BRB No. 92-2269 BLA

HOMER E. CLAY )
)
Claimant-Petitioner )
)
v. )
)
RANGER FUEL CORPORATION )
) DATE ISSUED:
Employer-Respondent )
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-in-Interest ) DECISION and ORDER

Appeal of the Revised Decision and Order of George A. Fath, Administrative Law Judge, United States Department of Labor.

Don M. Stacy, Beckley, West Virginia, for claimant.

Stacy V. Killen (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (91-BLA-1511) of Administrative Law Judge George A. Fath awarding benefits on a 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). This case involves a duplicate claim issue. Claimant filed his first claim for benefits on July 9, 1980. This claim was denied on March 6, 1981 as claimant failed to establish total disability and total disability due to pneumoconiosis. *See* Director's Exhibit 22. Claimant filed a second claim for benefits on April 25, 1990, which the administrative law judge considered as a duplicate claim pursuant to 20 C.F.R. §725.309. Upon considering the

evidence of record, the administrative law judge found that claimant established at least thirty years of coal mine employment and that he is totally disabled. The administrative law judge then found that claimant failed to establish that his total disability is caused by pneumoconiosis. Thus, the administrative law judge determined that a material change in condition was not established. Accordingly, benefits were denied on the basis of the prior denial. On appeal, claimant contends that the administrative law judge erred in failing to find that claimant established the existence of

pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and in failing to find that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Employer responds in support of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

It is first noted that, as claimant established total disability, the administrative law judge erred in finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990). However, any error is harmless as the administrative law judge properly considered all of the evidence of record in making his finding regarding total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). *See Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Regarding the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), claimant contends that the administrative law judge erred in weighing the medical opinions of record. In support of this contention claimant argues that the opinions of Drs. Fino, Tuteur and Hippensteel are entitled to less weight due to the fact that they did not examine claimant. However, this contention is without merit as the administrative law judge is not required to discount the opinions of non-examining physicians on this basis alone. *See Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Claimant further contends that the administrative law judge erred in giving greater weight to the opinions of Drs. Zaldivar, Fino, Tuteur and Hippensteel because they failed to provide a reasonable explanation for their conclusions that claimant's total disability is due to cigarette smoking. Claimant also contends that the opinions of Drs. Daniel and Rasmussen establish a quantum of medical evidence sufficient to establish total disability when viewed along with claimant's testimony. Upon considering the opinions of record, the administrative law judge properly found that Drs. Daniel and Rasmussen are the only physicians to attribute claimant's total disability to his coal mine employment and that Drs. Zaldivar, Fino, Hippensteel and Tuteur attribute claimant's disability to other causes. *See* Decision and Order at 7; Director's Exhibit 11; Claimant's

Exhibits 5, 11, 12; Employer's Exhibits 1, 3, 5, 9, 10, 12, 13. The administrative law judge then permissibly gave less weight to the opinions of Drs. Daniel and Rasmussen based on their qualifications.[1] *See* Decision and Order at 7; *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990). Further, the administrative law judge permissibly assigned Dr. Rasmussen's opinion less weight because Dr. Rasmussen failed to state how he reached his conclusion that claimant's coal mine dust exposure is at least a major contributing factor to his totally disabling respiratory insufficiency. *See* Decision and Order at 7; Claimant's Exhibits 5, 11; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). The administrative law judge then permissibly assigned the most weight to the opinions of Drs. Fino and Hippensteel because they are the most rational and well-reasoned opinions of record because both of these physicians "listed several factors which led them to conclude that the miner's disability is the result of a smoking-related lung impairment, rather than pneumoconiosis: positive bronchodilator response, elevated lung volumes, etc." *See* Decision and Order at 7; Employer's Exhibits 3, 5, 9, 12, 13; *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As the administrative law judge's weighing of the medical reports is rational and supported by substantial evidence, his finding that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) is affirmed. *See generally Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Further, as claimant has not established total disability due to pneumoconiosis, a requisite element of entitlement under 20

[1]Dr. Daniel is Board-Certified in Family Practice, while Drs. Zaldivar, Fino, Hippensteel and Tuteur are all Board-Certified in Internal Medicine and Pulmonary Diseases. Dr. Rasmussen is not Board-Certified in Pulmonary Medicine. *See* Decision and Order at 7.

C.F.R. Part 718, the administrative law judge's denial of benefits is affirmed. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).[2]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[2]It is noted that claimant's contention regarding the administrative law judge's failure to find that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) is without merit, as claimant previously established the existence of pneumoconiosis before the district director and as this finding was undisturbed by the administrative law judge. *See* Decision and Order at 2. Also, claimant's contention that the administrative law judge failed to apply the true doubt rule is without merit as the true doubt rule is inapplicable in this case because the administrative law judge did not find the evidence of record to be equally probative on any issue. *See Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309 (1984).

JAMES F. BROWN
Administrative Appeals Judge