BRB No. 00-1068 BLA

CHARLES E. RITTER	)	
	)	
	)	
Claimant - Respondent	)	
	)	
v.	)	DATE ISSUED: _____
	)	
DRUMMOND COMPANY, INC.	)	
	)	
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 - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Laura A. Woodruff and Kevin A. Patton (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (99-BLA-0929) of Administrative Law Judge Gerald M. Tierney (the administrative law judge) 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). The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2000), 718.203(b)(2000), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c)(2000), and thus was sufficient

to establish both a material change in conditions pursuant to 20 C.F.R. §725.309(c)(2000) and entitlement to benefits. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(2000). Employer contends that the evidence does not demonstrate that Dr. Westerman is claimant's treating physician, that the administrative law judge failed to adhere to the holding in *Island Creek Coal Company v. Compton* 211 F.3d 203, BLR 2- (4th Cir. 2000), and that the medical reports which are based upon negative x-rays are not reasoned, and thus should not be credited. Employer also contends that the administrative law judge erred in finding that the evidence establishes that claimant's total disability is due to pneumoconiosis at Section 718.204(b)(2000). [1] Employer contends that there is no credible evidence of record to establish this causal link. Employer futher contends that the administrative law judge erred when he found that the evidence establishes a material change in conditions at Section 725.309(c)(2000). Claimant[2], in response, urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not file a response brief .[3]

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[1]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[2]Claimant is Charles E. Ritter, the miner, who has filed four applications for benefits with the Department of Labor (DOL). The first three were all administratively denied. Director's Exhibits 30, 31, 32. The fourth claim, the instant duplicate claim, was filed on May 21, 1998. Directors Exhibit 1.

[3]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 they are found at 65 Fed. Reg.80,045-80, 107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 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). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

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, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, employer asserts that the administrative law judge erred when he found that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(2000). Employer takes issue with the administrative law judge's characterization of Dr. Westerman as claimant's treating physician. Employer correctly argues that Dr. Westerman actually stated that his opinion was based upon his examination and treatment of claimant, and this statement is somewhat vague. Claimant's Exhibit 1. The administrative law judge gave the "greatest weight" to Dr. Westerman's opinion on the basis that he was claimant's treating physician and because he found that it was the best explained opinion of record. Decision and Order at 5-6. The administrative law judge addressed employer's argument that Dr. Westerman was not claimant's treating physician in footnote 3 of his Decision and Order. The administrative law judge stated that : "Claimant testified that Dr. Westerman is his current treating physician who prescribes inhalers, a breathing machine and pills to help him breathe (H. Tr. At 26-29)." Decision and Order at 5, n. 3.[4] The administrative law judge then correctly stated that Dr. Westerman explained that claimant came to him in 1998 because he wanted a "closer" pulmonologist. Decision and Order at 5, n. 3; Director's Exhibit 26. The administrative law judge quoted Dr. Westerman's most recent report, wherein Dr. Westerman stated that his opinion was based upon his treatment of claimant. Decision and Order at 5, n. 3; Claimant's Exhibit 1.[5] The totality of these statements constitutes substantial evidence to

[4] In fact, claimant stated that Dr. Westerman was "the best" doctor and that he prescribed inhalers, a breathing machine and pills. H. Tr. at 26-28.

[5]The record reflects that Dr. Westerman also stated in his earlier opinion that: "[a]t this juncture [I] will intervene as above and obtain records for review and will follow up in two weeks for clinical response." Director's Exhibit 26 p. 3. The cover letter to this report contains a notation from the certified legal assistant that the report is from claimant's treating physician. Director's Exhibit 26.

support the administrative law judge's finding that Dr. Westerman was claimant's treating physician. As such, we hold that the administrative law judge permissibly found the doctor's opinion entitled to the greatest weight. *See Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

Employer also argues that Dr. Westerman's opinion is unreasoned, undocumented and premised upon flawed analysis. We disagree. The administrative law judge permissibly found that Dr. Westerman relied upon a chest x-ray, smoking and work histories, and his treatment of claimant. Further, he found that Dr. Westerman adequately explained all of his findings. See *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Tackett v. Director, OWCP*, 12 BLR 1-11 (1988); Decision and Order at 4-6; Director's Exhibit 26; Claimant's Exhibit 1. Accordingly, we reject employer's contentions to the contrary, and we affirm the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4)(2000). *See* 20 C.F.R. §718.202(a)(4).

Employer also argues that the administrative law judge's findings violate the holding in *Compton*.[6] We reject this argument, however, as this case arises within the appellate jurisdiction of the Eleventh Circuit, and *Compton* is a Fourth Circuit case. The Board has long held that 20 C.F.R. §718.202(a) sets forth alternative means for establishing the existence of pneumoconiosis. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Thus, we decline to apply the holding of *Compton* in this case arising in the Eleventh Circuit. As we have previously affirmed the administrative law judge's finding at Section 718.202(a)(4)(2000), *see* Section 718.202(a)(4), we decline to address employer's specific contentions with respect to *Compton.*

With respect to the administrative law judge's findings at Section 718.204(b) (2000), employer contends that the record contains no credible evidence that satisfies claimant's burden under the standard set forth in *Lollar v. Alabama By-Products Corp.* 893 F.3d 1258, 13 BLR 2-277 (11th Cir. 1990). Dr. Westerman opined that claimant was totally disabled due to the effects of both cigarette smoking and coal dust exposure and that both contributed substantially to that disability. Director's Exhibit 26; Claimant's Exhibit 1. We hold that this opinion satisfies the standard set forth in *Lollar*, that pneumoconiosis must be a substantially contributing condition to claimant's total disability. *See* 20 C.F.R. §718.204(c). Moreover, the revised regulation at Section

[6]The administrative law judge, in fact, weighed the negative x-ray evidence against the positive medical report evidence and concluded that claimant established the existence of pneumoconiosis. Decision and Order at 6.

718.204(c), which applies to the instant case, states that a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis is found to be a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Inasmuch as the administrative law judge properly credited Dr. Westerman's opinion at Section 718.204(b)(2000) because he found that Dr. Westerman was claimant's treating physician, *see Onderko, supra; Revnack, supra*; we reject employer's arguments and affirm the administrative law judge's finding that claimant has established total disability due to pneumoconiosis at Section 718.204(b)(2000). *See* 20 C.F.R. §718.204(c). In light of the foregoing, we further affirm the award of benefits.[7]

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

SO ORDERED.

ROY P. SMITH

[7]Employer contends that because the administrative law judge's findings of the existence of pneumoconiosis and total disability due to pneumoconiosis are flawed, his finding of a material change in conditions, premised upon these findings, is also flawed. Inasmuch as we have rejected employer's specific arguments regarding the administrative law judge's weighing of the relevant evidence of record, and employer raise no other specific contention at 20 C.F.R. §725.309(d)(2000), we affirm the administrative law judge's finding of a material change in conditions. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge