BRB No. 03-0182 BLA

RUBEN WEBSTER, Junior	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTERS RESOURCES, INCORPORATED	)	DATE ISSUED: 10/28/2003
	)	
	)	
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 B Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2001-BLA-631) of Administrative Law Judge Gerald M. Tierney rendered 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).[1] The administrative law judge found twenty

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

years and five months of coal mine employment established and he adjudicated the claim pursuant to 20 C.F.R. Part 718, based on the date of filing.[2] Decision and Order at 2. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence established the existence of pneumoconiosis, an element of entitlement previously adjudicated against claimant, and thus, found a material change in conditions established. The administrative law judge further found, on considering all the evidence of record, that the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, that claimant was totally disabled, and that the total disability was due to pneumoconiosis were established. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the award. The Director, Office of Workers= Compensation Programs, is not participating in this appeal.

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); *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 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*).

Pursuant to Section 718.202(a)(1), employer argues that the administrative law judge should have accorded greater weight to the preponderance of the negative x-ray readings. The administrative law judge found: that the majority of the readings of x-rays taken in 1994 were read as negative for the existence of pneumoconiosis by B readers, Director=s Exhibits 32-13, 32-14, 32-27, 32-31, 33-17, 19, 17, 26-12, 26-13; that the March 8, 2000 x-ray was read positive by Drs. Ahmed, Cappiello and Miller, board-certified, B-readers, negative by Drs. Cohen and Goldstein, B-readers; and it was read as unreadable by Dr. Sergeant, a dually

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[2] Claimant filed his first claim for benefits on June 27, 1994, which was denied on November 15, 1994 and on January 6, 1998, because claimant failed to establish any of the elements of entitlement. Director=s Exhibit 26. Claimant filed the instant, duplicate claim on December 20, 1999. Director=s Exhibits 1, 24.

qualified physician. Director=s Exhibits 6, 7, 9; Claimant=s Exhibits 1-3, and that the December 15, 2000 x-ray was also read positive by Drs. Cappiello, Ahmed and Miller, but negative by Drs. Goldstein and Sargent. Director=s Exhibits 21, 22; Claimant=s Exhibits 1-3.

Thus, the administrative law judge found positive for the existence of pneumoconiosis, not only the majority of the readings of the most recent x-rays, dated March 8, 2000 and December 15, 2000, but that the positive readings were by dually qualified physicians, while the negative readings and an interpretation classified as unreadable were by B-readers. The administrative law judge, therefore, accorded greater weight to the positive readings of the x-rays taken March 8, 2000 and December 15, 2000, based on the recency of the x-rays and the qualifications of the readers. This was rational. 20 C.F.R. ' 718.202(a)(1); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*); *see Underwood Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31 (4th Cir. 1997); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Employer next argues that the administrative law judge erred in finding the medical opinion evidence of record sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Because we affirm the administrative law judge=s finding that the x-ray evidence establishes the existence of pneumoconiosis at Section 718.202(a)(1) in this case, however, we need not address employer=s argument regarding the administrative law judge=s finding at Section 718.202(a)(4). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985)(ASection 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis.@); *see, e.g., Dagnan v. Blue Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203, 2-210 (11th Cir. 1993).

Employer also contends that the evidence is insufficient to establish total disability. Specifically, employer argues that the administrative law judge failed to consider the contrary probative evidence of record, *i.e.*, the non-qualifying pulmonary function studies and blood gas studies, when he found that the medical opinion evidence established a totally disabling respiratory impairment. Contrary to employer=s contention, the administrative law judge stated that although the pulmonary function studies and blood gas studies did not establish total disability, the opinions of Drs. Hinkamp and Cohen, who reviewed the exertional requirements of claimant=s coal mine employment, established total disability. The administrative law judge rejected the opinion of Dr. Godstein who merely stated in a 1994 report that claimant had a minimal pulmonary impairment but the doctor could not describe or explain the extent of the impairment. This was rational. *See Clark*, 12 BLR at 1-155; *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 BLR1-236 (1987)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245, 1-247 (1985).

Contrary to employer=s contention, the existence of non-qualifying[3] studies does not require the administrative law judge to disregard evidence supportive of a finding of total disability. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988)(*en banc*). Accordingly, having weighed all the relevant evidence, the administrative law judge rationally found that claimant was totally disabled. 20 C.F.R. '718.204(b)(2)(i)-(iv). *Clark*, 12 BLR at 1-155; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Finally, employer contends that the administrative law judge erred in finding that pneumoconiosis susbstantially contributed to claimant=s total disability pursuant to Section 718.204(c), based on the opinions of Drs. Hinkamp and Cohen. Employer contends that the evidence shows that claimant was treated for hypertension and sleep apnea and that the administrative law judge ignored these diagnoses.

The administrative law judge found that both Drs. Cohen and Hinkamp, in well-reasoned opinions, found that coal dust exposure was the primary cause of claimant=s total disability, while Dr. Goldstein stated that claimant, A has a significant shortness of breath that is related to COPD and probably to his hypertension,@ without further explanation. Decision and Order at 13. Moreover, the administrative law judge found that the physicians who diagnosed the existence of pneumoconiosis also specifically mentioned claimant=s sleep apnea and hypertension, but never stated that these conditions contributed to claimant=s disability. Thus, the administrative law judge rationally found the opinions of Drs. Cohen and Hinkamp to be better reasoned and documented than the opinions of Dr. Goldstein and rationally concluded that the evidence established that pneumoconiosis was a substantially contributing factor in claimant=s total disability. 20 C.F.R. '718.204(c); *see Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); *see also Clark*, 12 BLR 1-149; *King*, 8 BLR 1-262; *Fields*, 10 BLR 1-19. Therefore, the administrative law judge=s disability causation finding is rational and must be affirmed. 20 C.F.R. '718.204(c).

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *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 if the administrative law judge=s findings are supported by substantial evidence, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge=s finding that the evidence of record establishes the existence of

[3] A Aqualifying@ pulmonary functions study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B. C respectively. A Anon-qualifying@ study exceeds those values. *See* 20 C.F.R. '718.204(b)(2)(i), (ii).

pneumoconiosis, that claimant was total disability, and that claimant=s total disability was due to pneumoconiosis.[4]

[4] We affirm the administrative law judge=s finding that pneumoconiosis arose out of coal mine employment as unchallenged on appeal, as well as his finding regarding the onset date. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge=s Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge