BRB No. 98-1394 BLA

CHARLES W. LOVE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
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 on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collet, Hyden, Kentucky, for claimant.

Timothy J. Walker, London, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-401) of Administrative Law Judge Donald W. Mosser denying 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 is on appeal to the Board for the second time. In the original Decision and Order, the administrative law

judge adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 and found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge thus found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. Claimant appealed and in *Love v. Leeco, Inc.*, BRB No. 97-0683 BLA (Jan. 20, 1998)(unpub.), the Board affirmed the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3) and his findings that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(3). The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4) and remanded the case to the administrative law judge to reweigh the evidence relevant to the issues of the existence of pneumoconiosis and total disability thereunder. On remand, the administrative law judge again found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) or total disability pursuant to 20 C.F.R. §718.204(c)(4) and again found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), citing the standard articulated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not participated 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 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 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)(*en banc*).

Claimant initially contends that the administrative law judge erred in rejecting

the opinions of Drs. Vaezy, Clarke and Baker in favor of the opinions of Drs. Broudy, Vuskovich, Anderson and Myers at Section 718.202(a)(4). Claimant asserts that the opinions of Drs. Myers and Anderson are not documented and reasoned, as the administrative law judge found, since both physicians diagnosed a pulmonary condition, but neither physician provided an etiology for the pulmonary condition they diagnosed. Decision and Order on Remand at 3; Claimant's Brief at 3.

Dr. Myers diagnosed chronic obstructive pulmonary disease, but no pneumoconiosis. Employer's Exhibit 8. Dr. Anderson diagnosed a mild decrease in pulmonary function, but no pneumoconiosis. Employer's Exhibit 7. Neither physician discussed the cause of the pulmonary disease or decrease in pulmonary function. Contrary to claimant's argument, a physician's opinion on etiology which consists of responding "no" to questions set forth on a standardized medical report form is sufficiently reasoned pursuant to Section 718.202(a)(4). *Perry*, *supra*. The administrative law judge, therefore, could rationally determine that the opinions of Drs. Meyers and Anderson were reasoned and documented as both physicians checked no in the boxes on standardized forms asking whether claimant has an occupational lung disease caused by his coal mine employment. Their responses on these standardized forms were based on information they obtained from claimant's employment and medical histories, physical examination, x-ray and other objective tests. Decision and Order on Remand at 3; Employer's Exhibits 7-8. As claimant does not otherwise challenge the bases upon which the administrative law judge gave diminished weight to the opinions of Drs. Vaezy, Clarke and Baker, nor assert that the administrative law judge erred in finding the opinions of Drs. Broudy and Vuskovich, who found no pneumoconiosis, documented and reasoned, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[1] *See* 20 C.F.R. §718.201.

[1] Claimant also generally alleges that the administrative law judge selectively analyzed the evidence and substituted his own conclusion for that of the physicians, but we decline to address this allegation since claimant failed to give any specific instances where this error occurred. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 9 BLR 1-610 (1984); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4), asserting that the administrative law judge erred in relying, in part, on the medical opinion of Dr. Anderson and in discounting the medical opinions of Drs. Clarke and Vaezy.[2] Claimant contends that the administrative law judge erred in finding Dr. Anderson's opinion to be documented and reasoned, asserting that Dr. Anderson merely checked a box indicating that claimant could do his usual coal mine employment, but failed to explain how he reached this conclusion. Claimant's Brief at 5. Dr. Anderson checked the box on the standardized form stating that claimant could perform his usual coal mine employment and also, contrary to claimant's assertion, stated that claimant "[d]oes retain sufficient pulmonary functional capacity to do so" in the space provided on the form for an explanation. Decision and Order on Remand at 4; Employer's Exhibit 7. Furthermore, Dr. Anderson's opinion refers to claimant's history, examination and objective tests. We, therefore, reject claimant's assertion that the administrative law judge erred in finding Dr. Anderson's opinion documented and reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Perry*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985).

Claimant next alleges that the administrative law judge improperly substituted his opinion for Dr. Vaezy's when he questioned the accuracy of the physician's findings after stating that Dr. Vaezy gave no reason for changing his interpretation regarding the severity of claimant's impairment.[3] We disagree.

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[2] Claimant does not raise any specific allegations of error regarding the administrative law judge's accordance of diminished weight to Dr. Clarke's opinion or his crediting of the opinions of Drs. Broudy and Vuskovich.

[3] In his brief, claimant stated that the administrative law judge rejected Dr. Myers' opinion, but it is apparent from the context of his entire discussion that claimant was actually referring to Dr. Vaezy's opinion. *See* Decision and Order on Remand at 4; Claimant's Brief at 6.

In considering the medical evidence of record, an administrative law judge may not selectively analyze the evidence. *See Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Crider v. Dean Jones Coal Co.*, 6 BLR 1-606 (1983); *see also Stevenson v. Windsor Power House Coal Co.*, 6 BLR 1-1315 (1984). The weight accorded the evidence and the determinations concerning the credibility of medical experts and witnesses are, however, for the administrative law judge to make and cannot be disturbed when rational and supported by substantial evidence. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985); *Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977).

In this case, the administrative law judge permissibly questioned the accuracy of Dr. Vaezy's opinion because he did not explain how he reached a finding of "mild to moderate defect" based on the results of a May 1995 pulmonary function study when he had earlier diagnosed only the presence of a mild impairment, even questioning the diagnosis by the use of a question mark, Decision and Order at 4, based on the results of a February 1995 pulmonary function study, after noting that there was no real difference between the results of the February and May studies. *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984); Decision and Order on Remand at 4; Director's Exhibits 15-16, 36.

Claimant also asserts that the administrative law judge erred in rejecting Dr. Vaezy's opinion because he gave no reason for the change in his opinion, but not rejecting Dr. Anderson's opinion on the same basis. Claimant's Brief at 6. Claimant does not, however, point to any change Dr. Anderson made in his opinion nor does the record reflect one.

Contrary to claimant's argument, the administrative law judge rationally credited Dr. Anderson's report as documented and reasoned since it was based on claimant's coal mine employment, medical and smoking histories, subjective complaints and symptoms, and the results of a physical examination, x-ray, pulmonary function study, blood gas study and an electrocardiogram, all of which Dr. Anderson discussed in arriving at his diagnoses of no evidence of pneumoconiosis, a mild decrease in pulmonary function and arteriosclerotic heart disease with old myocardial infarction as well as in reaching his conclusion that claimant could perform his usual coal mine employment from a respiratory standpoint. Employer's

Exhibit 7. As the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987), we affirm the administrative law judge's findings regarding the credibility of the opinions of Drs. Vaezy and Anderson. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence and is in accordance with law.

Further, we reject claimant's general contention that the inadvisability of claimant's return to work in dusty condition is sufficient to establish a totally disabling respiratory impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989). We also reject claimant's contention that since pneumoconiosis is a progressive and irreversible disease, it would have manifested itself by adversely affecting claimant's ability to perform his usual coal mine employment or comparable and gainful work since its initial diagnosis, as total disability is an element claimant must affirmatively establish. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). As the administrative law judge weighed all of the newly submitted medical evidence and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability pursuant to Section 718.204(c), we affirm his findings that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to Section 725.309. *See Ross*, *supra*; *Clark*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic*, *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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge