BRB No. 99-1329 BLA

ALLEN RAY WALTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

W. William Prochot (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-1963) of Administrative Law Judge Thomas F. Phalen, Jr. awarding 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). This case has been before the Board previously. In the original Decision and Order, the administrative law judge found twenty-one years of coal mine employment. Decision and Order dated November 21, 1997. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.

§§718.202(a)(4), 718.203 and 718.204. Decision and Order dated November 21, 1997. Accordingly, benefits were awarded. Employer appealed and the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203, but vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204 and remanded the case for the administrative law judge to reconsider the medical evidence concerning total disability and to reevaluate the evidence concerning disability causation in light of *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). *Walton v. Peabody Coal Co.*, BRB No. 98-0474 BLA (February 2, 1999)(unpublished).

On remand, the administrative law judge concluded that the evidence was sufficient to establish total disability and that claimant's total disability was due to pneumoconiosis in light of *Smith, supra*. Decision and Order on Remand at 4-8. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), erred in finding that claimant was totally disabled pursuant to Section 718.204(c) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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 administrative law judge's Decision and Order is supported by substantial evidence and

[1]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

contains no reversible error therein. Initially, employer's contention that the administrative law judge's Decision and Order on Remand fails to comport with the Administrative Procedure Act (APA), 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), is without merit. The administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

Employer contends that intervening case law requires that the case be remanded for the administrative law judge to determine if the presence of pneumoconiosis is established pursuant to Section 718.202(a)(4) in light of *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). We disagree. The United States Court of Appeals for the Third Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Williams, supra*. Consequently, within the jurisdiction of the United States Court of Appeals for the Third Circuit, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to any part of Section 718.202(a), then the administrative law judge must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Williams, supra*. The instant case, however, arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2. We decline to apply *Williams*, in this case, inasmuch as the United States Court of Appeals for the Sixth Circuit has not adopted the reasoning by the United States Court of Appeals for the Third Circuit and we have consistently applied the long standing precedent that Section 718.202(a) provides four alternative methods by which claimant can establish the existence of pneumoconiosis. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Since we previously affirmed the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge's finding is law of the case and thus we reject employer's contention regarding the existence of pneumoconiosis. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Employer next contends that the administrative law judge erred in finding that the

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[2]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record...." 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).

[3]The United States Court of Appeals for the Fourth Circuit has also adopted this approach to determine if claimant has established the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000).

medical opinion evidence established total disability pursuant to Section 718.204(c)(4). Employer specifically contends that the administrative law judge failed to consider the exertional requirements of claimant's usual coal mine employment and the physicians' impairment ratings in determining whether the medical opinions were sufficient to establish a totally disabling respiratory impairment. We disagree. The administrative law judge discussed the medical opinions of record and rationally found that the opinions of Drs. Baker, Anderson, Simpao, O'Bryan and Vaezy were sufficient to establish that claimant is totally disabled. Decision and Order on Remand at 5-7; Director's Exhibits 12, 13, 14; Employer's Exhibits 1, 2, 7, 8; Claimant's Exhibits 1, 5. Contrary to employer's contentions, the administrative law judge was aware of the exertional requirements of claimant's coal mine employment. The administrative law judge, in the instant case, found that claimant's last coal mine employment for the last year and one-half was as a fire boss and that prior to this he was a miner operator for five years and that the exertional requirements of these jobs were heavy. Decision and Order on Remand at 6-7; Hearing Transcript at 13-15. Before the administrative law judge can determine whether the miner is able to perform his usual coal mine work, he must identify the employment that was the miner's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. (emphasis added) *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). In this case, however, although the administrative law judge failed to make a specific finding regarding claimant's usual coal mine employment, a remand is not required as a review of the record indicates that there is no evidence which would support a finding that claimant may have changed jobs due to respiratory problems and the administrative law judge specifically found that claimant's employment as fire boss and miner operator constituted heavy labor. Decision and Order on Remand at 6-7; Hearing Transcript at 13-15; *McMath*, *supra*; *Turner*, *supra*; *Parsons*, *supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Laird*, *supra*. Additionally, the physicians who addressed the issue of claimant's total disability specifically noted that claimant was totally disabled from coal mine employment or comparable gainful

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[4]An individual's usual coal mine work is "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), unless he changed jobs because of 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).

[5]Contrary to employer's assertions, the administrative law judge rationally determined that claimant's employment as a fire boss and miner operator constituted heavy work based on claimant's testimony. Hearing Transcript at 12-15; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Co.*, 12 BLR 1-77 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

work due to a moderate to severe obstructive defect. Director's Exhibits 10, 12, 13, 14; Employer's Exhibits 1, 2, 5, 7, 8; Claimant's Exhibits 1, 4, 5, 6. Thus the administrative law judge, within his discretion as fact-finder, reasonably found that the medical opinion evidence was sufficient to establish total disability pursuant to Section 718.204(c)(4) in light of his finding that claimant's coal mine employment was heavy work and the physician's assessment of claimant's respiratory impairment. Decision and Order on Remand at 7; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *McMath, supra*; *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry, supra*.

Furthermore, in determining if total disability was established, the administrative law judge noted the existence of contrary probative evidence in the record, but permissibly concluded that this evidence did not outweigh the evidence supportive of a total disability finding. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order on Remand at 4-7. Consequently, inasmuch as the administrative law judge permissibly found that the more recent pulmonary function study evidence and the medical opinions of record were sufficient to establish total respiratory disability upon weighing all of the relevant evidence, we affirm the administrative law judge's finding of total disability pursuant to Section 718.204(c). See *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock, supra*; *Gee, supra*.

Employer further asserts that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Employer contends that the administrative law judge erred in finding the medical opinions of record sufficient to establish causation in light of *Smith, supra*. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). In the instant case, the administrative law judge specifically considered the opinions of Drs. Vaezy, Baker, Houser and O'Bryan pursuant to *Smith, supra*, and permissibly concluded that the physicians' opinions were sufficient to prove that claimant's total disability was due in part to pneumoconiosis. *See* 20 C.F.R. §718.204(b); Decision and Order on Remand at 7-8; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

In *Smith, supra*, the United States Court of Appeals for the Sixth Circuit held that

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[6]The administrative law judge properly noted that all of the blood gas study evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) but that two physicians indicated that their studies indicated deficient oxygenation of the blood and thus were supportive of the preponderance of the evidence establishing total disability. Decision and Order on Remand at 4, 7; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987).

proving causation "requires a miner to prove more than a *de minimis* or infinitesimal contribution by pneumoconiosis to his total disability." The court noted that it was not overruling its prior holding in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), that "the miner does not need to prove total disability by pneumoconiosis 'in and of itself' [but declared that] a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment." *Smith, supra*. The administrative law judge addressed the medical opinion evidence and stated: that Dr. Baker opined in relevant part that both smoking and coal mine employment contributed about equally to claimant's impairment; that Dr. Vaezy opined that he was unable to separate how much claimant's smoking history and pneumoconiosis contributed to the impairment; that Dr. Houser conceded that claimant's impairment is related to coal dust exposure and that Dr. O'Bryan opined that coal dust exposure and cigarette smoking contributed to claimant's disability. Director's Exhibits 12, 13, 14; Employer's Exhibits 1, 2, 7, 8; Claimant's Exhibits 1, 5. The administrative law judge correctly found that the physicians attributed claimant's disability to his coal dust exposure and smoking and candidly admitted that they could not apportion the amount of disability due each condition. Decision and Order on Remand at 8. The administrative law judge concluded that although the physicians' opinions are insufficient to prove the exact percentage that claimant's total disability is due to pneumoconiosis, the evidence meets claimant's burden of affirmatively establishing that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory impairment. Decision and Order on Remand at 8. It is the administrative law judge's function to weigh the evidence of record and draw conclusions, inferences and resolve the conflicts in the medical evidence, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Co.*, 12 BLR 1-77 (1988); *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, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence of record establishes causation pursuant to Section 718.204(b) and the award of benefits as they are supported by substantial evidence and in accordance with law.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge