BRB No. 98-1109 BLA

DARRELL MAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	DATE ISSUED:
	)	
TRANSCO ENERGY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Buttermore, Turner & Boggs, PSC), Harlan, Kentucky, for claimant.

Timothy J. Walker, London, Kentucky, 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 (96-BLA-1359) of Administrative Law Judge Robert L. Hillyard 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). The administrative law judge found the

evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.[1] The administrative law judge also found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). Further, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). However, the administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). 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

---

[1]Claimant filed his initial claim on March 6, 1990. Director's Exhibit 26. On February 25, 1993, Administrative Law Judge Donald W. Mosser issued a Decision and Order denying benefits. *Id*. Although Judge Mosser found that claimant established the existence of pneumoconiosis arising out of coal mine employment, Judge Mosser found that claimant failed to establish a totally disabling respiratory impairment due to pneumoconiosis. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on August 11, 1995. Director's Exhibit 1.

[2]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(c) and 725.309 are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Specifically, claimant asserts that the administrative law judge should have credited Dr. Vaezy's opinion because Dr. Vaezy is not biased. The administrative law judge considered the medical opinions of Drs. Baker, Jarboe, Harrison and Vaezy. Whereas Dr. Harrison, in a report dated April 24, 1996, opined that claimant's pulmonary impairment is due to cigarette smoking, Director's Exhibit 23, Dr. Vaezy, in reports dated September 11, 1995 and January 19, 1996, opined that claimant's pulmonary impairment is due to cigarette smoking and coal dust exposure. Director's Exhibits 10, 11. In a report dated April 17, 1990, Dr. Baker opined that claimant suffers from a mild pulmonary impairment due to coal workers' pneumoconiosis. Director's Exhibit 26. Further, Dr. Jarboe, in a report dated August 21, 1990, opined that claimant does not suffer from coal workers' pneumoconiosis and retains the functional respiratory capacity to perform the work of a coal miner. Director's Exhibit 26.

The administrative law judge properly accorded greater weight to the opinions of Drs. Harrison and Vaezy than to the opinions of Drs. Baker and Jarboe because they are the most recent medical opinions of record.[3] *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). Further, the administrative law judge properly discounted the opinions of Drs. Baker and Jarboe concerning the cause of claimant's disability because the underlying premises of Dr. Jarboe, that

[3]The administrative law judge stated that "the opinions of Drs. Harrison and Vaezy are based on recent examinations that accounted for the Claimant's additional smoking and objective medical evidence." Decision and Order at 14. The administrative law judge further stated, "I find the 1996 opinions of Drs. Harrison and Vaezy are more probative of the Claimant's current condition and are entitled to more weight than the...opinions from 1990." *Id*. at 13. Claimant does not contest the administrative law judge's decision to give less weight to the opinions of Drs. Baker and Jarboe at 20 C.F.R. §718.204(b) based on the fact that they are less recent than the opinions of Drs. Harrison and Vaezy.

claimant did not suffer from pneumoconiosis or a totally disabling respiratory impairment, and Dr. Baker, that claimant did not suffer from a totally disabling respiratory impairment, were inaccurate.[4] *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Additionally, the administrative law judge, within a proper exercise of his discretion as trier of fact, found Dr. Harrison's opinion to be "at least as, if not more, documented and reasoned as Dr. Vaezy's and entitled to equal,[5] if not greater, weight."[6] Decision and Order at 14; *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). We reject claimant's assertion that the administrative law judge should have credited Dr. Vaezy's opinion because Dr. Vaezy is not biased. There is no evidence in the record which supports an allegation that any of the physicians submitting a medical opinion is biased. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). Moreover, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Since claimant failed to establish total disability due to pneumoconiosis at 20

---

[4]Claimant does not contest the administrative law judge's decision to give less weight to the opinions of Drs. Baker and Jarboe with regard to the cause of the miner's disability at 20 C.F.R. §718.204(b) since the doctors' opinions are based on erroneous premises.

[5]In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the United States Supreme Court held that when evidence is equally balanced, claimant must lose.

[6]The administrative law judge observed that Dr. Vaezy "does not directly address the effects that the Claimant's continued smoking has had on his pulmonary function." Decision and Order at 14. Further, the administrative law judge observed that "Dr. Vaezy failed to explain why he opined that the Claimant's pulmonary impairment is due to both pneumoconiosis and smoking rather than just to the Claimant's continued smoking." *Id*. In contrast, the administrative law judge observed that "Dr. Harrison specifically noted the Claimant's pulmonary function has worsened because of smoking." *Id*.

C.F.R. §718.204(b), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order 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