of law:

"According to Claimant's testimony, his responsibilities as bathhouse attendant included such activities as mopping floors, servicing mine safety lanes, scrubbing walls, taking out trash, and transporting and loading supplies. TR 10-12. Although the trash and supplies could sometimes weigh as much as thirty to fifty pounds, claimant testified that he was not required to lift or handle anything that was too heavy. In fact, claimant could and did receive help from the maintenance men when he needed assistance loading or transporting heavy objects. TR 19-21. Based on this testimony, I find that the evidence does not support the contention that claimant's last job of bathhouse attendant entailed or required heavy manual labor."

Decision and Order at 10-11.

judge's findings that the evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c) and, thus, insufficient to establish a material change in conditions pursuant to Section 725.309(d), as they are supported by substantial evidence. Inasmuch as claimant has failed to establish total respiratory disability pursuant to Section 718.204(c), an essential element of entitlement under 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address claimant's other arguments on appeal. *Anderson*, *supra*; *Trent*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge