BRB No. 97-0989 BLA

JOHN J. GIBERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SILVERBROOK ANTHRACITE	)	DATE ISSUED:
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
and	)	
	)	
COOLBAUGH SAND and STONE, INCORPORATED	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employers/Carriers-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Christopher L. Wildfire (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for Silverbrook Anthracite and Rockwood Casualty Insurance Company.

Maureen E. Calder (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for Coolbaugh Sand & Stone.

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

PER CURIAM:

Employer, Silverbrook Anthracite (Silverbrook), appeals the Decision and Order (96-BLA-00313) of Administrative Law Judge Robert D. Kaplan awarding benefits 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). The administrative law judge found that claimant's[1] employment with Coolbaugh Sand & Stone Inc. (Coolbaugh) does not constitute coal mine employment, that Silverbrook is the properly designated responsible operator, that claimant established nine years of qualifying coal mine employment, that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309, that the parties stipulated that claimant has pneumoconiosis, and that claimant is totally disabled due to pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.203(c), 718.204(b), (c)(4). Accordingly, benefits were awarded commencing May, 1994. On appeal, employer contends that the administrative law judge erred in making his finding regarding the responsible operator issue and pursuant to Section 718.204(b). Claimant and Coolbaugh respond urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate in this appeal.[2]

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 pursuant to 20 C.F.R. Part 718, claimant must

[1] Claimant is John J. Giberson, the miner, who filed a claim for benefits on July 30, 1979, which was denied on February 9, 1981. Director's Exhibit 33. Claimant filed the instant claim for benefits on May 10, 1994. Director's Exhibit 1.

[2] We affirm the administrative law judge's findings regarding the existence of pneumoconiosis and pursuant to 20 C.F.R. §§725.309, 718.203(c), 718.204(c)(4) and the date of onset of disability as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Employer initially contends that the administrative law judge erred in finding that claimant's work with Coolbaugh did not constitute coal mine employment under the Act and in failing to designate Coolbaugh as the responsible operator. Employer's Brief at 3-10. In making his finding regarding claimant's coal mine employment, the administrative law judge considered the hearing testimony of claimant, Michael Kominski and Richard Rinus. Decision and Order at 3-6. Claimant testified that while working at Coolbaugh, he operated a drill and that, although Coolbaugh was a rock quarry, he would drill into coal about two-thirds of the time that he worked there. Hearing Transcript at 77, 101-102. Claimant further testified that the coal would be separated from any rock and transported to breakers which were located between one-half mile to one mile from the quarry. Hearing Transcript at 103-105.

Michael Kominski, the manager of Kominski Bros., which owns Coolbaugh, testified that Coolbaugh is a quarry which has a permit to extract sand and stone, but not coal. Hearing Transcript at 133, 137. He further testified that of the 300,000 to 400,000 tons of rock extracted from the quarry annually, less than 500 tons of that material was coal. Hearing Transcript at 161-176. Mr. Kominski also stated that it was impossible that claimant drilled into coal two-thirds of the time that he worked at Coolbaugh. Hearing Transcript at 170. Richard Rinus, an employee at Coolbaugh for nineteen years, testified that he was a driller's helper for a year and a half and that they hit coal once during that time period. He estimated that seventy tons of coal were removed as a result of that hit. Hearing Transcript at 189-191.

Upon considering the hearing testimony, the administrative law judge acted within his discretion in crediting Mr. Kominski's testimony that the coal extracted from the quarry amounted to about one-tenth of one percent of the material removed from the site and that claimant could not have struck coal two-thirds of the time that he worked at Coolbaugh. Decision and Order at 5; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 BLA (1986). The administrative law judge also rationally found that Mr. Rinus' testimony is corroborative of Mr. Kominski's testimony. Decision and Order at 5; *Lafferty, supra; Stark, supra*. Further, the administrative law judge rationally found that the amount of coal extracted from Coolbaugh was minimal and that Coolbaugh

does not constitute a coal mine because coal mining did not constitute a substantial part of the activity and exposure. Decision and Order at 6; *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Wisor v. Director, OWCP*, 6 BLR 1-727 (1984), *aff'd* 748 F.2d 176, 7 BLR 2-46 (3d. Cir. 1984). Consequently, we affirm the administrative law judge's finding that claimant established nine years of qualifying coal mine employment and that employer is the responsible operator.

Employer next contends that the administrative law judge erred in failing to credit the opinions of Drs. Kibelstis and Dittman relating claimant's total disability to scleroderma rather than pneumoconiosis. Employer's Brief at 10-14. Dr. Kibelstis, in a report dated May 17, 1996, stated that he examined claimant and opined that claimant has advanced silicosis with compensatory emphysematous changes in both lower lobes, scleroderma and Raynaud's phenoma, and "may have lung changes as a result of this process independent of occupational dust exposure." Rockwood Casualty Exhibit 2. In a supplemental report also dated May 17, 1996, Dr. Kibelstis performed a record review and opined that claimant has a totally disabling respiratory impairment and stated:

> Although it is impossible for me to clearly state that this man's impairment is all due to pneumoconiosis, emphysema, or scleroderma, I strongly suspect, and feel I have justification to say that some of his disease is related to his coal mine and dust exposure, more specifically to silica exposure when he was tunneling and drilling in the mines.

Rockwood Casualty Exhibit 2. In a deposition dated August 26, 1996, Dr. Kibelstis again diagnosed pneumoconiosis and scleroderma and opined that claimant's severe respiratory impairment was caused by emphysema which was caused by scleroderma. Rockwood Casualty Exhibit 4.

In a report dated August 29, 1995, Dr. Dittman opined that claimant is disabled due to his scleroderma. Responsible Operator Exhibit 4. In a deposition dated December 20, 1996, Dr. Dittman stated that claimant's pulmonary symptoms are caused primarily by scleroderma, but that cigarette smoking contributed as well. Responsible Operator Exhibit 6. Both Dr. Kibelstis and Dr. Dittman stated in their depositions that rheumatologists generally have the most experience in treating scleroderma. Rockwood Casualty Exhibit 4; Responsible Operator Exhibit 6.

The record also contains progress notes from a rheumatologist whose name is not legible. The physician, whom the administrative law judge identified as Dr. Wineburgh, in a note dated February 21, 1995, opined that claimant has limited scleroderma. Claimant's Exhibit 7. In a note dated April 4, 1996, another rheumatologist, Dr. Schaeffer, opined that claimant has limited scleroderma which he feels is not a cause of any fibrotic lung changes because the pattern does not fit scleroderma. Claimant's Exhibit 7. In another note dated May 7, 1996, Dr. Schaeffer again diagnosed limited scleroderma. Claimant's Exhibit 7.

With respect to the medical opinion evidence concerning claimant's scleroderma, the administrative law judge found that the opinions of the rheumatologists are entitled to the greatest weight concerning the diagnosis of scleroderma, as was acknowledged by Drs. Dittman and Kibelstis. Decision and Order at 13. The administrative law judge then rationally assigned greatest weight to the opinions of Drs. Wineburgh and Schaeffer that claimant had limited scleroderma and to Dr. Schaeffer's opinion that claimant's scleroderma did not contribute to his pulmonary disability.[3] Decision and Order at 13; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty, supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Perry, supra*. Considering the medical opinion evidence as a whole, the administrative law judge acted within his discretion as trier-of-fact and permissibly concluded that the preponderance of the medical opinions establish that pneumoconiosis was a causative factor in claimant's disability. Decision and Order at 12; *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Perry, supra; Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson*, *supra*. Consequently, we affirm the administrative law judge's finding that claimant established total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b) as it is supported by substantial evidence and in accordance with law.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[3] The record also contains the opinions of Drs. Pelczar, Weiss, Fagan, and Levinson. Director's Exhibit 26; Claimant's Exhibits 3, 5-7; Inservco Exhibits 1, 2. Dr. Pelczar opined that claimant is totally disabled due to pneumoconiosis. Director's Exhibit 26; Claimant's Exhibit 5. Dr. Weiss opined that claimant has severe pulmonary impairment of mixed etiology including mixed dust pneumoconiosis. Responsible Operator Exhibit 5; Claimant's Exhibit 3. Dr. Fagan opined that claimant has severe pulmonary impairment due to pneumoconiosis. Claimant's Exhibits 6, 7. Dr. Levinson opined that claimant has no impairment due to pneumoconiosis. Inservco Exhibits 1, 2.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge