BRB No. 00-1020 BLA

DAVID L. BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARMAN MINING COMPANY,	)	DATE ISSUED:
	)	
INCORPORATED	)	
	)	
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 - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Bobby Belcher (Wolfe & Farmer), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-0025) of Administrative Law Judge Rudolf L. Jansen 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] Pursuant to this duplicate claim filed December 18, 1996,[2] the

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer

administrative law judge considered whether the newly submitted evidence was sufficient to establish a material change in conditions.[3] After crediting claimant with twenty-seven years of coal mine employment, the administrative law judge found the newly submitted evidence

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to the amended regulations.

[2] Claimant filed claims on February 27 1987 and April 29, 1991 which were denied. Those denials were never appealed. Claimant's third claim, filed on December 10, 1992, was dismissed pursuant to claimant's motion to withdraw the claim.

[3] As employer contends, the administrative law judge erred in applying the law of the United States Court of Appeals for the Sixth Circuit in determining the relevant standard on duplicate claims because he found claimant's last coal mine employment was in Kentucky when, in fact, claimant's last coal mine employment was in Virginia. This is harmless error, however, inasmuch as claimant cannot establish a material change in conditions under the law of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

of record insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, elements previously adjudicated against claimant, and therefore insufficient to establish a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in not finding the existence of pneumoconiosis and total disability established, and erred in failing to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer 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.[4]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief and stayed for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit will not affect the outcome of this case. Claimant, in response, argues that the regulations will affect the outcome of this case. Based on the briefs submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith,*

[4] We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), and 718.204(c)(2), (3)(2000), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*).

Initially, claimant contends that the administrative law judge's Decision and Order violates the APA's requirements that the administrative law judge did not state the reasons for his decision. Contrary to claimant's contention, however, the administrative law judge has provided an adequate explanation of his findings of fact and conclusions of law. Thus, his Decision and Order complies with the requirements of the APA.

Claimant next contends that the administrative law judge erred in according less weight to Dr. Sundaram's opinion on the issue of whether claimant had coal workers' pneumoconiosis because Dr. Sundaram did not discuss claimant's smoking history, inasmuch as the record does not establish that claimant's smoking history had any bearing on whether claimant suffered from coal workers' pneumoconiosis. Claimant's argument is rejected. The administrative law judge could rationally accord less weight to Dr. Sundaram's opinion because his failure to discuss claimant's smoking history reflected an incomplete picture of the miner's health history. Decision and Order at 11; Claimant's Exhibit 1. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Moreover, contrary to claimant's argument, claimant's smoking history may be relevant in determining whether or not the miner's respiratory impairment, if any, arose out of coal mine employment. 20 C.F.R. §718.201. Accordingly, we affirm the administrative law judge's accordance of less weight to Dr. Sundaram's opinion for the reason given.

Claimant also asserts that the administrative law judge erred in according greater weight to the opinions of Drs. Tuteur and Broudy based on their superior credentials because he did not discuss the source of that information and he admitted that Dr. Sundaram was a specialist and treating physician. The record, however, includes the credentials of the physicians. Claimant's Exhibit 3; Employer's Exhibit 7, 8, 10, 12. Thus, contrary to claimant's argument, the administrative law judge could rationally accord greater weight to the opinions of Drs. Broudy and Tuteur based on their superior credentials which were supported in the record and less weight to Dr. Sundaram's opinion. *Id.*; Claimant's Exhibit 3; Employer's Exhibits 10, 12. Moreover, contrary to claimant's argument the administrative law judge is not required to accord greater weight to the opinion of a treating physician.

Milburn Colliery Co. v. Hicks, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Accordingly, we affirm the administrative law judge's accordance of greater weight to the opinions of Drs. Broudy and Tuteur based on their superior credentials.

Claimant further asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Broudy, that claimant did not have pneumoconiosis, because it was the most recent opinion of record. However, because the administrative law judge provided other valid reasons for according greater weight to Dr. Broudy's opinion, we will not address this argument. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Finally, claimant contends that "[a] rational evaluation of the medical evidence shows that [claimant] is totally disabled[.]" Claimant's Brief at 4. This contention, however, fails to identify sufficiently any error on the part of the administrative law judge in considering the evidence on the issue of total disability. Accordingly, the administrative law judge's finding that the newly submitted evidence fails to establish a totally disabling respiratory impairment is affirmed. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray*, *supra*; and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence. *See Clark*, *supra*; *Anderson*, *supra*. Thus, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis or total disability and, therefore, a material change in conditions. *Rutter*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge