BRB No. 98-1618 BLA

KESTER J. MEADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (97-BLA-1762) of Administrative Law Judge Richard T. Stansell-Gamm on a claim[1] 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 before the Board for the third time. In the initial Decision and Order, Administrative Law Judge John J. Forbes, Jr. properly adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited claimant with thirty-four years of qualifying coal mine employment. Administrative Law Judge Forbes then determined that

[1] Claimant is Kester J. Meade, the miner, who filed his application for benefits on June 3, 1987. Director's Exhibit 1.

claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b) and total respiratory disability pursuant to 20 C.F.R. §718.204(c)(4), and accordingly, awarded benefits. Director's Exhibit 43. Employer timely appealed and the Board affirmed Administrative Law Judge Forbes' findings under 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), and 718.204(c)(1)-(3), but vacated his total disability determination at 20 C.F.R. §718.204(c)(4) and remanded the case for further consideration. *Meade v. Clinchfield Coal Co.*, BRB No. 89-4083 BLA (Dec. 27, 1991)(unpub.); Director's Exhibit 51.

Subsequently, the case was reassigned without objection to Administrative Law Judge Stuart A. Levin. On remand, Administrative Law Judge Levin found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) and hence, denied benefits. Director's Exhibit 55. Claimant appealed and the Board affirmed Administrative Law Judge Levin's finding at 20 C.F.R. §718.204(c)(4), and accordingly, affirmed his denial of benefits. *Meade v. Clinchfield Coal Co.*, BRB No. 93-1003 BLA (Mar. 29, 1994)(unpub.); Director's Exhibit 61. Claimant appealed the Board's decision and the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, vacated Administrative Law Judge Levin's finding under 20 C.F.R. §718.204(c)(4), and remanded the case so the administrative law judge could conduct a hearing to obtain further information regarding Dr. Garcia's opinion. *Meade v. Clinchfield Coal Co.*, No. 94-1483 BLA (4th Cir. Jan. 10, 1995)(unpub.); Director's Exhibit 66. In accordance with the Court's decision, the Board remanded the case to the administrative law judge. *Meade v. Clinchfield Coal Co.*, BRB No. 93-1003 BLA (Mar. 17, 1995)(unpub. Order); Director's Exhibit 68.

On remand, Administrative Law Judge Levin determined that none of the parties had filed any further evidence in response to the Court's remand order or his efforts to further develop the record in compliance with the Court's directive, therefore, he remanded the case to the district director to permit either party to develop evidence responsive to the Court's remand order or to permit claimant to pursue modification. Director's Exhibit 81. The district director denied benefits on May 9, 1997, Director's Exhibit 83, after which claimant requested a formal hearing. Thereafter, the case was assigned to Administrative Law Judge Richard T. Stansell-Gamm (administrative law judge), who held a hearing in this case on March 24, 1998. In his Decision and Order, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(c)(1)-(4), and accordingly, denied benefits.

On appeal, claimant argues that the administrative law judge improperly weighed the medical opinion evidence pursuant to Section 718.204(c)(4). Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating his intention not to participate 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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to Section 718.204(c)(4), claimant argues that the administrative law judge erroneously discredited Dr. Smiddy's report on the basis that Dr. Smiddy was unfamiliar with claimant's specific job duties, and that the administrative law judge did not apply this same standard when weighing the opinions of Drs. Sargent, Fino, and Castle.[2] In addition, claimant avers that the administrative law judge improperly rejected Dr. Smiddy's opinion because it was older than the other physicians' opinions of record. Claimant's contentions lack merit.

[2] In a report dated July 6, 1988, Dr. Smiddy opined that claimant is not physically capable of the type of physical activity required for underground coal mine employment due to his respiratory impairment, which is secondary to his pneumoconiosis. Director's Exhibit 63.

Drs. Sargent, Fino, and Castle each provided various reports during the course of this claim and all three physicians consistently opined that claimant suffers from a restrictive ventilatory impairment that would not preclude him from performing moderately strenuous labor. Director's Exhibits 39, 40, 84; Employer's Exhibits 5, 9, 10, 12, 13.

In evaluating whether the medical opinion evidence was sufficient to demonstrate total disability, the administrative law judge properly examined each opinion to determine whether that physician was familiar with the exertional requirements of claimant's coal mine job as a belt examiner.[3] *See Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989); Decision and Order [on Remand] at 20-22. Notwithstanding Dr. Smiddy's listing of all of the jobs claimant has held in his coal mine employment career, the administrative law judge permissibly attributed less weight to Dr. Smiddy's opinion because Dr. Smiddy failed to state his knowledge of the physical demands required for claimant's position as a belt examiner. *See Walker*, *supra*; *Budash*, *supra*; Decision and Order [on Remand] at 20; Director's Exhibit 63. Inasmuch as the administrative law judge, within a proper exercise of his discretion, determined that Dr. Smiddy's opinion is less persuasive due to his lack of familiarity with the exertional requirements of claimant's usual coal mine work, we reject claimant's contention. In addition, the administrative law judge permissibly found Dr. Smiddy's opinion less well-documented inasmuch as it is based on an incomplete medical record since it was rendered in 1988 and "the remaining doctors who evaluated the issue of total disability had another ten years of medical history to consider." Decision and Order [on Remand] at 21. Although the United States Court of Appeals for the Fourth has held, "A bare appeal to 'recency' is an abdication of rational decisionmaking[,]" the Court held further that "[t]here may be new or additional evidence developed that discredits an earlier opinion; a comparison of medical reports and tests over a long period may

[3] Claimant testified at both formal hearings in this case with respect to the exertional requirements of his usual coal mine job as belt examiner. During the first formal hearing before Administrative Law Judge Forbes on April 4, 1989, claimant testified that he "had to examine the belts to see if they needed rock dust and to see if we had any bad rollers, and just checked for things that was damaged like that. I checked all of that." In addition, claimant stated that he drove a Jeep part of the distance of the belts he was required to examine. Director's Exhibit 27 at 12-13.

Claimant similarly testified during the formal hearing before Administrative Law Judge Stansell-Gamm on March 24, 1998. Claimant testified that federal law precluded belt examiners from examining belts while riding in a Jeep. He mentioned, therefore, that after he completed his examination, he would drive the Jeep out of the mines. He also stated that he was required to examine six miles of belt and six miles of return airways, all of the belt rollers, bar extensions and bars, on a tipple with four floors, auxiliary fans and frames, and was required to complete fourteen belt drive books. [1998] Hearing Transcript at 42-43, 55-56. Under cross-examination, claimant testified that his duties did not involve crawling, lifting or carrying. [1998] Hearing Transcript at 65.

conceivably provide a physician with a better perspective than the pioneer examiner." *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993). Hence, we affirm the administrative law judge's rational determination to accord Dr. Smiddy's opinion diminished weight because it precedes the more recent physicians' opinions by ten years and the opinions of Drs. Sargent, Castle, and Fino were based on records from the interim ten-year period in addition to more recent physical examinations and diagnostic tests conducted in 1997 and 1998. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 n.6 (1985)(recency is a relevant consideration in weighing medical reports); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Director's Exhibit 84; Employer's Exhibits 5, 9, 10, 12, 13.

Claimant contends further that, given the administrative law judge's determination that one of claimant's coal mine employment duties was walking twelve miles per day, Dr. Robinette's opinion is more than sufficient to demonstrate total disability because he found that claimant was unable to walk for as many as six miles per day.[4] Initially, the administrative law judge found that Mr. John Border, claimant's supervisor, presented the most credible assessment of the physical demands of a belt examiner[5] and rationally determined that claimant's job constituted light manual labor, consisting of walking at least twelve miles per day, with one-third of that distance on a ten percent incline, carrying up to twenty pounds of equipment, and lifting up to twenty pounds. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); Decision and Order [on Remand] at 13. Although the administrative law judge initially found Dr. Robinette's opinion to be well documented and reasoned, he reasonably concluded that the opinions of Drs. Sargent, Fino, and Castle were more persuasive because these opinions were consistent with the objective medical evidence in the record demonstrating a mild to moderate restrictive impairment and normal blood gas exchange capability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel*, 8 BLR at 1-141; Decision and Order [on Remand] at

[4] In his third report of record dated August 5, 1997, Dr. Robinette specifically opined that claimant would be "unable to work as a belt examiner, walking up to six miles of belt, checking belt drives and checking air returns." Claimant's Exhibit 1.

[5] Mr. John Border, claimant's supervisor, testified at the 1998 hearing and stated that "as a belt examiner, [claimant] observed all the rollers to make sure that there was no coal spills and that they were going properly as they were rolling, because the roller sticks create excessive dust. And, he had to check the deluge systems on all the discharge points, which is required by federal law. ... And, he had to check for rock dust, coal spills and generally just anything that he seen [sic], that was not proper, that there was not fire on that belt." *Id.* at 74. With respect to the Jeep, Mr. Border testified, "He would either observe and examine the belt going in, and ride the transportation out, or he would ride in and examine his belts going out. There was no point walking both ways." *Id.* at 75.

21-22. Inasmuch as the administrative law judge properly considered the objective data offered as documentation and credited the opinions of Drs. Sargent, Fino, and Castle as adequately supported by such data over the opinion of Dr. Robinette which is not, we affirm the administrative law judge's credibility determination. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

Claimant finally argues that the administrative law judge failed to consider the fact that both Drs. Robinette and Fonseca opined that claimant's myasthenia gravis[6] is controlled with medication, whereas employer's physicians assumed that claimant's myasthenia gravis is active. A review of the record reveals that Drs. Robinette and Fonseca opined that claimant's myasthenia gravis did not contribute to his respiratory disability whereas Drs. Sargent, Fino and Castle opined that claimant's myasthenia gravis may be the cause of his non-disabling ventilatory impairment. Nevertheless, the gravamen of claimant's argument involves the etiology of his ventilatory impairment, an issue set forth in Section 718.204(b), rather than the issue of whether his ventilatory impairment prevents him from performing his usual coal mine employment, as found under Section 718.204(c)(4). The administrative law judge, within a proper exercise of his discretion, found that the opinions of Drs. Fino and Castle were entitled to determinative weight because each physician had "a more complete view of claimant's condition because they comprehensively reviewed the entire medical record, including Dr. Robinette's and Dr. Sargent's evaluations." *See Thorn, supra*; Decision and Order [on Remand] at 21. Thus, we reject claimant's argument. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Inasmuch as claimant has not otherwise challenged the administrative law judge's finding that he failed to establish total respiratory disability pursuant to Section 718.204(c), a requisite element of entitlement under Part 718, we affirm the administrative law judge's Decision and Order denying benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[6] Myasthenia gravis is defined as "a syndrome of fatigue and exhaustion of the muscular system marked by progressive paralysis of muscles without sensory disturbance or atrophy. It may affect any muscle of the body, but especially those of the face, lips, tongue, throat, and neck." *Dorland's Illus. Medical Dictionary* (25th ed. 1974).

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge