BRB No. 03-0138 BLA

KIRK DUNN, Jr.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 10/22/2003
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

Sarah M. Hurley (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (01-BLA-1033) of Administrative Law Judge Gerald M. Tierney 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).[1] This case involves a duplicate miner's claim filed on August 28, 2000.[2] After crediting claimant with at least forty years of coal mine employment, the administrative law judge found the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) and determined that, therefore, claimant established a material change in conditions pursuant to 20 C.F.R. §718.309 (2000). Considering the claim on the merits, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3), but found the medical opinion evidence sufficient to establish the presence of the disease pursuant to Section 718.202(a)(4). The administrative law judge then found claimant entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was unrebutted. The administrative law judge further found that, while the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the medical opinion evidence supporting a finding of total disability pursuant to Section 718.204(b)(2)(iv) was sufficient to establish total disability, and outweighed the contrary evidence under Section 718.204(b)(2)(i)-(iv). The administrative law judge further found the evidence of record sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c) and, consequently, awarded benefits. On appeal, employer challenges the

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[1]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.

[2] Claimant filed an initial claim on August 20, 1990. Director's Exhibit 32. In a Decision and Order dated October 28, 1992, Administrative Law Judge Quentin P. McColgin determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and, consequently, Judge McColgin denied benefits. *Id*. Claimant filed a second claim on January 2, 1997. Director's Exhibit 33. This claim was finally denied on October 30, 1997 by the district director, who found that claimant failed to establish any of the elements of entitlement pursuant to 20 C.F.R. Part 718 (2000). *Id*. Claimant took no further action in pursuit of benefits until filing the instant duplicate claim on August 28, 2000. Director's Exhibit 1.

administrative law judge's findings under Sections 718.202(a)(4), 718.204(b)(2)(iv) and 718.204(c). Claimant responds in support of the decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, indicating he disagrees with employer's argument pertaining to the administrative law judge's disability causation finding under Section 718.204(c). The Director further indicates that he does not presently intend to respond to employer's other arguments on appeal.[3]

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, and in accordance with applicable law. 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).

On appeal, employer first contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4). Specifically, employer contends that the administrative law judge failed to weigh all of the relevant evidence together under Section 718.202(a)(1)-(4) before concluding that the medical opinion evidence alone was sufficient to establish the presence of pneumoconiosis. Employer also contends that the two medical opinions relied upon by the administrative law judge, *i.e.*, the opinions of Drs. Shad and Ozgun, do not constitute reasoned opinions sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). In addition, employer asserts that the clear preponderance of the evidence of record should have led the administrative law judge to the conclusion that claimant does not suffer from pneumoconiosis. Employer's contentions lack merit.

First, contrary to employer's contention, the administrative law judge properly found that the fact that claimant did not present sufficient chest x-ray or biopsy evidence of pneumoconiosis does not preclude a finding that the disease is established under Section 718.202(a)(4). 20 C.F.R. §718.202(a)(1)-(4); Decision and Order at 5. We are not persuaded by employer's contention that the administrative law judge was required to weigh all of the relevant evidence together under 20 C.F.R. §718.202(a)(1)-(4) in light of the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); s*ee also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). We decline to extend the holding in *Compton* in this case, which arises within the jurisdiction of the

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[3]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and findings pursuant to 20 C.F.R. §§725.309 (2000) and 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2-3.

Eleventh Circuit. The Board has long held that Section 718.202(a)(1)-(4) provides four alternative means by which the existence of pneumoconiosis may be established. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

In addition, the administrative law judge properly found that the opinions of Drs. Shad and Ozgun support a finding of pneumoconiosis. Decision and Order at 5. Section 718.201 provides that pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). Dr. Shad, who examined claimant on October 24, 2000, diagnosed claimant with chronic obstructive pulmonary disease attributable to smoking and coal dust exposure. Director's Exhibit 13. Dr. Ozgun, who treated claimant on numerous occasions in 2000, indicated in a questionnaire dated January 22, 2002 that claimant has chronic obstructive pulmonary disease, and that claimant's forty year coal dust exposure plays a "significant role (10% or more)" in contributing to that condition. Claimant's Exhibit 1. Contrary to employer's contention, the administrative law judge properly credited, as well-reasoned and documented, the opinions of Drs. Shad and Ozgun. Whether a medical opinion is reasoned and documented is for the administrative law judge to decide. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). The administrative law judge explained that both Drs. Shad and Ozgun demonstrated that they were aware of claimant's work and medical histories, and that the doctors conducted the relevant testing associated with pulmonary evaluations. Decision and Order at 5. The administrative law judge further found that, while Drs. Russakoff and Goldstein, who rendered contrary opinions with regard to pneumoconiosis, also based their opinions on these factors, Director's Exhibits 28, 32, 33, Dr. Ozgun conducted his own in-depth evaluation of claimant and treated claimant on at least five occasions thereafter. Decision and Order at 5; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge also rationally concluded that the opinions of Drs. Ozgun and Shad are reasoned and documented since claimant has a forty year coal dust exposure history and a remote smoking history of only one-half to one pack of cigarettes per day for one to two years, ending forty to fifty years ago. Decision and Order at 2, 5. Employer's reference to contrary evidence in the record supporting a finding that claimant does not have pneumoconiosis amounts to a mere request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Employer next contends that the administrative law judge improperly found that claimant established total disability pursuant to Section 718.204(b)(2). Employer argues that the administrative law judge improperly found total disability established based upon a comparison of claimant's job description and the medical opinions of record. Employer asserts that, moreover, the administrative law judge failed to weigh the like and unlike

evidence together pursuant to Section 718.204(b)(2)(i)-(iv) before reaching his ultimate conclusion that claimant is totally disabled. Employer's contentions lack merit. Reasonably determining that claimant's most recent coal mine employment as a general outside laborer constituted heavy manual labor, and comparing those exertional requirements to the medical opinions of Drs. Ozgun, Shad, Russakoff and Goldstein, indicating that claimant has moderate to severe respiratory impairment, Director's Exhibits 13, 28, 32, 33; Employer's Exhibit 3; Claimant's Exhibit 1, the administrative law judge properly found the medical opinion evidence sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); Decision and Order at 8. Furthermore, contrary to employer's contention, the administrative law judge did, in fact, properly weigh all of the like and unlike evidence pursuant to Section 718.204(b)(2)(i)-(iv) before ultimately concluding that claimant established total disability. The administrative law judge properly found the medical opinion evidence most probative on the issue of total disability because the medical opinion evidence takes into consideration a totality of factors permitting the physicians to interpret testing and assess impairment. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); Decision and Order at 9. Accordingly, we affirm the administrative law judge's finding that claimant established total disability under Section 718.204(b).

Finally, employer argues that the administrative law judge improperly found the opinions of Drs. Ozgun and Shad sufficient to establish disability causation pursuant to Section 718.204(c). Employer contends that neither physician's opinion supports a finding that pneumoconiosis was a substantial contributing cause of claimant's totally disabling respiratory impairment. This contention lacks merit. In order to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), claimant must establish that his pneumoconiosis is a substantially contributing cause of his totally disabling pulmonary or respiratory impairment.[4] 20 C.F.R. §718.204(c); *Lollar v. Alabama By-*

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[4]Revised Section 718.204(c) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

Products Corp., 893 F.2d 1258, 1265, 13 BLR 2-277, 2-283 (11th Cir. 1990). The administrative law judge noted that while Dr. Shad did not indicate the degree to which claimant's coal dust exposure contributed to his totally disabling respiratory impairment, Dr. Shad's opinion does not refute a finding that claimant's coal dust exposure substantially contributed to his respiratory impairment. Decision and Order at 9; Director's Exhibit 13. The administrative law judge did not rely upon Dr. Shad's opinion, but merely found it supportive of Dr. Ozgun's opinion that claimant's coal dust exposure played a "significant role" in his respiratory impairment. Decision and Order at 9-10; Claimant's Exhibit 1. As argued by claimant and the Director, the administrative law judge properly found that Dr. Ozgun's opinion meets the criterion that pneumoconiosis be a substantially contributing cause of claimant's total disability. 20 C.F.R. §718.204(c); *Lollar*, 893 F.2d at 1265, 13 BLR at 2-283. The administrative law judge properly accorded determinative weight to the opinion of Dr. Ozgun on the basis that it is a well-reasoned and documented opinion, for the reasons discussed above. Accordingly, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis under Section 718.204(c).

Inasmuch as we herein have affirmed the administrative law judge's findings that claimant has met his burden at Sections 718.202(a)(4), 718.203(b) and 718.204(b), (c), we hold that the administrative law judge properly found claimant entitled to benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge