

BRB No. 05-0926 BLA

RONNIE LEE BOWER)
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 Claimant-Respondent)
)
 v.) DATE ISSUED: 07/28/2006
)
 MYSTIC ENERGY, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) 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.

John Cline (Lay Representative), Piney View, West Virginia, for claimant.

Robert Weinberger (Employment Programs Litigation Unit), Charleston, West Virginia, for employer/carrier.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: Dolder, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (hereinafter, carrier) appeals the Decision and Order on Remand – Awarding Benefits (03-BLA-5510) of Administrative Law Judge Daniel L. Leland 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). This case is before the Board for a second time. In his original Decision and Order, the administrative law judge credited claimant with thirty-two years of coal mine employment and adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and also a total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found the evidence sufficient to establish one of the elements of entitlement previously adjudicated against claimant. On the merits, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). Further, the administrative law judge found the evidence sufficient to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b) and that claimant’s total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appealed the award of benefits to the Board. In a Decision and Order issued on February 28, 2005, the Board affirmed in part and vacated in part the administrative law judge’s award of benefits and remanded the case to the administrative law judge for further proceedings. *Bower v. Mystic Energy, Inc.*, BRB No. 04-0401 BLA (Feb. 28, 2005)(Hall, J., dissenting)(unpub.). The Board specifically remanded the case for the administrative law judge reconsider the pulmonary function study evidence and weigh all of the contrary probative evidence together to determine whether claimant has established total disability due to pneumoconiosis pursuant to Sections 718.204(b)(2) and 718.204(c). *Bower*, slip op. at 6.

On remand, the administrative law judge found that the medical evidence was sufficient to establish a total respiratory disability due to pneumoconiosis pursuant to Sections 718.204(b)(2) and 718.204(c). Decision and Order on Remand at 2. Accordingly, the administrative law judge awarded benefits commencing as of March 1,

¹ Claimant’s initial claim was filed on October 8, 1998. Director’s Exhibit 1. This claim was denied by the Department of Labor on February 25, 1999 because claimant failed to establish the existence of pneumoconiosis and total disability. *Id.* Because claimant did not pursue this claim any further, the denial became final. Claimant’s most recent claim was filed on March 22, 2001. Director’s Exhibit 3.

2001.

On appeal, employer contends generally that the administrative law judge erred in finding that the medical evidence establishes claimant's total disability was due to pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds urging affirmance of the administrative law judge's award of benefits as supported by substantial evidence.

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).

Pursuant to Section 718.204(b)(2), the administrative law judge considered the relevant medical evidence, both like and unlike, in finding that the medical evidence is sufficient to establish a total respiratory disability. Decision and Order on Remand at 2. In particular, the administrative law judge set forth the pulmonary function study evidence, noting that the pre-bronchodilator values of the most recent studies yielded both qualifying values and values "barely above the qualifying levels" but that the post-bronchodilator values of these studies were non-qualifying.² Decision and Order on Remand at 2; Director's Exhibits 18, 29; Claimant's Exhibits 1, 3. The administrative law judge found that the blood gas studies yielded non-qualifying values. Decision and Order on Remand at 16, 17, 29; Claimant's Exhibit 1. Weighing this evidence together with the medical opinion evidence, the administrative law judge credited the opinion of Dr. Rasmussen, that claimant is totally disabled, finding that it is well reasoned and documented whereas he found the contrary opinion of Dr. Zaldivar is not creditable because it is too speculative. Decision and Order on Remand at 2; Director's Exhibit 29; Claimant's Exhibit 1; *see also Bower*, slip op. at 5. Consequently, the administrative law judge found that the medical evidence, considered as a whole, establishes that claimant is totally disabled.

Employer, in challenging the administrative law judge's finding that claimant is

² The administrative law judge, in weighing the recent pulmonary function study evidence, found that while the post-bronchodilator values of the four most recent studies were non-qualifying, the June 12, 2001 and June 19, 2001 ventilatory studies yielded qualifying pre-bronchodilator values and the pre-bronchodilator values of the February 13, 2002 and August 13, 2002 ventilatory studies were barely above the qualifying level. Decision and Order on Remand at 2; Director's Exhibits 18, 29; Claimant's Exhibits 1, 3.

totally disabled, argues that a single medical opinion, weighed together with all the other medical evidence, is insufficient to establish that claimant is totally disabled. Employer's Brief at 3. Employer does not specifically identify any error made by the administrative law judge in his evaluation of Dr. Rasmussen's opinion. Employer's argument is essentially a request for the Board to reweigh the evidence, which exceeds the Board's scope of review, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge, who is charged with evaluating the credibility of the evidence and resolving conflicts in the evidence, permissibly accorded determinative weight to the opinion of Dr. Rasmussen over the contrary evidence. *See Lafferty v. Cannerton Industries, Inc.*, 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Because the administrative law judge weighed and discussed all of the contrary and probative evidence of record, we affirm his determination that claimant has established that he is totally disabled. *Id.*

Furthermore, we affirm the administrative law judge's finding that the medical evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). The administrative law judge, crediting the medical opinion of Dr. Rasmussen, that claimant's pneumoconiosis was a major contributing factor to his total disability, further found that this opinion was corroborated by the medical opinion of Dr. Mullins as well as the report of the West Virginia Occupational Pneumoconiosis Board. Decision and Order on Remand at 2. In addition, the administrative law judge found that because the Board affirmed his prior finding discrediting the opinion of Dr. Zaldivar on the issue of disability causation, *Bower*, slip op. at 8-9, there is no probative evidence contradictory to the finding that claimant's total disability is due to pneumoconiosis. Decision and Order on Remand at 2. Consequently, the administrative law judge found disability causation established pursuant to Section 718.204(c).

Employer contends that the administrative law judge erred in finding that the opinion of Dr. Mullins and the report of the West Virginia Occupational Pneumoconiosis Board corroborate the opinion of Dr. Rasmussen, arguing that a "25% impairment does not constitute a 'major' contributing cause of claimant's disability." Employer's Brief at 3. We disagree. Here, the administrative law judge found that while both Dr. Mullins and the West Virginia Occupational Pneumoconiosis Board diagnosed only a 25% pulmonary impairment, both reports nonetheless opined that this impairment, which the administrative law judge found previously to be totally disabling, was due to claimant's coal worker's pneumoconiosis. Decision and Order on Remand at 2; Director's Exhibit 15; Claimant's Exhibit 3. Therefore, because the administrative law judge's interpretation of these reports as corroborating Dr. Rasmussen's report is not patently unreasonable, we reject employer's contention. *Tackett v. Cargo Mining Co.*, 12 BLR 1-

11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Since the remainder of employer's argument is again essentially a request for the Board to reweigh the evidence, which exceeds the Board's scope of review, *see Anderson*, 12 BLR 1-111; *Worley*, 12 BLR 1-20, we reject this request. Consequently, we affirm the administrative law judge's determination that claimant has established that his totally disabling respiratory impairment is due to pneumoconiosis pursuant to Section 718.204(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge