BRB No. 98-0557 BLA

CALVIN WEISS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-BLA-2559) of Administrative Law Judge Ralph A. Romano denying 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 is on appeal to the Board for the second time. In his original Decision and Order, the administrative law judge credited claimant with eight and one-half years of coal mine employment based on a stipulation by the parties and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[1] The

[1] Claimant filed his initial claim for benefits on April 30, 1984 and Administrative Law Judge Thomas W. Murrett's denial of benefits was affirmed by the Board in *Weiss v. Director, OWCP*, BRB No. 87-2504 BLA (Apr. 30, 1990)(unpub.). Claimant filed another application for benefits on May 8, 1990, which was treated as a request for modification and

administrative law judge considered only the later evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 and benefits were denied. Claimant appealed and in *Weiss v. Director, OWCP*, BRB No. 96-1310 BLA (July 30, 1997) (unpub.), the Board, after noting the procedural history of this case, affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(c)(1)-(3), but vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(4). The Board thus remanded the case for further consideration of the medical opinions and a determination of whether total disability was established by a preponderance of the evidence thereunder. The Board also vacated the administrative law judge's finding that a material change in conditions was not established pursuant to 20 C.F.R. §725.309 and instructed the administrative law judge to consider all of the evidence of record to determine if the evidence supports entitlement if he found total disability pursuant to 20 C.F.R. §718.204(c) established.

On remand, the administrative law judge reconsidered the recently submitted medical opinion evidence of record and found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). The administrative law judge also found that invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 was not established by the x-ray evidence. The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were again denied. In the instant appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(c)(4) or invocation of presumption contained in 20 C.F.R. §718.304. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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,

---

denied by the district director on December 31, 1990. No further action was taken on that claim. Director's Exhibit 17. Claimant filed a duplicate claim on September 29, 1992, which the district director denied on February 17, 1993. No further action was taken on that claim. Director's Exhibit 18. The instant claim was filed on December 23, 1994. Director's Exhibit 1.

and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order on Remand, 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. In considering the medical opinions pursuant to Section 718.204(c)(4), the administrative law judge permissibly found that the opinion of Dr. Talati, that claimant did not have a significant pulmonary impairment, was entitled to the greatest weight based on his superior qualifications and because his opinion was better supported by the objective evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); Decision and Order on Remand at 2-4; Director's Exhibits 7-9. Furthermore, the administrative law judge permissibly accorded less weight to the medical opinion of Dr. Aquilina, that claimant was totally disabled due to pneumoconiosis, since the administrative law judge found his opinion to be unsupported by objective evidence and that the underlying documentation did not support his conclusions. *Clark, supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order on Remand at 3-4; Claimant's Exhibits 5-6. Consequently, the administrative law judge acted within his discretion as fact-finder in concluding that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4).[2]

[2] Since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), lay

testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

With respect to claimant's eligibility for the irrebuttable presumption of entitlement due to the existence of complicated pneumoconiosis, the administrative law judge properly considered the relevant x-ray evidence and the qualifications of the physicians and acted within his discretion in concluding that the interpretations by Drs. Barrett and Cook, that the December 11, 1995 x-ray did not show complicated pneumoconiosis, outweighed the positive reading of complicated pneumoconiosis by Dr. Bassali, and thus the administrative law judge permissibly found that claimant failed to establish the existence of totally disabling pneumoconiosis pursuant to 20 C.F.R. §718.304. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Clark, supra*; *Wetzel, supra*; Decision and Order on Remand at 2 n.2; Director's Exhibit 20; Claimant's Exhibits 4, 6. Thus, we affirm the administrative law judge's findings that the evidence of record was insufficient to establish complicated pneumoconiosis or total disability in accordance with the provisions of Section 718.204(c). Inasmuch as the administrative law judge properly considered the newly submitted medical evidence and rationally concluded that the evidence did not establish a material change in conditions, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge