BRB No. 02-0539 BLA

JACK DARIUS CASSITY)
)
Claimant-Petitioner)
)
v.)
)
EASTERN ASSOCIATED COAL) DATE ISSUED:

CORPORATION)
)
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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0002) of Administrative Law Judge Gerald M. Tierney denying benefits 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).[1] The administrative law judge credited claimant with

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All

twelve years of coal mine employment based upon employer's concession and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant also challenges the administrative law judge's finding that the

---

citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant's initial claim was filed on May 8, 1989. Director's Exhibit 28. On May 9, 1991, Administrative Law Judge Victor Chao issued a Decision and Order denying benefits. *Id.* Judge Chao's denial was based upon claimant's failure 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 February 17, 2000. Director's Exhibit 1.

[3]The revisions to the regulations at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001.

newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

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).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions at 20 C.F.R. §725.309(d) (2000). *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). The administrative law judge stated that "[t]he elements of entitlement previously adjudicated against [c]laimant were the existence of pneumoconiosis and total disability." Decision and Order at 3; Director's Exhibit 28.

[4]Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

Initially, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. Whereas Dr. Rasmussen opined that claimant suffers from pneumoconiosis, Director's Exhibits 9, 10; Claimant's Exhibit 7, Drs. Branscomb, Fino and Zaldivar opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 26; Employer's Exhibits 1, 6, 9, 10, 11. The administrative law judge properly accorded greater weight to the opinions of Drs. Fino and Zaldivar than to the contrary opinion of Dr. Rasmussen based upon their superior qualifications.[5] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant asserts that the opinions of Drs. Branscomb, Fino and Zaldivar are not reasoned because they are based solely on negative x-ray readings. Contrary to claimant's assertion, Drs. Branscomb, Fino and Zaldivar based their opinions on x-ray readings, smoking and coal mine employment histories and clinical findings. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Ogozalek v. Director, OWCP*, 5 BLR 1-309 (1982).

---

[5]The administrative law judge stated that "[t]he record established that Drs. Zaldivar and Fino are [B]oard-certified pulmonary specialists with specific experience treating coal miners." Decision and Order at 6. The administrative law judge also stated that "[t]he record established that Dr. Branscomb, though not [B]oard-certified in pulmonary medicine, is a pioneer in the field with extensive experience in treating coal miners." *Id.* Further, the administrative law judge stated that "Dr. Rasmussen's signature carried a series of abbreviations apparently to indicate his qualifications and that he practices in the division of pulmonary medicine." *Id.* However, the administrative law judge stated that "Dr. Rasmussen's curriculum vitae was not part of the record to specifically establish his qualifications." *Id.*

In weighing the conflicting medical opinions, the administrative law judge found that "Dr. Rasmussen's reports did not indicate that he personally had the opportunity to review [c]laimant's extensive past medical evidence that included information about the extent of [c]laimant's past alcohol problems." Decision and Order at 6. In contrast, the administrative law judge found that "[Drs. Branscomb, Fino and Zaldivar] had the opportunity to review [c]laimant's medical evidence dating back to at least the 1980's." *Id.* The administrative law judge also found that "[i]n reaching their respective conclusions, [Drs. Branscomb, Fino and Zaldivar] explained why the various aspects of [c]laimant's evidence, considered as a whole, pointed away from coal mine dust exposure as being a factor in this case." *Id.* Hence, the administrative law judge stated, "[i]n light of the more detailed reviews and discussions provided by Drs. Zaldivar, Branscomb, and Fino..., I conclude that [c]laimant did not meet his burden of proof." *Id* at 6-7. The administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb, Fino and Zaldivar than to the contrary opinion of Dr. Rasmussen because the former are better reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller, supra*. Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the opinion of Dr. Rasmussen. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Furthermore, since the administrative law judge properly found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(a)(4),[6] we reject claimant's assertion that the administrative law judge erred

---

[6]We hold as a matter of law: that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), since there is no biopsy or autopsy evidence of record and that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3), since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled

in failing to weigh together the evidence at 20 C.F.R. §718.202(a)(1)-(4) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). We disagree. Whereas Drs. Fino and Rasmussen opined that claimant suffers from a totally disabling respiratory or pulmonary impairment, Director's Exhibits 9, 10; Claimant's Exhibit 7; Employer's Exhibit 6, Drs. Branscomb and Zaldivar opined that claimant does not suffer from a totally disabling respiratory or pulmonary impairment, Director's Exhibit 26; Employer's Exhibits 1, 9, 10. Based upon his weighing of the conflicting medical opinions, the administrative law judge stated that "[c]laimant did not meet his burden of proof." Decision and Order at 9.

---

to the presumption at 20 C.F.R. §718.305 because the miner filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Claimant asserts that the administrative law judge erred in discrediting the opinions of Drs. Fino and Rasmussen. The record reflects that the administrative law judge carefully considered the medical opinion evidence and determined that Dr. Zaldivar's opinion outweighed the opinions of Drs. Fino and Rasmussen. The administrative law judge stated, "I place less weight on Dr. Fino's opinion as he simply noted that [c]laimant last worked as a production foeman (sic) and jack setter without specifically discussing what he understood to be the exertional requirements of [c]laimant's usual coal mine job." *Id.* at 8. The administrative law judge contrasted Dr. Fino's opinion with those of Drs. Rasmussen and Zaldivar who had "provided [a] more detailed discussion[] and rationale with regard to this issue."[7] *Id.* The administrative law judge went on to contrast Dr. Rasmussen's opinion with Dr. Zaldivar's opinion. He noted that although Dr. Rasmussen and Dr. Zaldivar agreed on the degree of claimant's impairment, "Dr. Rasmussen concluded that this degree of impairment would render [c]laimant totally disabled from resuming his last coal mine job with its attendant requirement for heavy manual labor." *Id.* The administrative law judge also stated that "Dr. Rasmussen explained that although [c]laimant's work was supervisory, he was required to do heavy and perhaps some very heavy manual labor including setting jacks, carrying rock dust bags 180 feet, and shoveling; all of which require oxygen consumption of greater than 25 ccc/kg'min." *Id.* at 9.

The administrative law judge stated that "Dr. Zaldivar concluded that [c]laimant's pulmonary capacity is sufficient to allow him to perform his usual coal mining work as a supervisor performing intermittent moderate to heavy labor," since "[c]laimant's main work was supervisory and his secondary work was helping his men...[c]laimant was not doing heavy labor all along but was doing heavy labor intermittently." *Id.* at 8-9. The administrative law judge stated that based upon "the high oxygen consumption that [c]laimant was able to achieve, Dr. Zaldivar found that [c]laimant was capable of performing medium work on a regular basis and intermittent heavy labor, but not heavy labor on a continuous basis." *Id.* at 8.

[7]The administrative law judge stated that "Dr. Branscomb's discussion was not as extensive." Decision and Order at 9.

The administrative law judge stated that he found Dr. Zaldivar's opinion to be "the most credible on the issue of total disability." *Id.* at 9. The administrative law judge noted that "[Dr. Zaldivar's] understanding of [c]laimant's job duties was consistent with [c]laimant's testimony."[8] *Id.* The administrative law judge also observed that "[Dr. Zaldivar] understood that [c]laimant performed heavy labor as part of his job but that it was not on a continuous basis." *Id.* Further, the administrative law judge noted that "[Dr. Zaldivar] provided convincing evidence that [c]laimant was able to perform that level of exercise." *Id.* An administrative law judge, as fact-finder, has broad discretion in assessing the evidence and determining whether a party has met its burden of proof. *See Kuchwara v. Director, OWCP*. 7 BLR 1-167 (1984). Moreover, the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Thus, since the administrative law judge properly accorded greater weight to the opinion of Dr. Zaldivar than to the contrary opinions of Drs. Fino and Rasmussen because he found that Dr. Zaldivar's opinion is the most credible opinion on the issue of total disability, we reject claimant's assertion that the administrative law judge erred in discrediting the opinions of Drs. Fino and Rasmussen.[9] Further, since it is supported by substantial evidence,

---

[8]In considering claimant's testimony with respect to his usual coal mine employment, the administrative law judge stated:

> Though [c]laimant's main job was to supervise the men, he also helped them work (TR 17, 25). The work involved lifting and carrying. He helped carry ties, carry rails, and drove spikes (TR 17). He estimated that wood ties weighed 150 pounds and that rail sections weighed 2000 pounds requiring stake bars to be used to pry the sections (TR 17-18). He moved 70 pound bags of rock dust (TR 18-19). Claimant estimated that he would help out his men every other day for up to an hour (TR 25).

Decision and Order at 8.

[9]We reject claimant's assertion that the opinion of Dr. Zaldivar is not reasoned. Claimant's assertion is based upon the premise that Dr. Zaldivar relied upon a test that lasted twelve minutes and showed that claimant could only work for a little over twelve minutes while claimant's regular coal mine employment involved a longer period of time. Dr. Zaldivar opined that claimant's pulmonary capacity is sufficient to allow him to perform his usual coal mining work based upon an examination, objective tests, coal mine employment and smoking histories, and a review of medical data. Director's Exhibit 26. An administrative law judge may not substitute his opinion for that of the physician. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

we affirm the administrative law judge’s finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Finally, since the administrative law judge properly found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b), we affirm the administrative law judge’s finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000).[10] *See Rutter*, *supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[10]In view of our disposition of the case at 20 C.F.R. §725.309 (2000), we decline to address claimant’s contention that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).