

BRB No. 88-791 BLA

WALTER DEAN)
)
 Claimant-Petitioner)
)
 v.)
)
 FLAT GAP MINING CORPORATION)
)
 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 Denying Benefits of V. M. McElroy,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe & Farmer), Norton, Virginia, for claimant.

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

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and
SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (85-BLA-3962) of
Administrative Law Judge V. M. McElroy 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

seq. (the Act). The administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with approximately twenty-five years of qualifying coal mine employment. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) - (a)(3). Assuming arguendo that the medical opinions established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), the administrative law judge determined that claimant would be entitled to the presumption that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203. Nevertheless, the administrative law judge concluded that claimant failed to establish total disability under 20 C.F.R. §718.204(c), and accordingly denied benefits. Claimant appeals, contending that the administrative law judge erred in assigning determinative weight to Dr. Dahhan's opinion in his consideration of the medical reports of record, and that the administrative law judge erred in ignoring the evidence of record which showed that the miner was totally disabled under Section 718.204(c). Employer responds, urging affirmance. The Director, Office of Workers'

Compensation Programs, has not participated in this appeal.¹

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. §932(a); O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

¹ The administrative law judge's findings under 20 C.F.R. §§718.202 and 718.203, and with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence, and contains no reversible error. The administrative law judge reasonably determined that the pulmonary function studies and the blood gas studies of record were insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(1) and (c)(2) inasmuch as the preponderance of the objective test results, including the most recent tests, were non-qualifying.² See Sexton v. Southern Ohio Coal Co., 7 BLR 1-411 (1984); Keen v. Jewell Ridge Coal Corp., 6 BLR 1-454 (1983). In evaluating the medical opinions of record under 20 C.F.R. §718.204(c)(4), the administrative law judge, as trier-of-fact, permissibly found the opinion of Dr. Dahhan to be the most persuasive. See Brown v. Director, OWCP, 7 BLR 1-730 (1985). The administrative law judge acted within his discretion in according Dr. Dahhan's opinion the most weight, based on his finding that Dr. Dahhan had excellent credentials, see Warman v. Pittsburgh & Midway Coal Mining Co., 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985); he relied on the more recent medical evidence, see Sexton, supra; and his conclusions were most consistent with the

² A "qualifying" pulmonary function 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 and C, respectively. A "non-qualifying" study yields values that

objective tests. See Decision and Order at 7; Wetzel v. Director, OWCP, 8 BLR 1-139 (1985); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); Cooper v. United States Steel Corp., 7 BLR 1-842 (1985). Claimant's assignment of error goes only to the weight of the evidence, which is the province of the administrative law judge. See Price v. Peabody Coal Co., 7 BLR 1-671 (1985). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. See Anderson v. Valley Camp of Utah, Inc., 12 BLR1-111 (1989); Price, supra. Claimant additionally contends that the administrative law judge erred in failing to weigh the lay testimony in conjunction with the medical evidence under Section 718.204(c).³ Any error by the administrative law judge in failing to specifically weigh the lay testimony is harmless in light of the contrary probative medical evidence which the administrative law judge considered and found overwhelmingly supportive of his finding that claimant failed to establish total disability. See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987). Consequently, we affirm the administrative law judge's findings under Section 718.204(c) as they are rational and supported by substantial evidence.

exceed those values.

³ We note that the administrative law judge was aware of the lay testimony. See Decision and Order at 2, 3.

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge