

BRB No. 05-0684 BLA

CHARLES E. CALDWELL)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 01/23/2006
 PERRY AND HYLTON, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COALWORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)
) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Harold Albertson (Albertson & Jones), Charleston, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5640) of Administrative law judge Richard A. Morgan rendered on a subsequent 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 The administrative law judge accepted the parties' stipulation of at least thirty-three years of coal mine employment² and found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d), based on employer's concession that claimant established the existence of pneumoconiosis arising out of coal mine employment and that he is totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2). Turning to the merits of the claim, the administrative law judge found that claimant failed to establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his consideration of the medical opinions pursuant to Section 718.204(c) when he found that claimant did not establish that his total disability is due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs has indicated that he will not file a substantive response in this 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant filed his first claim on November 21, 1985. Director's Exhibit 1. The district director denied the claim by reason of abandonment on January 14, 1988. *Id.* Claimant filed this claim on June 12, 2002. Director's Exhibit 3.

² The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ We affirm as unchallenged on appeal the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and that he established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(c), the administrative law judge considered three medical opinions. In an April 16, 1986 physical examination report submitted in claimant's first claim, Dr. Zaldivar diagnosed claimant with a "mild impairment of oxygenation . . . presumably due to pneumoconiosis." Director's Exhibit 1. In the current claim, Dr. Walker examined and tested claimant on August 21, 2002 and diagnosed Coal Workers Pneumoconiosis and chronic bronchitis, both due to "Occupational dust." Director's Exhibit 11 at 4. Dr. Walker opined that claimant has a severe obstructive and restrictive ventilatory impairment that "would affect his ability to performed [sic] his work." *Id.* Dr. Zaldivar examined and tested claimant on June 20, 2003 and reviewed Dr. Walker's report and testing. Director's Exhibit 12. Dr. Zaldivar concluded that, although claimant has pneumoconiosis, "[n]one of [his] pulmonary impairment is related to his occupation. All of the impairment is the result of musculoskeletal weakness and likely right diaphragm paralysis" due to "polymyositis."⁴ Director's Exhibit 12 at 2-3.

The administrative law judge accurately noted that claimant had to establish that pneumoconiosis is a "substantially contributing cause" of his total disability. 20 C.F.R. §718.204(c)(1); Decision and Order at 8. Applying this standard, the administrative law judge gave "little weight" to Dr. Zaldivar's 1986 opinion because Dr. Zaldivar had "merely *presumed* that the mild impairment in oxygenation was related to pneumoconiosis," and because, "in 1986, claimant's polymyositis had not yet been diagnosed." Decision and Order at 9 (emphasis in original). Turning to Dr. Walker's opinion, the administrative law judge found that even assuming that Dr. Walker had clearly stated that claimant's disabling ventilatory impairment is due to pneumoconiosis,

⁴ Polymyositis is the "inflammation of several or many muscles at once; it is attended by pain, tension, edema, deformity, insomnia, and sweats, and is often associated with cancer." *Dorland's Illustrated Medical Dictionary* 1234 (25th ed. 1974). Claimant reported this condition to Dr. Zaldivar and testified that he thinks he was diagnosed with it in 1993. Director's Exhibit 12 at 4; Hearing Tr. at 15. As summarized by the administrative law judge, Dr. Zaldivar explained that polymyositis has caused muscle weakness in claimant that has likely paralyzed the right side of his diaphragm, which is elevated on x-ray, preventing expansion of the right lung. Decision and Order at 7-8; Director's Exhibit 12 at 2.

“Dr. Walker’s opinion is undermined by his failure to even consider the possible role of polymyositis. In fact, Dr. Walker never even mentions ‘polymyositis.’” Decision and Order at 9. The administrative law judge also noted that “Dr. Walker’s credentials are not in evidence.” *Id.* By contrast, the administrative law judge found that Dr. Zaldivar “thoroughly analyzed the available medical data” in his 2003 report and explained why claimant’s totally disabling pulmonary condition is due solely to polymyositis. *Id.* The administrative law judge found Dr. Zaldivar’s 2003 report “better reasoned than Dr. Walker’s opinion” and supported by Dr. Zaldivar’s “superior credentials” in internal and pulmonary medicine. *Id.* Consequently, the administrative law judge found that claimant did not establish that his total disability is due to pneumoconiosis.

Claimant contends that the administrative law judge erred by crediting Dr. Zaldivar’s opinion because it “is based upon speculation.” Claimant’s Brief at 3. Specifically, claimant notes that at one point in his report, Dr. Zaldivar stated that the right side of claimant’s diaphragm “may be paralyzed” and advised that “fluoroscopy” be done to evaluate the paralysis. Claimant’s Brief at 3; Director’s Exhibit 12 at 2, 3. Claimant asserts that because fluoroscopy “was never performed . . . the . . . report of Dr. Zaldivar was mere speculation.” Claimant’s Brief at 3. Claimant’s contention lacks merit.

Although an administrative law judge may not rely on a medical opinion that is purely speculative, *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), it is the administrative law judge’s role to evaluate the weight and credibility of a medical opinion. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Underwood v Elkay Mining Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-2-28 (4th Cir. 1997). Here, the administrative law judge considered Dr. Zaldivar’s opinion as a whole and did not find it speculative or equivocal, but rather, found it well-reasoned and explained. Decision and Order at 7-9. Substantial evidence supports the administrative law judge’s finding, which was within his discretion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Employer’s Exhibit 12. Contrary to claimant’s argument, the Board is not authorized to reweigh the medical evidence. *Anderson*, 12 BLR at 1-113.

Moreover, claimant has not challenged the administrative law judge’s permissible determination that Dr. Walker’s opinion was “undermined” by his failure to consider claimant’s polymyositis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Additionally, the administrative law judge properly considered the physicians’ respective qualifications and rationally relied on Dr. Zaldivar’s “superior credentials” in weighing the medical opinions. Decision and Order

at 9; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Therefore, we affirm the administrative law judge's finding that claimant did not establish that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). Because claimant failed to establish a requisite element of entitlement, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge