BRB No. 02-0471 BLA

HUBERT ASBURY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, INCORPORATED	)	DATE ISSUED:_____
	)	
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 on Remand of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Hubert Asbury, Bluefield, Virginia, *pro se.*

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order on Remand (99-BLA-1156) of Administrative Law Judge Rudolf L. Jansen denying benefits on a miner's 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 is before the Board for the second time and involves a request for modification on a duplicate claim. Initially, the administrative law judge credited the miner with twenty-five years of coal mine employment pursuant to the parties' stipulation. March 20, 2000 Hearing Transcript at 9; Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the medical evidence of record to be insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Decision and Order at 8-10. Considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge determined that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 10. The administrative law judge further found that the newly submitted evidence failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, benefits were denied.

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[1]Claimant is Hubert Asbury, the miner, who filed his second claim for benefits on February 8, 1995. Director's Exhibit 1. Administrative Law Judge Robert G. Mahony denied benefits on February 13, 1997 because claimant failed to establish total respiratory disability. Director's Exhibit 46. Claimant timely appealed to the Board, and on February 25, 1998 the Board vacated Judge Mahony's decision and remanded this case to the Office of Administrative Law Judges. Director's Exhibits 47, 53. Subsequently, this case was remanded to the district director for consideration of evidence submitted with claimant's June 28, 1998 letter, which was treated as a request for modification. Director's Exhibits 55, 60. The district director denied claimant's request for modification, and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 71, 72. Claimant's previous claim for benefits, filed on July 30, 1990, was finally denied on November 23, 1990 because claimant failed to establish that he is totally disabled due to pneumoconiosis. Director's Exhibit 33.

[2]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[3]The Department of Labor has amended the regulations implementing the Federal 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In response to claimant's appeal, the Board affirmed the administrative law judge's findings that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1)-(c)(3) (2000). *See Asbury v. U.S. Steel Mining Co.*, BRB No. 00-0995 BLA (June 27, 2001)(unpub.). However, the Board vacated the administrative law judge's finding at Section 718.204(c)(4) (2000) and remanded this case for the administrative law judge to reconsider the relevant evidence pursuant to this subsection on remand. *Id.*

On remand for the second time, the administrative law judge considered the entire evidentiary record and found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Decision and Order on Remand at 7.

In his current appeal to the Board, claimant generally contends that the administrative law judge erred in denying benefits on remand. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by the Act, 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates*, Inc., 380 U.S. 359 (1965).

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now set out at 20 C.F.R. §718.204(b) in the amended regulations, while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) in the amended regulations.

On remand, the administrative law judge considered whether all of the medical evidence of record establishes total respiratory disability in conjunction with the instructions given in the Board's June 27, 2001 Decision and Order. In its June 27, 2001 Decision and Order, the Board held that the administrative law judge permissibly accorded less weight to Dr. Qazi's opinion regarding total respiratory disability. *See Asbury, supra*. However, the Board remanded this case for the administrative law judge to reconsider the opinions of Drs. Hippensteel and Krishnan because "the administrative law judge failed to explain how the physicians' reliance on claimant's history of coal mine employment supports their conclusions regarding total disability, and more specifically, how the additional five years of coal mine employment noted by Dr. Hippensteel 'bolstered' the physician's opinion." *Id.*

[5]Additionally, as noted by the administrative law judge, the Board did not disturb the administrative law judge's finding that Dr. Javed's opinion is not probative regarding the issue of total respiratory disability because this physician is unclear whether claimant's impairment is due to his pulmonary condition or to his cardiac or other health problems. *See Asbury v. U.S. Steel Mining Co.*, BRB No. 00-0995 BLA, *slip op.* at 6 n.7 (June 27, 2001)(unpub.).

[6]Dr. Krishnan found that claimant is disabled as a direct result of his coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibit 66. Dr. Hippensteel opined that claimant has no pulmonary impairment and that he could perform his previous job in coal mine employment from a pulmonary standpoint. Employer's Exhibit 1.

In reconsidering the opinions of Drs. Krishnan and Hippensteel on remand, the administrative law judge initially noted that both of these physicians are "pulmonary specialists." Decision and Order on Remand at 5. The administrative law judge, however, chose to "assign less probative weight to Dr. Krishnan's opinion and more to Dr. Hippensteel's opinion for [several] reasons." *Id.* First, the administrative law judge, within his discretion, accorded greater weight to Dr. Hippensteel's opinion because he found it to be "better reasoned and documented" than Dr. Krishnan's opinion. Decision and Order on Remand at 6; *see Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Specifically, the administrative law judge stated that "Dr. Krishnan did not support his conclusions with any documentation or medical data other than the single x-ray dated April of 1998 and his own observations over a period of about eight months." Decision and Order on Remand at 6. Furthermore, the administrative law judge noted that "Dr. Krishnan did not explain how [claimant's] cardiac condition, which was noted as severe by all physicians of record, contributed to Claimant's total disability or why he considered [claimant's] respiratory condition disabling in the face of the non-qualifying test results." *Id.* Conversely, the administrative law judge noted that Dr. Hippensteel based his opinion on an examination, an x-ray, non-qualifying pulmonary function and blood gas studies, an EKG, and medical and personal histories, including a smoking history of thirty pack years. *Id.*

[7]The record reveals that Dr. Krishnan is Board-certified in Pulmonology, Internal Medicine, Critical Care, and Geriatrics. Director's Exhibits 55, 66. Dr. Hippensteel is Board-certified in Internal Medicine and Pulmonary Disease, is a B-reader, and holds a sub-specialty in Critical Care Medicine. Employer's Exhibit 1.

Second, the administrative law judge found that Dr. Krishnan's reports do not show that he was familiar with any of the physical requirements of claimant's previous coal mining job such that he could adequately render an opinion that claimant is "disabled." Decision and Order on Remand at 6. In contrast, the administrative law judge noted that Dr. Hippensteel described the physical requirements of claimant's last coal mining job as mechanic, which involved heavy manual labor, in his opinion finding claimant able to return to his previous coal mine employment. *Id.* Therefore, the administrative law judge found Dr. Krishnan's opinion entitled to less weight. *See generally Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997)(recognizing that information regarding a miner's exertional work requirements mandates careful consideration in some cases such as where the physician must determine whether an impairment of a certain degree prevents the miner from performing his usual coal mine work); *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991).

The administrative law judge concluded by noting that Dr. Krishnan's status as claimant's treating physician is one factor to be considered in weighing the medical opinion evidence. Decision and Order on Remand at 6-7. However, the administrative law judge found Dr. Hippensteel's opinion is entitled to greater weight, "notwithstanding the fact that he is not a treating physician," because he found this physician's opinion to be better reasoned and documented and because Dr. Hippensteel was familiar with the physical requirements of claimant's previous coal mining job. Decision and Order on Remand at 7; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

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[8]The administrative law judge noted that claimant testified that his last coal mining job as mechanic required him to bend and stoop frequently and to lift two hundred to three hundred pounds with others. March 20, 2000 Hearing Transcript at 15-16.

[9]The administrative law judge also accorded less weight to Dr. Krishnan's opinion because he failed to consider claimant's smoking history of over thirty pack years and because Dr. Hippensteel's opinion is more recent than Dr. Krishnan's opinion by one year. Decision and Order on Remand at 5-6. However, because the administrative law judge has properly accorded less weight to Dr. Krishnan's opinion based on the reasons discussed above, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), we deem harmless any error the administrative law judge may have made in further discrediting Dr. Krishnan's opinion because this physician failed to consider claimant's smoking history and because his report was dated a year earlier than Dr. Hippensteel's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met his burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is neither empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we hold that the administrative law judge on remand properly found the medical opinion evidence insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

In considering all of the relevant evidence pursuant to Section 718.204(b), the administrative law judge properly found that claimant failed to establish total respiratory disability by a preponderance of the evidence. Decision and Order on Remand at 7; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara*, *supra*. Therefore, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b). *See Fields*, *supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Inasmuch as claimant has failed to establish total respiratory disability, *see* 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

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[10]We deem any error the administrative law judge may have made pursuant to 20 C.F.R. §§725.309(d), 725.310(a) (2000) to be harmless, *see Larioni*, *supra* inasmuch as he considered all the evidence of record to determine whether claimant is entitled to benefits on the merits of this case. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge