BRB No. 99-0717 BLA

NARCUS J. GEMSKI	)	
	)	
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 Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa (Cometa & Cappellini), Kingston, Pennsylvania, for claimant.

Edward Waldman (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, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-0562) of Administrative Law Judge Robert D. Kaplan 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). Adjudicating this duplicate claim[1]

[1] Claimant, Narcus J. Gemski, has filed three prior claims for benefits on September 12, 1975, May 20, 1991, and July 14, 1994, all of which were denied at the district director level. Director's Exhibits 18-20. Claimant did not pursue the denials on these claims. Subsequently, claimant filed his fourth application for benefits on June 27, 1997, which is the subject of the case *sub judice*. Director's

pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with one and three-quarter years of qualifying coal mine employment. The administrative law judge found that claimant failed to demonstrate a material change in conditions under 20 C.F.R. §725.309(d) because he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the medical evidence of record establishes a material change in conditions because the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4). The Director, Office of Workers' Compensation Programs (the Director) responds, arguing that the administrative law judge properly found that claimant failed to establish pneumoconiosis under Section 718.202(a)(4) and that claimant failed to allege any specific error with respect to the administrative law judge's Section 718.204(c)(4) determination. Therefore, the Director urges affirmance of the denial of benefits.[2]

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, and are 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).

Exhibit 1.

[2] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a)(1)-(3), and 718.204(c)(1)-(3) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 7, 13.

Claimant argues that the opinions of Drs. Gorski, Mandel, Aquilina, Liss, Cook, and Navani diagnosing the existence of pneumoconiosis are well reasoned opinions and that these physicians were well qualified to offer their opinions based on their demonstrated pulmonary expertise. The administrative law judge properly considered the newly submitted evidence in conjunction with claimant's fourth claim and, within a rational exercise of his discretion, accorded less weight to the opinions of Drs. Gorski, Mandel, and Navani because there was no indication that these physicians were aware of claimant's short coal mine employment history, *see Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985), claimant's cigarette smoking history, *see Gouge v. Director, OWCP*, 8 BLR 1-307, 1-308 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985), or his twelve-year dust exposure during his employment with a shoe company, *see Wisniewski v. Director, OWCP*, 929 F.2d 952, 15 BLR 2-57 (3d Cir. 1991); *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-38 (1987); *Graziani v. Director, OWCP*, 9 BLR 1-193 (1986); Decision and Order at 10-11; Director's Exhibits 13, 28; Claimant's Exhibits 1, 2. Consequently, the administrative law judge properly found that the opinions of Drs. Gorski, Mandel, and Navani were unreasoned. *See Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985). Similarly, the administrative law judge rationally found Dr. Aquilina's opinion undermined because Dr. Aquilina testified that he relied on a five-year coal mine employment history, and stated that "the strength" of his opinion would decrease if the length of coal mine employment was one to two years. *See Sellards*, *supra*; *Fitch*, *supra*; Decision and Order at 12; Claimant's Exhibit 6 at 26-27. The administrative law judge also properly discounted Dr. Aquilina's opinion because he was not aware of claimant's dust exposure during his shoe company employment. *See Wisniewski*, *supra*; Decision and Order at 12. Furthermore, the administrative law judge permissibly found that Dr. Cook's opinion that subpleural nodules "may be associated with coal workers' pneumoconiosis" was too equivocal to constitute a diagnosis of pneumoconiosis, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987), and correctly found that Dr. Liss did not diagnose the presence of pneumoconiosis. Decision and Order at 11; Claimant's Exhibit 4. Subsequently, the administrative law judge found that the opinions of Drs. Sahillioglu and Talati that claimant does not have pneumoconiosis were reasoned and documented.[3] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 12.

[3] Contrary to claimant's argument that the opinions of Drs. Sahillioglu and Talati are based upon negative x-ray readings, these physicians also relied upon physical examinations of claimant, pulmonary function and blood gas studies, and electrocardiograms. Director's Exhibits 4, 23, 29, 30; Claimant's Brief at p. 4 [unpaginated].

Inasmuch as the administrative law judge's determination at Section 718.202(a) is rational and supported by substantial evidence, we affirm his finding that claimant failed to establish the existence of pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); Decision and Order at 12.

With respect to Section 718.204(c)(4), claimant asserts that all of the physicians whose reports or testimony were proffered are sufficient to demonstrate total disability. In addition, claimant avers that the administrative law judge improperly disregarded these physicians' opinions under the issue of total disability because he had previously rejected them on the basis of their inaccurate length of claimant's coal mine employment histories. The Director initially argues that claimant has failed to allege any specific error with respect to the administrative law judge's Section 718.204(c)(4) determination, and therefore, the Board should affirm the administrative law judge's weighing of the evidence in this regard. In the alternative, the Director argues that, in the event the Board addresses the administrative law judge's determination, a remand of the case would be warranted because the administrative law judge's finding is not supported by substantial evidence. Specifically, the Director argues that the administrative law judge erroneously found that the pulmonary function and blood gas studies that Dr. Gorski administered were "suspect," and thereby accorded less weight to Dr. Gorski's opinion. *See* Decision and Order at 13-14. The Director similarly argues that the administrative law judge improperly rejected Dr. Aquilina's opinion because Dr. Aquilina relied on Dr. Gorski's opinion and the fact that pulmonary function studies performed the day after those administered by Dr. Aquilina yielded higher, normal values. The Director's argument has merit.

Contrary to claimant's argument, the administrative law judge did not utilize the length of claimant's coal mine employment as a factor for determining the probative value of each physician's assessment of total disability, but rather, evaluated the underlying objective documentation upon which each physician relied. Decision and Order at 14. The administrative law judge found Dr. Gorski's opinion entitled to diminished weight because the pO_2 value of claimant's November 1997 blood gas study was substantially lower than those of the other three blood gas studies and the FEV_1 and FVC values from the November 1997 pulmonary function test were lower than those obtained on the August 19, 1998 test, thereby rendering these tests "suspect." Decision and Order at 13-14; Director's Exhibits 3, 5, 14, 23; Claimant's Exhibit 3. Likewise, the administrative law judge discounted Dr. Aquilina's opinion because he substantially relied upon Dr. Gorski's opinion, conceded that the blood gas study he administered yielded normal values, and indicated that the pulmonary function study he administered revealed only a mild

restrictive defect. Decision and Order at 14. "In weighing medical evidence to evaluate the reasoning and credibility of a medical expert, however, the ALJ may not exercise 'absolute discretion to credit and discredit the expert's medical evidence.' " *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). By independently reviewing and interpreting the laboratory reports and finding the objective tests "suspect" absent any medical evidence demonstrating such, the administrative law judge impermissibly substituted his own expertise for that of the qualified physicians. Inasmuch as an administrative law judge is not free to set his own expertise against that of a physician who presents competent evidence, absent countervailing clinical evidence or a valid legal basis for doing so, *see Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Wetherill v. Director, OWCP*, 812 F.2d 376, 382, 9 BLR 2-239, 2-247 (7th Cir. 1987), we vacate the administrative law judge's analysis of the medical opinion evidence under Section 718.204(c)(4) and his determination pursuant to Section 725.309, and remand the case for further consideration.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and this case is remanded for proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge