BRB No. 01-0156 BLA

WILLIAM L. TAPPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOVERSPIKE BROTHERS, INCORPORATED/DOVERSPIKE BROTHERS COAL COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Philip L. Wein, Clarion, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (99-BLA-0069) of Administrative Law Judge Pamela Lakes Wood with respect to a living miner's 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 thirty-one years of coal mine employment and considered the claim, filed on August 8, 1997, pursuant to the regulations set forth in 20 C.F.R. Part 718 (2000). The administrative law judge determined that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and that claimant is totally disabled due to pneumoconiosis. The administrative law judge also determined that Doverspike Brothers Coal Company is the operator responsible for the payment of benefits and that its liability commenced on August 1, 1997. Employer argues on appeal that the administrative law judge did not properly weigh the medical opinion evidence relevant to the existence of a totally disabling respiratory or pulmonary impairment. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). As a result, the Board issued an order dated August 10, 2001, in which it rescinded its request for supplemental briefing. *Tapper v. Doverspike Brothers, Inc., et al.*, BRB No. 01-0156 BLA (Aug. 10, 2001)(unpub. Order).

[2]The administrative law judge's findings with respect to the length of claimant's coal mine employment, the identity of the responsible operator, and her findings pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204(b), and 718.204(c)(1)-(3) (2000) are affirmed, as they have not been challenged on appeal. *See Skrack v. Island Creek Coal*

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.204(c)(4) (2000), the administrative law judge considered the opinions of Drs. Fino, Gerhart, Schaaf, Shah, and Levine. The administrative law judge determined that Dr. Fino's opinion, that claimant has a mild pulmonary impairment which is not totally disabling, was entitled to little weight on the ground that "Dr. Fino assumed that claimant was five years older than he actually was; a fact that may have influenced his opinion as to the degree of disability." Decision and Order at 14; Director's Exhibit 41. The administrative law judge discredited Dr. Gerhart's opinion based upon her determination that "Dr. Gerhart does not appear to have squarely addressed the issue of claimant's ability to perform his last coal mine work" and that "his reports are not entirely legible on critical matters." *Id.*; Director's Exhibits 12, 63. Turning to the opinion of Dr. Schaaf, that claimant is suffering from a totally disabling pulmonary impairment, the administrative law judge deemed it worthy of greatest weight, as it was the best documented and reasoned opinion. *Id.*; Director's Exhibits 38, 47, 54; Claimant's Exhibit 4. The administrative law judge further determined that Dr. Schaaf's conclusion was corroborated by the reports in which Drs. Levine and Shah described claimant as lacking the respiratory ability to return to his last coal mining job. *Id.*; Director's Exhibits 34, 43. The administrative law judge then found that when considered together "with claimant's testimony and written submissions concerning the nature of his coal mine employment," Dr. Schaaf's opinion was sufficient to establish total disability pursuant to Section 718.204(c) (2000).

Employer argues that the administrative law judge's finding that claimant is suffering from a totally disabling respiratory impairment is irrational and is not supported by substantial evidence. Employer alleges specifically that the administrative law judge's analysis of this issue is fundamentally flawed, inasmuch as the administrative law judge did not clearly identify the exertional requirements of claimant's usual coal mine work. Similarly, employer maintains that the opinions of Drs. Schaaf, Levine, and Shah are not reasoned and documented, as these physicians did not demonstrate an adequate knowledge of claimant's last coal mine employment as a shuttle car operator. Employer also alleges that Dr. Schaaf's opinion is unsupported by the underlying documentation and does not contain a rationale for Dr. Schaaf's conclusion. Finally, employer argues that the administrative law judge's decision is fatally flawed by her discrediting of the opinions of Drs. Fino and Gerhart and by her weighing of the evidence as a whole to find total disability established.

Co., 6 BLR 1-710 (1983).

These contentions are without merit. In the present case, the administrative law judge found that claimant's "last and usual coal mine employment" was as a roof bolter *and* a shuttle car operator, but later indicated that claimant's final position with employer was shuttle car operator . Decision and Order at 11, 14. The administrative law judge further determined that claimant's "last or usual" coal mine employment "was heavy in nature." *Id*. at 15. As employer asserts, the administrative law judge's finding that claimant's usual coal mine employment was as both a roof bolter and a shuttle car operator is not supported by the record, inasmuch as claimant informed several physicians that he worked solely as a shuttle car operator during the last three and one-half years of his tenure with employer. Director's Exhibits 34, 28, 41; Claimant's Exhibit 4 at 10-11; *see Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984). This does not constitute an error requiring remand, however, in light of the fact that the administrative law judge's characterization of claimant's usual coal mine work as "heavy" is rational and supported by substantial evidence. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant indicated on Department of Labor Form CM-913 that on a daily basis, his job as a shuttle car operator required him to sit for six hours, lift one pound a maximum of seventy-five times, carry fifty pounds twice, and carry seventy-five pounds twenty times. Director's Exhibit 3. At the hearing, claimant testified that while running the shuttle cars, he and another employee were responsible for lifting "very heavy cables" that attached to the continuous miner "at least ten times a day." Hearing Transcript at 43. Claimant also indicated that he was required to perform maintenance on the shuttle car including changing tires, greasing, and repairing the vehicle. When asked to describe the nature of his coal mine employment, claimant stated that all of his jobs in the mines involved "heavy work." *Id*. at 49. Inasmuch as the evidence of record supports the administrative law judge's determination that claimant's usual coal mine employment required heavy manual labor, this finding is affirmed. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1985)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

Turning to the administrative law judge's consideration of the medical opinions relevant to the issue of total disability, we hold that the administrative law judge's findings with respect to Dr. Schaaf's opinion are rational and supported by substantial evidence. The administrative law judge acted within her discretion in crediting Dr.

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[3]Contrary to employer's assertion, there is a typewritten notation on Form CM-913 indicating that the job duties claimant described pertained to his position as a shuttle car operator. Director's Exhibit 3.

Schaaf's opinion. Although Dr. Schaaf did not set forth the specific exertional requirements of claimant's usual coal mine job, he stated that it was his understanding that claimant's work in the mines required heavy manual labor, which accords with the administrative law judge's determination. Claimant's Exhibit 4 at 13. Based upon this foundation, the administrative law judge acted within her discretion in treating Dr. Schaaf's opinion, that claimant's mild obstructive airways disease is totally disabling, as an opinion supportive of a finding of total disability. *See McMath*, *supra*; *Budash*, *supra*. The administrative law judge also rationally found that claimant's testimony regarding his physical limitations was credible and corroborated Dr. Schaaf's medical determination of total respiratory disability. *See Hillibush v. U.S. Department of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988); *Pekala v. Director, OWCP*, 13 BLR 1-1 (1989).

Moreover, contrary to employer's contentions, the administrative law judge acted within her discretion in determining that the reports of Drs. Levine and Shah supported Dr. Schaaf's opinion. Decision and Order at 14; Director's Exhibits 34, 43. Dr. Levine examined claimant and indicated that claimant's symptoms and the changes of obstructive pulmonary disease revealed on his pulmonary function study supported the conclusion that claimant could not perform his last job in the coal industry without significant shortness of breath. Director's Exhibit 34. The administrative law judge rationally determined, based upon her finding that claimant's job required heavy manual labor, that Dr. Levine's opinion corroborated Dr. Schaaf's finding of total disability. *See McMath*, *supra*; *Budash*, *supra*. With respect to Dr. Shah's opinion, inasmuch as Dr. Shah concluded that claimant has pneumoconiosis and is totally disabled by it, the administrative law judge did not err in treating Dr. Shah's statement that "Mr. Tapper simply does not have the respiratory and back ability" to perform jobs requiring lifting, carrying, climbing, etcetera, as a finding of total respiratory disability. *Id.*

With respect to the administrative law judge's consideration of the medical reports of Dr. Gerhart, the administrative law judge determined that Dr. Gerhart did not

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[4]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5]Employer's contention that the administrative law judge should have discredited Dr. Levine's opinion because he relied upon a nonqualifying pulmonary function study designated as "normal" is without merit. Dr. Levine specifically indicated his disagreement with the notation on a computer printout that the test was "normal" by writing "wrong" next to this conclusion. Director's Exhibit 34. He further noted that the pulmonary function study revealed changes consistent with obstructive pulmonary disease. *Id*.

"squarely address" the issue of total disability and that his written conclusions "are not entirely legible on critical matters." Decision and Order at 14; Director's Exhibits 12, 63. Accordingly, the administrative law judge found that Dr. Gerhart's opinion, that claimant has a mild impairment, was entitled to little weight. *Id*. Employer asserts that pursuant to 20 C.F.R. §725.456(e) (2000), the administrative law judge could have remanded the case to the district director for clarification of Dr. Gerhart's reports. We reject employer's contentions. The administrative law judge acted within her discretion in determining that aside from the problem of the legibility of his reports, Dr. Gerhart's diagnosis of a mild impairment, without a statement regarding the extent to which this impairment disabled claimant, does not contradict a finding of total disability pursuant to Section 718.204(c)(4) (2000) in this case. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also McMath*, *supra*; *Budash*, *supra*. Moreover, the administrative law judge was not required to remand the case to the district director to rectify the flaws in one medical opinion. *See Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985). Lastly, employer had ample opportunity to seek clarification of Dr. Gerhart's written statements prior to the date of the hearing in this case.

We affirm, therefore, the administrative law judge's determination that Dr. Schaaf's opinion, as corroborated by the opinions of Drs. Shah and Levine and claimant's testimony, outweighed the contrary probative evidence of record and established total respiratory disability pursuant to Section 718.204(c) (2000). Thus, we need not address employer's allegations of error regarding the administrative law judge's treatment of Dr. Fino's opinion, that claimant has a mild impairment but can perform his usual coal mine employment, and the administrative law judge's reference to claimant's inability to complete a cardiac stress test. Decision and Order at 14-15; Director's Exhibits 12, 41. Any errors in this regard are harmless in light of the administrative law judge's rational determination that the preponderance of relevant and probative evidence supports a determination that claimant is totally disabled. *See Johnson*, *supra*; *Larioni*, *supra*.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge