

BRB No. 08-0858 BLA

M.C.)
)
 Claimant-Respondent)
)
 v.)
)
 CANTERBURY COAL COMPANY) DATE ISSUED: 08/11/2009
)
 and)
)
 THE FIRE & CASUALTY COMPANY OF)
 CONNECTICUT)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Raymond F. Keisling (Carpenter, McCadden & Lane, LLP), Wexford, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2006-BLA-05721) of Administrative Law Judge Daniel L. Leland on a subsequent claim¹ 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 second time. In his prior Decision and Order, the administrative law judge credited claimant with thirty-six years and six months of qualifying coal mine employment and adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718, based on claimant's March 30, 2005 filing date. Weighing the medical evidence submitted since the denial of claimant's 2001 claim, the administrative law judge found that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, therefore, found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). He then considered all of the evidence of record *de novo*, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the award of benefits and remanded the case to the administrative law judge for further consideration of the evidence. *M.C. v. Canterbury Coal Co.*, BRB No. 07-0675 BLA (Apr. 30, 2008) (unpub.). Initially, the Board affirmed the administrative law judge's finding that the newly submitted evidence was sufficient to establish total disability pursuant to Section 718.204(b) and, therefore, established a change in an applicable condition of entitlement pursuant to Section 725.309(d).² However, the Board vacated the administrative law

¹ Claimant filed his first application for benefits on February 3, 1992, Director's Exhibit 1, which was ultimately denied by Administrative Law Judge Daniel L. Leland in his Decision and Order on Remand dated June 29, 1999. Judge Leland found that while claimant established the existence of pneumoconiosis arising out of coal mine employment under Sections 718.202(a) and 718.203(b), claimant failed to establish total respiratory disability at Section 718.204(c) (2000), and accordingly, denied benefits. Director's Exhibit 1. Claimant appealed and the Board affirmed the denial of benefits. [*M.C.*] *v. Canterbury Coal Co.*, BRB No. 99-1085 BLA (July 17, 2000) (unpub.); Director's Exhibit 1. Subsequently, claimant filed a second application for benefits on July 20, 2001, which the district director denied on August 19, 2002, because claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(b). Director's Exhibit 2. Claimant took no further action on this claim. On March 30, 2005, claimant filed a third application for benefits, which is the subject of this appeal. Director's Exhibit 4.

² The Board also affirmed, as unchallenged on appeal, the administrative law judge's finding that the evidence as a whole is sufficient to establish the existence of pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R.

judge's award of benefits, holding that the administrative law judge failed to consider all of the evidence of record, old and new, in determining whether claimant established total respiratory disability on the merits of entitlement. The Board therefore remanded the case for the administrative law judge to consider, *de novo*, all of the medical evidence of record in determining whether claimant has established total respiratory disability pursuant to Section 718.204(b). *M.C.*, slip op. at 5. In addition, the Board vacated the administrative law judge's finding of disability causation pursuant to Section 718.204(c), finding that the record contains inconsistencies with regard to the length of claimant's coal mine employment. The Board instructed the administrative law judge, on remand, to determine the significance, if any, of the difference in the length of coal mine employment credited by the administrative law judge and that relied upon by the physicians in rendering their opinions. *M.C.*, slip op. at 7.

On remand, the administrative law judge noted the Board's instructions and reconsidered the evidence of record. Weighing all of the medical evidence, the administrative law judge again found the evidence sufficient to establish total respiratory disability pursuant to Section 718.204(b). In addition, the administrative law judge again found the medical evidence sufficient to establish disability causation pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits, commencing as of March 1, 2005.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in finding total disability and disability causation established at Section 718.204(b), (c). Specifically, employer contends that the administrative law judge failed to adequately follow the Board's remand instructions in properly analyzing the impact of the difference between the coal mine employment history credited by the administrative law judge and that relied upon by Drs. Cohen and Celko. In addition, employer contends that the administrative law judge erred in failing to properly analyze and compare the numerical values of the blood gas study evidence, in finding that claimant established total respiratory disability. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a substantive response to employer's appeal unless requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

§§718.202(a) and 718.203(b). *M.C. v. Canterbury Coal Co.*, BRB No. 07-0675 BLA, slip op. at 3 n.2 (Apr. 30, 2008)(unpub.).

and in accordance with applicable law.³ 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).

In order to establish entitlement to benefits in a living miner’s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer challenges the administrative law judge’s finding that total disability was established at Section 718.204(b). Specifically, employer contends that the administrative law judge failed to properly analyze the blood gas study evidence because he did not numerically compare the values achieved in the studies from the earlier claims and those achieved in the most recent claim. Employer’s Brief at 7. Employer also contends that the administrative law judge failed to mention that claimant was not able to undergo the exercise portion of the blood gas studies. *Id.* Employer specifically argues that claimant bears the burden of establishing that “there has been a change in one of the parameters since there were previous denials.” Employer’s Brief at 8.

Contrary to employer’s contention, the administrative law judge was not required to compare the numerical values of the current blood gas studies with the values obtained in the prior studies in order to determine whether they demonstrate total respiratory disability. Rather, the administrative law judge properly found that the more recent studies were qualifying pursuant to Part 718, as they yielded values below the values set forth in Appendix C. 20 C.F.R. §718.204(b)(2); 20 C.F.R. Part 718, Appendix C; 2007 Decision and Order at 3, 5; Director’s Exhibits 13, 19; Claimant’s Exhibits 1, 5. Moreover, contrary to employer’s contention, an exercise blood gas study is not required where the “at rest” study was qualifying, as the regulations only require that “[i]f the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated.” 20 C.F.R. §718.105(b).

In considering the record as a whole, the administrative law judge properly noted that because pneumoconiosis is a progressive and irreversible disease, it can be appropriate to accord greater weight to the more recent evidence of record, especially

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant’s coal mining employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director’s Exhibit 5.

where a significant amount of time separates the evidence. *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004)(*en banc*)(McGranery, J., concurring and dissenting); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004)(*en banc*); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839, 1-841 (1985); see *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); Decision and Order on Remand at 2. Herein, the administrative law judge found that there was a difference of approximately thirteen years between the evidence in the miner's first claim and his current claim, and approximately three and one-half to four and one-third years between the evidence in claimant's second claim and his current claim. Decision and Order on Remand at 2-3. The administrative law judge therefore reasonably accorded greater weight to the blood gas studies from the current claim, all of which yielded qualifying values, as they were "considerably more recent" than the non-qualifying studies from the prior claims. *Parsons*, 23 BLR at 1-35; *Gillespie*, 7 BLR at 1-841; Decision and Order on Remand at 3.

Likewise, the administrative law judge found the medical opinions of Drs. Celko, Cohen and Fino, all of which diagnosed total respiratory disability, entitled to greater weight than the medical opinions from the prior claims, which did not diagnose total disability. *Parsons*, 23 BLR at 1-35; *Workman*, 23 BLR at 1-27; see *Cooley*, 845 F.2d at 624, 11 BLR at 2-149; Decision and Order on Remand at 3. In particular, the administrative law judge found that, in his 2005 medical report, Dr. Fino, the only physician to provide an opinion in each of the claims, opined that claimant had developed a totally disabling respiratory impairment since his 2001 medical report, thus, negating his prior opinions of no total respiratory disability. *Id.*; Director's Exhibits 1, 2, 19. Because employer does not challenge these specific findings and the administrative law judge has considered all of the evidence of record, and rationally accorded greater weight to the more recent evidence, we affirm his finding that claimant has established total respiratory disability pursuant to Section 718.204(b). 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Employer further contends that the administrative law judge's determinations regarding disability causation at Section 718.204(c) do not comply with the Board's remand order. Specifically, employer states that if claimant had only twenty-eight and one-half years of coal mine employment and not forty-three or forty-four years, as assumed by the physicians, that constitutes a sixteen year difference, which may have influenced the physicians' conclusions. Employer's Brief at 7. Thus, while noting that claimant did not challenge the stipulation to at least twenty-eight years and five months of coal mine employment, employer contends that the administrative law judge, nonetheless, "on his own," recalculated the length of claimant's coal mine employment. Employer's Brief at 7.

Contrary to employer's contention that the administrative law judge's finding does not comply with the Board's remand order, the administrative law judge has addressed the issues noted by the Board in its instructions on remand. The administrative law judge found that the three physicians in the current claim, Drs. Celko, Cohen and Fino, who were the only physicians to provide an opinion regarding disability causation,⁴ each relied on a coal mine employment history of forty-three years, whereas the administrative law judge credited claimant with thirty-six years and six months of coal mine employment. The administrative law judge, however, found that this disparity was relatively minor and does not change the findings on the issue of disability causation. Decision and Order on Remand at 3.

In his prior Decision and Order, the administrative law judge, within a reasonable exercise of his discretion as trier-of-fact, addressed the issue of the length of claimant's coal mine employment. Claimant, at the hearing, stated that he would agree that he worked "at least" twenty-eight years and five and one-half months of coal mine employment, as found by the district director. See Hearing Transcript at 10. Nonetheless, the administrative law judge considered the relevant evidence and credited claimant with thirty-six years and six months of coal mine employment. See generally *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988) (administrative law judge has a duty to make a specific, complete finding on the length of coal mine employment that may not be satisfied by a determination of an approximate number of years); Decision and Order dated April 12, 2007 (2007 Decision and Order) at 2-3. Specifically, the administrative law judge permissibly credited claimant with one quarter of qualifying coal mine employment for each quarter in which he earned at least \$50.00, as recorded on his Social Security Administration earning statements. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); 2007 Decision and Order at 3; Director's Exhibit 8. The administrative law judge provided a valid basis for crediting claimant with thirty-six years and six months of coal mine employment, and he addressed the discrepancy between the length of coal mine employment that he credited and the amount relied upon by the physicians, rationally finding that the six and one-half year difference was not significant. Consequently, we reject employer's contention that the administrative law judge failed to comply with the Board's remand order. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

The administrative law judge then weighed the individual medical opinions and accorded greatest weight to the opinion of Dr. Cohen that claimant is totally disabled due to his pneumoconiosis, over the contrary opinion of Dr. Fino that claimant's total

⁴ Drs. Kucera and Kettering, whose opinions were submitted with the prior claims, did not diagnose a totally disabling respiratory impairment and, hence, did not render opinions concerning disability causation. Director's Exhibits 1, 2.

disability was the result of his idiopathic pulmonary fibrosis, because Dr. Cohen's opinion was better reasoned than that of Dr. Fino.⁵ See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order on Remand at 4; Director's Exhibit 19; Claimant's Exhibit 1. In addition, the administrative law judge reasonably accorded greater weight to the opinion of Dr. Cohen because Dr. Cohen is "more widely published and has more expertise on occupational lung diseases than Dr. Fino." Decision and Order on Remand at 4; see *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Further, the administrative law judge permissibly accorded less weight to Dr. Fino's opinion because it was based on the faulty premise that claimant did not suffer from pneumoconiosis. See *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Clites v. J & L Steel Co.*, 663 F.3d 14, 3 BLR 2-86 (3d Cir. 1981); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 4. Because employer does not challenge these specific findings and the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm his finding that the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). Since claimant has established each of the elements of entitlement pursuant to Part 718, we affirm the administrative law judge's award of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

⁵ The administrative law judge noted, in part, that Dr. Cohen's opinion, unlike Dr. Fino's, was supported by pathology evidence and that Dr. Cohen explained how claimant's blood gas study results supported his findings. Decision and Order on Remand at 4.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge