BRB No. 04-0265 BLA

WILLIAM E. BRYANT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 11/30/2004
	)	
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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-5146) of Administrative Law Judge Gerald M. Tierney awarding benefits on a subsequent 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 fifteen and one-half years of coal mine employment and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge 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)(1) and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §§718.204(b)(2)(i) and (iv) and 718.204(b) overall. Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). In addition, employer challenges the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §§718.204(b)(2)(iv) and 718.204(b) overall. Lastly, employer challenges the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds by letter, contending that the administrative law judge correctly applied the disability causation standard enunciated at 20 C.F.R. §718.204(c)(1).[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);

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[1]Claimant filed his first claim on March 28, 1984. Director's Exhibit 1. This claim was denied by the Department of Labor (DOL) on July 23, 1984 and August 30, 1984 by reason of abandonment. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim on August 15, 1989. *Id*. This claim was denied by the DOL on December 6, 1989 and March 12, 1990 because claimant failed to establish a material change in conditions. *Id*. The denial became final because claimant did not pursue this claim any further. Claimant filed his third claim on April 25, 1994. *Id*. On September 14, 1999, the DOL approved claimant's request to withdraw this claim. *Id*. Claimant filed his most recent claim on January 25, 2002. Director's Exhibit 3.

[2]Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(b)(2)(i) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record consists of seven interpretations of four x-rays dated September 20, 1989, April 23, 2002, July 9, 2002 and February 5, 2003. Three readings are positive for pneumoconiosis, Director's Exhibit 8; Claimant's Exhibits 1, 2, and four readings are negative for pneumoconiosis, Director's Exhibits 1, 10; Employer's Exhibit 1. In weighing the conflicting x-ray readings, the administrative law judge considered the recency of the x-rays and the qualifications of the physicians who provided the x-ray readings. The administrative law judge specifically stated:

> I rely on the opinion of the more qualified readers. Drs. Ballard and Ahmed, who are both [B]oard certified radiologists and B-readers (DX 8; CX 4), identified the existence of pneumoconiosis on [c]laimant's April 2002 chest x-ray. Claimant has proved, by the preponderance of the new chest x-ray evidence, the existence of pneumoconiosis. I find the new chest x-ray evidence more probative of [c]laimant's current condition.

Decision and Order at 3.

Employer asserts that the administrative law judge erred in weighing the x-ray evidence. Employer's assertion is based on the premise that the administrative law judge's reliance on the most recent x-ray readings is flawed because he failed to reconcile the two positive readings of the April 23, 2002 x-ray with the negative readings of the July 9, 2002 and February 5, 2003 x-rays. As previously noted, the record consists of x-rays dated September 20, 1989, April 23, 2002, July 9, 2002 and February 5, 2003.[3] Based on his determination that the new x-ray evidence is more probative of claimant's current condition, the administrative law judge reasonably relied on the April 23, 2002, July 9, 2002 and February 5, 2003 x-ray readings. Drs. Ahmed and Ballard, who are B readers and Board-certified radiologists, read the April 23, 2002 x-ray as positive for pneumoconiosis while Dr. Hasson, who is a B reader, read the July 9, 2002 x-ray as negative for pneumoconiosis and Dr. Goldstein, who is also a B reader, read the February 5, 2003 x-ray as negative for pneumoconiosis. The administrative law judge properly accorded greater weight to the positive x-ray readings provided by physicians who are B readers and Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem*

[3]Drs. Russakoff and Cole read the September 20, 1989 x-ray as negative for pneumoconiosis while Dr. Ahmed read the same x-ray as positive for pneumoconiosis. Dr. Ahmed is a B reader and a Board-certified radiologist. Similarly, Dr. Cole is a B reader and a Board-certified radiologist. Although Dr. Russakoff is a B reader, he is not a Board-certified radiologist.

Mines Corp., 8 BLR 1-211 (1985). Thus, we reject employer's assertion that the administrative law judge erred in weighing the x-ray evidence. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Employer next contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, employer asserts that the administrative law judge erred in relying on Dr. Hawkins' opinion to establish total disability. The administrative law judge found that claimant's last coal mine job of more than one year was as an electrician. Decision and Order at 4. Although the administrative law judge noted that there are various descriptions of the requirements of claimant's last coal mine job, the administrative law judge reasonably relied on the description provided by claimant.[4] The administrative law judge stated, "based on the requirements set forth by [c]laimant himself, it is evident that [c]laimant performed manual labor which included: changing tires so heavy that it took at least two to three men; changing motors that were so heavy it took four or five men; carrying 70-100 pound pumps with a co-worker; and using a 20 or 40 pound sledgehammer to pry off the tires." *Id*. at 4-5. In addition, the administrative law judge stated that "[c]laimant was required to do much lifting and carrying; sometimes, he had to crawl the distance of a city block." *Id*. at 5.

In a report dated May 13, 2002, Dr. Hawkins opined that claimant suffers from a mild impairment. Director's Exhibit 8. Dr. Hawkins also opined that claimant suffers from exertional dyspnea, that claimant is unable to perform manual labor, and that claimant should avoid any exposure to chemicals and dust. *Id*. In a subsequent report dated October 28, 2002, Dr. Hawkins opined that claimant does not have the respiratory capacity to perform the job of an electrician/welder based in part on a description of the physical demands of claimant's last job. Claimant's Exhibit 5. Similarly, in a report dated July 16, 2002, Dr. Cohen opined that claimant does not have the respiratory capacity to perform the job of an electrician/welder based in part on a description of the physical demands of claimant's last job. Director's Exhibit 9. In reports dated February 5, 2003 and February 14, 2003, Dr. Goldstein did not render an opinion with respect to the issue of total disability. Employer's Exhibit 1. Similarly, in a report dated September 20, 1989, Dr. Hasson did not render an opinion with respect to the issue of total disability. Director's Exhibit 1. In a subsequent report dated July 9, 2002, however, Dr. Hasson opined that there was no evidence of a

[4]The administrative law judge noted that "[t]here are various descriptions of the exertional requirements of [claimant's last coal mine] job including [c]laimant's testimony (TR 12-14, 17-19), answers to interrogatories (DX 5), and a description provided by [c]laimant's counsel (DX 9; CX5)." Decision and Order at 4.

pulmonary impairment that would explain claimant's dysnea. Director's Exhibit 10.

Employer asserts that the administrative law judge erred in relying on Dr. Hawkins' opinion because he had previously indicated that he discredited it. The administrative law judge noted that Dr. Cohen's July 16, 2002 opinion and Dr. Hawkins' October 28, 2002 opinion are based in part on a job description provided by claimant's counsel. Decision and Order at 4. The administrative law judge also noted that claimant's counsel did not identify the source of the job description. *Id*. Hence, the administrative law judge discredited Dr. Cohen's July 16, 2002 opinion and Dr. Hawkins' October 28, 2002 opinion. Nonetheless, the administrative law judge credited Dr. Hawkins' May 13, 2002 opinion. The administrative law judge stated, "[p]rior to…Dr. Hawkins[']s response to [c]laimant's [c]ounsel's job description, he assessed [c]laimant's impairment as 'mild' noting [c]laimant's exertional dyspnea and that [c]laimant is unable to perform manual labor." *Id*. Thus, since the administrative law judge did not previously discredit Dr. Hawkins' May 13, 2003 opinion, we reject employer's assertion that the administrative law judge erred in relying on Dr. Hawkins' opinion because he had previously indicated that he discredited it. Further, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[5]

In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(b). Specifically, employer asserts that the administrative law judge ignored the objective medical testing in weighing the contrary probative evidence. Although the administrative law judge did not specifically identify the pulmonary function studies and arterial blood gas studies that he weighed against the medical opinion evidence, he nonetheless stated that he weighed together the different types of evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge found the pulmonary function study evidence sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). As discussed *supra*, at 2 n.2, employer did not contest the administrative law judge's finding that the pulmonary function study evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). In contrast, the administrative law judge found the arterial blood gas study evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). However, in weighing all of the contrary probative evidence of

[5]In weighing the medical opinions of Drs. Hawkins, Hasson and Goldstein, the administrative law judge focused on the 2002 and 2003 reports. The administrative law judge correctly found that "Drs. Hasson's and Goldstein's subsequent reports do not refute a conclusion of total disability." Decision and Order at 5. Based on the administrative law judge's consideration of Dr. Hawkins' May 13, 2002 opinion, that claimant suffered from a mild impairment, in conjunction with claimant's testimony about the exertional requirements of his last coal mine job, the administrative law judge reasonably found that claimant established total disability. *Id*.

record, like and unlike, the administrative law judge found "the physician opinion evidence the most probative means to prove total disability as it is not based on a specific physical finding or isolated numeric criteria." Decision and Order at 5. Thus, since the administrative law judge considered the objective evidence of record in weighing together all of the medical evidence with respect to the issue of total disability, we reject employer's assertion that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(b). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Finally, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer asserts that the administrative law judge erred in failing to apply the disability causation standard enunciated by the United States Court of Appeals for the Eleventh Circuit in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). The administrative law judge considered the reports of Drs. Goldstein, Hawkins, and Hasson. In a report dated May 13, 2002, Dr. Hawkins diagnosed pneumoconiosis related to dust exposure and asthma related to intrinsic/extrinsic environmental exposures. Director's Exhibit 8. Further, Dr. Hawkins opined that asthma contributed 80% to the cause of claimant's mild impairment and that pneumoconiosis contributed 20% to the cause of claimant's mild impairment. *Id*. In contrast, Drs. Goldstein and Hasson implicitly found that claimant's coal mine employment did not contribute to a disabling respiratory or pulmonary impairment. Specifically, Dr. Goldstein opined that claimant does not suffer from pneumoconiosis and that the etiology of claimant's asthma is unclear. Employer's Exhibit 1. Similarly, Dr. Hasson opined that claimant does not suffer from pneumoconiosis and diagnosed asthmatic bronchitis.[6] Director's Exhibit 1.

In *Lollar*, the Eleventh Circuit held that in order to qualify for benefits under 20 C.F.R. §718.204 (2000), a claimant must establish that his pneumoconiosis was a substantial contributing factor in the causation of his total pulmonary disability. In *Black Diamond Coal Mining Co. v. Director, OWCP* [*Marcum*], 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996), the Eleventh Circuit clarified its holding in *Lollar* with regard to the substantial contributing cause standard by explaining that "[a] conclusion that a contributing cause played more than an infinitesimal or *de minimis* part does not mean that the contributing cause was substantial." *Marcum*, 95 F.3d at 1083, 20 BLR at 2-333. Subsequent to the Eleventh Circuit's decision in *Lollar* and *Marcum*, the Department of Labor implemented revised

[6]Dr. Hasson noted "N/A" in the impairment section of the September 20, 1989 report. Director's Exhibit 1. Dr. Hasson also noted "N/A" in the same section with regard to the extent that a diagnosed condition contributes to an impairment. *Id*.

regulations at 20 C.F.R. §718.204(c) which address disability causation. Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii). After considering Dr. Hawkins' opinion in accordance with the disability causation standard at 20 C.F.R. §718.204(c)(1), the administrative law judge concluded that Dr. Hawkins' opinion establishes total disability due to pneumoconiosis. The administrative law judge specifically stated:

> Pneumoconiosis is a substantially contributing cause of a miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition. §718.204(c)(1)(i). I find Dr. Hawkins' conclusion that 20% of [c]laimant's impairment is due to pneumoconiosis meets that criteria. I find that it can reasonably be inferred that a 20% contribution is more than a negligible, inconsequential, or insignificant contribution. *See* Regulation Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,946 (Dec. 20, 2000).

Decision and Order at 6. Since the disability causation standard at 20 C.F.R. §718.204(c)(1) is consistent with the disability causation standard enunciated in *Lollar* and *Marcum*, we hold that the administrative law judge's failure to specifically apply the *Lollar* disability causation standard is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Further, since the administrative law judge reasonably found that Dr. Hawkins' opinion, the only medical opinion probative of the issue of total disability due to pneumoconiosis, satisfied the disability causation standard at 20 C.F.R. §718.204(c)(1), we affirm the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge