BRB No. 02-0176 BLA

GEORGE ROGERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (99-BLA-0800) of Administrative Law Judge Rudolf L. Jansen 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).[2] This case is before the Board for the third time.[3] In this

[1] Claimant filed his first application for benefits on September 29, 1981, which was finally denied on January 6, 1982. Director's Exhibit 18. Claimant did not appeal the denial. On February 16, 1988, claimant filed a duplicate claim, which is the subject of the instant appeal. Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal

request for modification of a duplicate claim, the administrative law judge considered the

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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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In a Decision and Order issued on April 23, 1991, Administrative Law Judge Glenn Robert Lawrence denied benefits on claimant's February 1988 claim, Director's Exhibit 22. The Board affirmed that denial in *Rogers v. Director, OWCP*, BRB No. 91-1426 BLA (Feb. 10, 1993) (unpub.). Director's Exhibit 23. Claimant appealed and the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this cases arises, affirmed the denial of benefits. *Rogers v. Director, OWCP*, No. 93-6285 (11th Cir. Sep. 20, 1994) (unpub.); Director's Exhibit 24. Claimant filed a petition for modification on September 19, 1995. Director's Exhibit 25. By Decision and Order dated November 13, 1997, Administrative Law Judge Rudolf L. Jansen denied the modification request and denied benefits. Director's Exhibit 40. Claimant appealed and the Board affirmed in part, vacated in part, and remanded the case for reconsideration of the medical evidence, specifically the opinion of Dr. Marder with respect to his diagnosis of pneumoconiosis and total disability. *Rogers v. Director, OWCP*, BRB No. 00-0584 BLA (Apr. 24, 2001) (unpub.).

newly submitted evidence and found it sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), one of the elements previously adjudicated against claimant, and thus, sufficient to establish a change in conditions. 20 C.F.R. §725.310 (2000). After reviewing the record in its entirety, however, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis and total respiratory disability. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge failed to properly weigh the medical opinion evidence regarding the existence of pneumoconiosis, but that this error is harmless inasmuch as substantial evidence supports the administrative law judge's determination that claimant failed to establish total respiratory disability. Hence, the Director urges affirmance of the denial of benefits. Claimant filed a reply brief responding to contentions raised by the Director and urging that the case be remanded.[4]

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).

In challenging the administrative law judge's finding that claimant failed to establish total respiratory disability at Section 718.204(b)(2)(iv), claimant argues that the administrative law judge erred by crediting Dr. Sherman's opinion over the opinion of Dr. Marder when he failed to consider whether Dr. Marder's credentials as a specialist in the treatment of occupationally related disease might be equal or superior to Dr. Sherman's credentials as a pulmonologist. Contrary to claimant's assertion, however, noting the credentials of both physicians, the administrative law judge properly accorded greater weight to Dr. Sherman's opinion as he was "the only physician of record with credentials in

[4] We affirm the administrative law judge's determinations pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.204(b)(2)(i)-(iii), and 725.310 (2000) as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order on Remand at 4-6.

pulmonary disease." Decision and Order on Remand at 5; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order on Remand at 6-7. Inasmuch as the administrative law judge correctly assessed Dr. Marder's medical credentials but found that those of Dr. Sherman were superior, we reject claimant's argument in this regard.

Claimant next argues that the administrative law judge erroneously credited the opinion of Dr. Sherman over the opinion of Dr. Marder because Dr. Sherman, conceding the existence of mild chronic obstructive pulmonary disease, did not consider the exertional requirements of claimant's usual coal mine employment while Dr. Marder described the requirements in detail. Claimant also contends that the administrative law judge erred in crediting Dr. Sherman's opinion over Dr. Marder's because it was based on less medical data. In assessing the medical opinions, the administrative law judge evaluated Dr. Sherman's opinion finding that, although portions of the pulmonary function studies he reviewed demonstrated mild obstructive lung disease, all of the values for FEV1 and FVC were "well above Part 718 Regulatory disability standards" resulting in no objective evidence to demonstrate that claimant's pulmonary function "is severe enough to cause a significant, much less disabling, impairment," Director's Exhibit 38. Thus, the administrative law judge rationally determined that Dr. Sherman did not find claimant totally disabled. *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Contrary to claimant's argument, this factor did not diminish the probative value of Dr. Sherman's opinion because Dr. Sherman found that claimant did not have a disabling respiratory impairment; hence, the administrative law judge reasonably found the opinion insufficient to demonstrate total disability. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997) (physician's report need not reflect miner's exertional requirements where physician finds no impairment).

Further, after reviewing medical records consisting of claimant's coal mine employment history, a predominance of x-ray interpretations revealing no pulmonary disease, and pulmonary function and arterial blood gas studies yielding non-qualifying values, Dr. Sherman rendered his consulting opinion that claimant was not totally disabled. Director's Exhibit 38. Contrary to claimant's assertion, Dr. Sherman was not compelled to consider additional objective evidence relied upon by Dr. Marder, particularly since Dr. Sherman's medical report and total disability assessment were based on the diagnostic tests contemplated by the regulations, thus rendering his opinion reasoned. *See* 20 C.F.R. §718.204(b)(2)(iv). Moreover, the finding of whether a report is reasoned is a credibility determination that rests with the trier-of-fact and must be affirmed if supported by substantial evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846, 1-851 (1985). Accordingly, the administrative law judge's determination that Dr. Sherman's opinion was entitled to dispositive weight is supported by substantial evidence and must be affirmed. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-*

Robbins Coal Co., 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order on Remand at 6.

Claimant likewise contends that Dr. Long's opinion should be accorded no weight as it suffers from the same deficiencies as Dr. Sherman's opinion. Specifically, claimant contends that the administrative law judge erred by finding that Dr. Long's one-sentence disability opinion, that "PFS of 11/6/96 are significantly higher than the [Part] 718 standards for disability", was not well-reasoned and documented as it lacked any analysis and relied entirely upon the non-qualifying pulmonary function study dated November 6, 1996. Claimant, therefore, argues that Dr. Long's opinion is worthy of no weight. Claimant's Petition for Review at 8, citing Director's Exhibit 36. Contrary to claimant's contention, however, Dr. Long did address, in addition to the results of the November 6, 1996 pulmonary function study, claimant's coal mine employment and smoking histories, chest x-ray, and pulmonary function studies, stating that "... in my opinion, a significant respiratory impairment has not been established." Director's Exhibit 36. The administrative law judge, therefore, properly found that Dr. Long rendered a well documented and reasoned opinion that claimant was not totally disabled. *See Trumbo, supra; Lucostic, supra*; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); *see also Rowe, supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see also Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); Decision and Order on Remand at 6-7. Accordingly, we affirm the administrative law judge's determination that the weight of the evidence, *i.e.*, the opinions of Drs. Sherman and Long and the non-qualifying pulmonary function and blood gas studies of record, failed to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(iv); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee, supra*.

Inasmuch as the administrative law judge properly found that claimant failed to satisfy his burden of establishing total respiratory disability, a requisite element of entitlement in this Part 718 case, by a preponderance of the evidence, we affirm his Section 718.204(b) determination.[5] 20 C.F.R. §718.204(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); Decision and Order on Remand at 7.

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

[5] Claimant's failure to affirmatively establish total respiratory disability on the merits, a requisite element of entitlement in this Part 718 case, obviates the need to address claimant's arguments regarding the existence of pneumoconiosis and disability causation. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge