BRB No. 99-0819 BLA

JAMES R. GRIMMETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/ APOGEE COAL COMPANY	)	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 - Denial of Benefits On Remand From The Benefits Review Board of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, Kentucky, for claimant.

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial Of Benefits On Remand From The Benefits Review Board (96-BLA-01438) of Administrative Law Judge Ralph A. Romano on a duplicate 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 the earlier Decision and Order Awarding Benefits, the administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) as the evidence established that claimant was totally disabled, the element of entitlement previously decided against him. Turning to the merits,

the administrative law judge found that claimant established twenty-four years of coal mine employment, failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), but established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence of record was sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §§718.204(c)(1), (4) and 718.204(b). Employer appealed, and in *Grimmett v. Arch of West Virginia/Apogee Coal Co.*, BRB No. 97-1554 BLA (Aug. 5, 1998)(unpub.), the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 718.204(b), (c)(4) and 725.309 and remanded the case for reconsideration under those Sections.[1] On remand, the administrative law judge found that the evidence was insufficient to establish total disability due to pneumoconiosis at Section 718.204(b) and (c) and therefore insufficient to establish a material change in conditions pursuant to Section 725.309.[2] Accordingly, he denied benefits. Claimant appeals, contending that the administrative law judge erred in his consideration of the medical evidence at Section 718.204(b) and (c). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

[1] The Board affirmed the finding of twenty-four years of coal mine employment, and that the pulmonary function studies establish total disability at 20 C.F.R. §718.204(c)(1), and that Dr. Rasmussen's medical opinion, if credited, would be sufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

[2] Because the administrative law judge found that total disability due to pneumoconiosis was not established, he did not reconsider whether claimant established the existence of pneumoconiosis at Section 718.204(a)(4).

Claimant contends that the administrative law judge erred in combining "his discussion of whether claimant had shown a totally disabling respiratory impairment with the question of whether claimant's total disability arose from his pneumoconiosis," and that the administrative law judge erred in according less weight to Dr. Rasmussen's opinion because he relied, in part, on a positive x-ray, when the weight of the x-ray evidence was negative, and because he failed to consider claimant's nonqualifying blood gas studies. Claimant also contends that the administrative law judge erred in according dispositive weight to the opinions of the employer's physicians regarding causation in contravention of the holding in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), and *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Likewise, claimant contends that the "mere fact that claimant smoked cigarettes or that that habit contributed to his disability does not bar" entitlement since claimant is only required to show that pneumoconiosis contributed to his totally disabling respiratory impairment. Finally, claimant contends that the administrative law judge erred in finding employer's physicians "well-reasoned when in his initial Decision and Order he had rejected them for their total lack of explanation" and "their internal contradictions." Claimant's Brief at 10.

The evidence of record contains six medical opinions. Dr. Tan, who examined claimant on November 14, 1979, diagnosed the existence of pneumoconiosis, noted claimant's history of coal mine employment and cigarette smoking, but did not address whether claimant had a totally disabling respiratory impairment. Director's Exhibit 25.

Dr. Walker, who examined the claimant on November 24, 1995, concluded, based on x-ray, electrocardiogram, pulmonary function and blood gas testing, that the miner did not have pneumoconiosis, but was obese and had bronchitis with bronchospasm. He opined that the etiology of his diagnosis was (1) the aging process (2) hypertension and (3) cigarette smoking. Dr. Walker further concluded that the miner could not perform his last coal mine employment job due to his severe coronary artery disease. Director's Exhibit 13.

Dr. Rasmussen concluded, based on his August 21, 1996 examination, a review of Dr. Bassali's x-ray reading, an electrocardiogram, a treadmill exercise study and pulmonary function and blood gas testing, that claimant had a moderate pulmonary impairment and that he was totally disabled from resuming his former coal mine employment as a result of pulmonary insufficiency. Dr. Rasmussen further concluded that the two risk factors for the claimant's respiratory impairment were previous cigarette smoking and coal mine dust exposure; the latter of which must be considered a significant or major contributing factor to his disabling respiratory insufficiency. Claimant's Exhibit 4.

Dr. Zaldivar, who is board certified in internal medicine and pulmonary disease, concluded on the basis of his September 18, 1996 examination and review of claimant's medical file, that claimant had coronary artery disease, a significant smoking history, the

presence of a moderate airway obstruction and normal diffusing capacity which was compatible with asthma, rather than coal workers' pneumoconiosis. Dr. Zaldivar, therefore, concluded that claimant did not have coal workers' pneumoconiosis or any dust disease of the lungs. Rather, based on the examination, smoking history, objective testing and negative chest x-rays, Dr. Zaldivar found an airway obstruction due to a combination of the miner's past smoking history, plus bronchospasm (asthma). Dr. Zaldivar also diagnosed (1) diabetes mellitus (2) a past history of smoking (3) a past history of coal mine employment and (4) ischemic heart disease resulting in heart attacks. He found that although, from a pulmonary standpoint, claimant could not perform heavy manual labor, he could perform his usual coal mine employment as an equipment operator. Dr. Zaldivar went on to state that claimant's disability was not the result of a dust disease of the lungs. At his deposition, Dr. Zaldivar reiterated that claimant's symptoms were consistent with cardiac disease and that claimant did have an impairment related to or aggravated by coal dust exposure. Employer's Exhibit 8.

In a report dated March 24, 1997, Dr. Repsher, who is board-certified in internal medicine and pulmonary disease, reviewed the medical evidence of record noting the presence of diabetes mellitus, hypertension, acid peptic disease, a history of bleeding ulcers, and marked obesity. On reviewing the pulmonary function study, blood gas study and x-ray evidence, he concluded that there was no evidence of coal workers' pneumoconiosis or any respiratory disease either caused by or significantly aggravated by coal dust exposure, although he did find "COPD, moderately severe, secondary to cigarette smoking." Employer's Exhibit 5A. Dr. Repsher explained his finding that claimant did not have pneumoconiosis by pointing to the fact that the miner had no x-ray evidence of pneumoconiosis, there was no pulmonary function evidence of coal workers' pneumoconiosis, claimant's COPD showed no element of restrictive disease which would be expected in clinically significant coal workers' pneumoconiosis, the pulmonary function study and blood gas study were nonqualifying and the miner suffered from other serious medical problems, such as diabetes mellitus, hypertension, severe obesity and recurrent acid peptic disease, which disabled him from coal mine employment. Employer's Exhibit 5a.

Dr. Loudon concluded, in a report dated April 2, 1997, that based on a review of the evidence, including x-ray, pulmonary function studies and the reports of Drs. Walker, Rasmussen and Zaldivar, that there was no objective diagnosis justifying a diagnosis of coal workers' pneumoconiosis, rather the evidence suggested the presence of a moderate degree of chronic bronchitis or asthma which responded to bronchodilators. Dr. Loudon also found a severe degree of coronary artery disease and a moderate airflow obstruction, due to claimant's cigarette smoking habit. Thus, Dr. Loudon concluded that, although he did find a degree of pulmonary or respiratory impairment caused by cigarette smoking, and, to some extent, an asthmatic tendency, there was no coal workers' pneumoconiosis. Thus, although Dr. Loudon found claimant totally disabled from his usual coal mine employment, it was not

caused in whole or part by pneumoconiosis. Employer's Exhibit 7.

In weighing the evidence on the issue of total disability, the administrative law judge found, based on claimant's hearing testimony, that his coal mine employment involved moderate exertion, not heavy physical labor. Decision and Order at 5-6. Reviewing the evidence at each subsection of Section 718.204(c), the administrative law judge found that the pulmonary function studies "were sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)," Decision and Order at 2, that the blood gas studies were not, and that there was no evidence of cor pulmonale [with right sided congestive heart failure], necessary to establish total disability at 20 C.F.R. §718.204(c)(2), (3).

In reviewing the medical opinions at Section 718.204(c) the administrative law judge found them, "upon reconsideration, insufficient to establish total disability due to pneumoconiosis, as required by 20 C.F.R. §718.204(c)(4)," as Dr. Rasmussen was the only physician to find the miner totally disabled due to pneumoconiosis. Decision and Order at 6. In reviewing Dr. Rasmussen's report, the administrative law judge found that Dr. Rasmussen made "no mention of the miner's heart disease, which was noted by Drs. Zaldivar, Walker, Repsher and Loudon as being of significance in their evaluations of the miner." Decision and Order at 6. The administrative law judge further noted that Dr. Rasmussen relied "heavily upon the miner's work history and positive chest x-ray to reach his conclusion that the miner suffers from pneumoconiosis," when he had found the x-ray evidence to be negative for the disease. Decision and Order at 6. The administrative law judge further found that Dr. Rasmussen's "summary conclusion that the miner's coal mine employment was a contributing factor to his pulmonary impairment, without further explanation or discussion of the miner's other conditions, including heart disease and obesity," and that his failure to explain his opinion in light of the non-qualifying blood gas studies, and the miner's normal diffusing capacity rendered his opinion "lacking in reasoning or support." Decision and Order at 6. In conclusion, therefore, the administrative law judge found that because Dr. Rasmussen's opinion was not well-reasoned or well-documented, it was not "sufficient to outweigh the contrary medical evidence," including the reports of Drs. Zaldivar, Walker and Loudon. Decision and Order at 7. Moreover, the administrative law judge noted that he considered the superior qualifications of Drs. Zaldivar and Loudon in assessing the weight to be given to the medical reports.[3] Thus, based on the reports of Drs. Zaldivar, Walker and Loudon, the administrative law judge found that the miner failed to establish total disability due to pneumoconiosis, and, therefore, a material change in conditions.

[3] The administrative law judge found that the report of Dr. Repsher was not "particularly persuasive" as he relied "upon an erroneous conclusion that pulmonary function studies were not qualifying." Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

First, we note that although we agree with claimant that the administrative law judge erred in combining "his discussing of whether claimant had shown a totally disabling respiratory impairment with the question of whether claimant's total disability arose from his pneumoconiosis," Claimant's Brief at 6, any error is harmless, as the administrative law judge properly found that claimant failed to establish that his totally disabling respiratory impairment, if any, arose out of coal mine employment. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, the administrative law judge properly found that Dr. Tan's opinion was of little value because she failed to make any disability findings. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd* 9 BLR 1-104 (1986). *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Likewise, the administrative law judge permissibly accorded little weight to Dr. Rasmussen's opinion as Dr. Rasmussen failed to mention claimant's heart disease which was found to be of significance in the evaluations by Drs. Zaldivar, Walker, Repsher and Loudon, *see Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and because he failed to explain his opinion in light of the non-qualifying blood gas studies, and because he relied heavily upon the miner's work history and positive chest x-rays to find the existence of pneumoconiosis. *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, contrary to claimant's argument, we cannot say that the administrative law judge erred in relying on the opinions of Drs. Zaldivar, Walker and Loudon, in contravention of the holding of the Fourth Circuit in *Warth*, *supra*, as their opinions were based on examination, testing, x-ray and history and they never stated that an obstructive impairment could not be caused by coal mine employment. *Stiltner v. Island Creek Coal Co.*, 86 F.2d 337, 20 BLR 2-248 (4th Cir. 1996). Likewise, contrary to claimant's argument, the Fourth Circuit's holding in *Grigg*, *supra* which dealt with a presumption of totally disabling pneumoconiosis at Section 727.203(a), does not prohibit the administrative law judge from considering physicians' opinions that acknowledge that claimant has a disabling respiratory impairment, but find that it is not causally related to coal mine employment. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Zaldivar, Walker and Loudon based on their superior credentials. Decision and Order at 6; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*)(*rev'd on other grounds*). Additionally, contrary to claimant's contention the administrative law judge is not barred from reconsidering the physicians opinions and arriving at a different finding regarding the reasonedness of their opinions in this case which was remanded for reconsideration of the evidence, *Grimmett*, *supra*, and as his findings are supported by

substantial evidence. *See Rowe v. Director, OWCP*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). We therefore affirm the administrative law judge's weighing of the medical opinions and his finding that claimant failed to establish that he was totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(b). *Dehue*, *supra*; *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-84 (4th Cir. 1995); *see Doss v. Director, OWCP*, 854 F.2d 1316, 19 BLR 2-181 (4th Cir. 1995). Further, as claimant has failed to establish that he was totally disabled due to pneumoconiosis, the administrative law judge properly found that claimant failed to establish a material change in conditions, 20 C.F.R. §725.309(d), and we must affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order - Denial Of Benefits On Remand From The Benefits Review Board is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge