

BRB No. 02-0513 BLA

JACK R. CLINE)
)
 Claimant-Respondent)
)
 v.)
)
 ROCKY CREEK MINING,)
 INCORPORATED)
)
 and)
 WEST VIRGINIA COAL-WORKER'S)
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier - Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr. (Clifford, Mann & Swisher, PLLC) Charleston, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Carrier appeals the Decision and Order on Remand Awarding Benefits (99-BLA-0668) of Administrative Law Judge Daniel L. Leland rendered 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 is before the Board for a second time.

¹ The Department of Labor has amended the regulations implementing the Federal

In its prior Decision and Order, the Board affirmed the administrative law judge's finding of seventeen years of coal mine employment, that a material change in conditions was established, and that the existence of coal workers' pneumoconiosis was established, but vacated the administrative law judge's finding that total disability due to pneumoconiosis was established and remanded the case for the administrative law judge to reconsider the evidence pursuant to 20 C.F.R. §718.204(b), (c). See *Cline v. Rocky Creek Mining Company, Inc.*, BRB No. 01-0158 BLA (Nov. 20, 2001)(unpub.). On remand, the administrative law judge again found that claimant established total disability and causation. Accordingly, benefits were again awarded.

On appeal, carrier challenges the findings of the administrative law judge regarding the medical opinion evidence and contends that the administrative law judge erred in finding total disability and causation established. Claimant responds, urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

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 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 prove 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 to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Carrier contends that the administrative law judge erred in according greater weight to Dr. Gaziano's opinion as well-reasoned because Dr. Gaziano had an inaccurate understanding of the exertional requirements of claimant's usual coal mine employment based on a mischaracterization of claimant's job duties which was provided by claimant's counsel.² Likewise, employer contends that the administrative law judge erred in crediting Dr. Younes's opinion because it was in conflict with the non-qualifying tests of record and because Dr. Younes was not a pulmonary specialist, like Dr. Zaldivar. Instead carrier contends that the administrative law judge should have credited Dr. Zaldivar's opinion, that claimant was not totally disabled, because it was supported by the diagnostic tests of record and because, contrary to the administrative law judge's finding, Dr. Zaldivar discussed claimant's job duties as a buggy operator and pinner in the mines and clearly understood the exertional requirements of claimant's coal mine job when he opined that claimant retained the pulmonary capacity to perform that job.

In finding that claimant established total disability, the administrative law judge credited the opinions of Drs. Gaziano and Younes over the opinion of Dr. Zaldivar because he found they were better supported by the documentation of record and because they had better knowledge of claimant's strenuous duties as a buggy operator and pinner. The administrative law judge accorded less weight to Dr. Zaldivar's opinion because it was unclear that Dr. Zaldivar considered the heavy labor involved in claimant's jobs as a buggy operator and pinner, since his report did not discuss these duties.

Claimant testified that he worked in the mines as a buggy operator and pinner, but also stated that he did just about anything but run the miner. Hearing Transcript at 9. Describing his duties, claimant noted that he pulled big miner cable weighing "a hundred, hundred and some pounds" and that he was a pinner, carrying half-headers, metal plates, weighing fifty or more pounds. Hearing Transcript at 10. Additionally claimant testified that, when required,

² Specifically, carrier asserts that Dr. Gaziano relied on a mischaracterization, by claimant's counsel, that claimant's coal mine employment required claimant to lift cable weighing in excess of 150 pounds, heavy timbers weighing in excess of 75 pounds, and other equipment and cable weighing in excess of 200 pounds, when claimant testified at the hearing that the cable and timbers he lifted were around 100 pounds, and the metal plates weighed 50 or more pounds. Carrier's Brief at 5.

he would shovel the belt, build stoppings with cinder blocks, and bust up rock with a sledge hammer. He also testified that he was required to do a lot of walking. Hearing Transcript at 10-11.

In a medical report dated March 21, 2000, Dr. Gaziano opined that claimant suffered from a moderate degree of pulmonary functional impairment of approximately 30%. Claimant Exhibit 1. Responding to claimant's counsel's letter, in which counsel stated that claimant was frequently required to lift heavy electrical cable weighing in excess of 150 pounds on a daily basis, lift heavy timbers in excess of 75 pounds, and lift other heavy equipment in excess of 200 pounds, and asking whether Dr. Gaziano believed claimant could perform his usual coal mine employment, Dr. Gaziano opined that he believed that claimant's last coal mine employment, as described by counsel, consisted of very heavy work which claimant would not be able to perform. Claimant's Exhibit 1 - Letter dated April 2, 2000. Dr. Younes, noting that claimant was a buggy operator, diagnosed a moderate restrictive impairment which would interfere with claimant's last mining job. Director's Exhibit 9. Dr. Zaldivar, noted that claimant's last coal mine employment was as a buggy operator and roof bolter. Dr. Zaldivar further noted that although claimant normally transported coal, if something broke down he would pick it up, and that he worked on low coal, had to bend the bolt, and he and another miner had to do timbering using 6 or 7 foot long timbers. Director's Exhibit 2. Dr. Zaldivar found that claimant had a mild pulmonary impairment and retained the respiratory capacity to perform his usual coal mine employment. Employer's Exhibit 3.

After reviewing the evidence, we conclude, contrary to carrier's argument, that the administrative law judge reasonably inferred that claimant's usual coal mine employment was heavy work and reasonably concluded that Dr. Gaziano's opinion supported a finding of total disability. Although claimant's counsel may have exaggerated the weight of items lifted by claimant in his coal mine employment, claimant's testimony nonetheless supports the administrative law judge's finding that Dr. Gaziano's opinion, when considered with claimant's testimony, supported a finding of total disability. *See Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469, 1-471 (1984). Moreover, contrary to employer's argument, the administrative law judge could reasonably rely on Dr. Younes's opinion as support for the opinion of Dr. Gaziano, who was a pulmonary specialist. The administrative law judge properly accorded less weight to Dr. Zaldivar's opinion because "it [was] unclear whether Dr. Zaldivar considered the heavy labor involved as a buggy operator and pinner." Decision and Order at 2. While Dr. Zaldivar noted that claimant mostly transported coal, Employer's Exhibit 3, claimant's testimony indicates that there were numerous, other daily duties required in his coal mine employment. Hearing Transcript at 9-11. Further, contrary to employer's contention, the administrative law judge is not required to discount the opinions of physicians who rely, in part, on non-qualifying pulmonary function studies, especially where, as here, the administrative law judge noted that Dr. Gaziano's opinion is supported by history and examination. Accordingly, we affirm the administrative law judge's finding that

claimant established total disability. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Church v. Eastern Associated Coal Corp.*, 21 BLR 1-8 (1996), *modif'd on other grounds* 21 BLR 1-52 (1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Turning to the issue of causation, employer asserts that the administrative law judge erred in not crediting Dr. Zaldivar's opinion that claimant's pulmonary impairment was due to traumatic injuries, not coal mine employment. In finding that claimant's pneumoconiosis substantially contributed to his total disability, the administrative law judge accorded greater weight to the opinions of Drs. Gaziano and Younes because, while they acknowledged claimant's previous traumatic injuries, they nonetheless concluded, based on physical examination and diagnostic findings, that claimant's pneumoconiosis was a cause of claimant's pulmonary impairment. The administrative law judge accorded less weight to Dr. Zaldivar's opinion that claimant's pulmonary impairment was due to traumatic injuries, not coal mine employment, because he was the only physician of record to reach this conclusion and because he failed to specify in what way claimant's airways obstruction was the result of past traumatic injuries. This was rational. *See Hicks, supra; Clark, supra; Lucostic, supra.*

Accordingly, the Decision and Order on Remand - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge