

BRB Nos. 97-1673 BLA
and 97-1673 BLA-A

CHARLES F. JORDAN, JR.)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL COMPANY)	DATE ISSUED:
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (96-BLA-310) of Administrative Law Judge Samuel J. Smith 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.¹ The

¹ Claimant filed his first application for benefits on June 1, 1993. The claim was denied by the district director for failure to establish any of the elements of entitlement on November 18, 1993. Claimant did not pursue an appeal. Director's Exhibit 28. Claimant

administrative law judge considered the new and old evidence in the record and found that claimant established the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. Part 718. Accordingly, benefits were awarded. The administrative law judge determined that the date of onset of total disability is March 1, 1995, the month in which the medical evidence establishes that claimant became totally disabled due to pneumoconiosis. On appeal, claimant contends that the administrative law judge erred in determining the date of onset of disability. Employer cross-appeals contending that the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.204(b), 718.204(c)(1), (4) are erroneous. Employer also responds to claimant's appeal asserting that if the award of benefits is affirmed, the administrative law judge's determination regarding the onset date should also be affirmed. Claimant responds, urging affirmance of the administrative law judge's finding of entitlement. The Director, Office of Workers' Compensation Programs has indicated that he will not participate in this case.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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. Failure of claimant to establish any of these elements precludes entitlement. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

filed the instant claim for benefits on December 27, 1994. Director's Exhibit 1.

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 that there is no reversible error contained therein. Employer initially contends that the administrative law judge erred in applying the “later evidence rule” by crediting the most recent x-ray, particularly because an x-ray taken two months earlier was read as negative by three physicians who are board-certified radiologists and B-readers, and also in failing to resolve the inconsistencies in the readings of the two 1993 x-rays as well as the March 15, 1995 x-ray. Petition for Review at 11. The record contains three new x-rays, dated March 15, 1995, August 9, 1995 and October 5, 1995. With respect to the latter two x-rays, the administrative law judge found that they were contemporaneous given the close timing of the two x-rays. The administrative law judge found that the August 9, 1995 x-ray had been uniformly read as negative by three B-readers.² The administrative law judge further found that the October 5, 1995 x-ray had been read as positive by six B-readers, of whom five were also board-certified radiologists. The administrative law judge also considered the conflicting interpretations that were part of the old evidence developed with claimant’s first application for benefits, and concluded that based on the progressive nature of pneumoconiosis, the most recent x-ray was entitled to the greatest weight. Contrary to employer’s contentions, the administrative law judge permissibly considered the x-ray evidence of record, noted the qualifications of the physicians interpreting the films, and ultimately, based his finding on the numerical superiority of the interpretations by well-qualified physicians reading the most recent x-ray. Such a determination is entirely consistent with the position stated by the United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case arises, which has held that the “later is better” theory is irrational where the later evidence indicates an improvement in the miner’s condition. See *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); see also *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we affirm the administrative law judge’s finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).³

² The record indicates that two of these physicians were also board-certified radiologists. Employer’s Exhibit 1.

³ We need not address employer’s contentions at 20 C.F.R. §718.202(a)(4) as we have

affirmed the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Employer next contends that the administrative law judge erred in determining that claimant's usual coal mine employment entailed heavy manual labor. Employer argues that both Drs. Rasmussen and Zaldivar found that claimant was not totally disabled from his usual coal mine employment, as described to them by claimant, of operating mobile equipment and occasionally cleaning bulldozer treads with a shovel. Petition for Review at 20. The administrative law judge determined that claimant's last coal mine employment required that he perform "light to moderate work on a daily basis in performing the task of a mobile equipment operator." Decision and Order at 32. The administrative law judge also noted, however, that in addition to the information claimant provided to each physician regarding his usual coal mine employment, claimant provided additional and a "slightly differing version" of the exertional requirements of his last coal mine employment at the hearing. Decision and Order at 31. Claimant testified that when the machine that he was operating was down, he had to shovel a beltline, once or twice a week. Hearing Transcript at 17-18. Claimant also testified that he performed the work of moving the slurry line on overtime, which required that he drive stakes into the ground to hold the pipe with the use of a sixteen pound sledge hammer, and that this work would take four hours to accomplish. Hearing Transcript at 20-21. Claimant further stated that he would not have been able to keep his job had he been unable to perform the job of moving the slurry line. Hearing Transcript at 27. The administrative law judge found that on cross-examination, claimant admitted that he did not provide the physicians with the same job description that he did at the hearing, and that he had not thought that it was important at the time. Based on this additional description of claimant's last coal mine employment, the administrative law judge found that shoveling the beltline and moving the slurry pipe were essential tasks required for claimant's continued employment, and that these tasks involved heavy manual labor. Decision and Order at 32. Contrary to employer's assertion, the administrative law judge permissibly relied on claimant's testimony regarding the exertional requirements of his usual coal mine work and rationally found that claimant's usual coal mine work entailed heavy manual labor. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdak v. North American Coal Corp.*, 7 BLR 1-469 (1984). Based on this determination, the administrative law judge then considered the opinions of Drs. Rasmussen and Zaldivar.⁴ The administrative law judge

⁴ Dr. Zaldivar examined claimant on August 9, 1995 and obtained employment and smoking histories. The physician also noted symptoms and performed an x-ray and objective tests. Dr. Zaldivar also reviewed claimant's medical records. The physician concluded that claimant suffered from asthma, a disease of the general population, and emphysema due to smoking. He opined that claimant does not have pneumoconiosis and would be able to do moderate work on a continuous basis. Dr. Zaldivar additionally stated that claimant would not be able to do very heavy labor and that claimant's job description did not require him to do heavy manual labor. Therefore, claimant is capable of performing his usual coal mine work. Director's Exhibit 21.

credited Dr. Rasmussen's opinion and found that claimant established total disability pursuant to Section 718.204(c)(4). We affirm this weighing of the medical opinion evidence as the administrative law judge permissibly accorded determinative weight to Dr. Rasmussen's reasoned opinion and statement that claimant would be totally disabled from heavy manual labor, and the record supports the administrative law judge's finding that claimant's usual coal mine employment entailed heavy manual labor.⁵ See *McMath, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 31-32. We therefore affirm the administrative law judge's finding that the evidence establishes total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence.

Dr. Rasmussen examined claimant on March 15, 1995. He also obtained histories and performed objective tests. He diagnosed coal workers' pneumoconiosis based on work history and x-ray evidence, chronic bronchitis, and possible hyperactive airways disease. Dr. Rasmussen opined that the pneumoconiosis and chronic bronchitis were a result of coal mine dust exposure and that claimant exhibits minimal to moderate impairment in respiratory function and is unable to perform heavy manual labor. He lastly stated that the risk factors for this impairment were the smoking history, possible hyperactive airways disease, and coal mine dust exposure, with the latter being a significant contributing factor. Director's Exhibit 10. Dr. Rasmussen was also deposed on May 21, 1996. Claimant's Exhibit 4.

⁵ The administrative law judge additionally determined that Dr. Zaldivar's medical opinion was not a reasoned medical opinion because the physician did not acknowledge that the underlying pulmonary function test was qualifying. Decision and Order at 32. We note, however, that Dr. Zaldivar's opinion that the miner is unable to do heavy labor also supports the administrative law judge's finding at 20 C.F.R. §718.204(c). Director's Exhibit 21.

Employer next challenges the administrative law judge's findings at Section 718.204(c)(1). Employer contends that the administrative law judge's determination regarding claimant's height is not supported by substantial evidence and that the assumption made by the administrative law judge regarding the miner's height converted claimant's non-qualifying pre-bronchodilator values into qualifying values.⁶ Petition for Review at 23-26. Employer's argument is without merit. The administrative law judge noted that the record contained the results of four pulmonary function studies which recorded varying heights between sixty-nine and seventy and one-half inches. Claimant himself testified at the hearing that his height is five foot eleven and one-half inches. Hearing Transcript at 15. The administrative law judge noted that employer did not cross-examine claimant with respect to his height. The administrative law judge then found that it was unclear how claimant was measured for his medical examinations or whether he was measured at all. The administrative law judge further found that based on his observations of claimant during the hearing, he had no reason to question the credibility of claimant's sworn statement regarding his height. Thus, after careful consideration of the conflicting evidence regarding claimant's height, the administrative law judge acted within his discretion in determining that claimant is seventy-one and one-half inches tall. See *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order at 23. The administrative law judge further determined that based on the administrative history of 20 C.F.R. §718.103, the pre-bronchodilator values were entitled to greater weight in that they were more useful in assessing a miner's disability. Decision and Order at 25. The administrative law judge found that the only pulmonary function study which was part of claimant's first claim was non-qualifying, but based on the pre-bronchodilator values of the three new pulmonary function studies, claimant had established total disability pursuant to Section 718.204(c)(1). Director's Exhibits 7, 21, 28; Claimant's Exhibit 1. Employer does not challenge this finding, and it is supported by the administrative law judge's findings regarding claimant's height and the values obtained on those pulmonary function tests. We therefore affirm the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(c)(1).

Lastly, employer contends that Dr. Rasmussen's opinion is not reasoned or documented and that the administrative law judge erred in finding that the physician's

⁶ A "qualifying" pulmonary function 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. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1).

opinion established claimant's disability was due to pneumoconiosis at Section 718.204(b). Employer contends that Dr. Rasmussen believes that any miner who has a respiratory impairment, no matter what the underlying cause, is disabled due to coal mine employment. Petition for Review at 27. Employer further argues that the physician's opinion is not based on medical studies, but rather his inability to distinguish between the role claimant's smoking history and coal mine employment history played in his impairment. Employer contends that Dr. Rasmussen's opinion is not an affirmative opinion that claimant's disability arises out of coal mine employment. We disagree. The administrative law judge noted the standard articulated by the United States Court of Appeals for the Fourth Circuit in *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), that pneumoconiosis be at least a contributing cause of claimant's disability. The administrative law judge then noted that Dr. Rasmussen opined that there were three risk factors for claimant's impaired pulmonary functioning, which were previous cigarette smoking, coal mine dust exposure, and claimant's possible hyperactive airways disease. He credited Dr. Rasmussen's statement that coal mine dust exposure must be considered a significant contributing factor as he found that the physician provided ample basis for his medical opinion. *See Fields, supra*; Decision and Order at 34. The administrative law judge also rationally declined to accord weight to Dr. Zaldivar's opinion. Consistent with United States Court of Appeals for the Fourth Circuit's reasoning in *Toler, supra*, the administrative law judge questioned the probative value of Dr. Zaldivar's opinion on disability causation given the physician's determination that claimant did not suffer from pneumoconiosis, the presence of which the administrative law judge had already determined to exist. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge permissibly credited Dr. Rasmussen's opinion that claimant's coal mine employment was a significant contributory cause in claimant's impairment, we affirm his finding at Section 718.204(b). Furthermore, as the administrative law judge's findings are supported by substantial evidence, we affirm his finding that claimant is entitled to benefits.

We lastly turn to claimant's contention that the administrative law judge's determination regarding the date of onset of disability is erroneous. Claimant contends that the evidence does not establish the date of onset and that the date should therefore have been determined to have been the date of claimant's filing of his claim, rather than the date of Dr. Rasmussen's second examination of claimant on March 15, 1995. Claimant's argument is without merit. The administrative law judge considered the evidence of record and found that Dr. Rasmussen's March 1995 opinion established that claimant was totally disabled due to pneumoconiosis. Thus, the administrative law judge properly concluded that the onset date is March 1, 1995. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Carney v. Director, OWCP*, 11 BLR 1-32 (1988).

Accordingly, the administrative law judge's Decision and Order awarding benefits is

affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge