

BRB No. 01-0139 BLA

ROBERT R. SISLER)
)
 Claimant-Petitioner)
)
 v.)
)
 SHAFER BROTHERS' CONSTRUCTION,)
 INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (00-BLA-0448) of Administrative Law Judge Gerald M. Tierney 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). After finding that claimant established at least thirty-three years of coal mine employment, the administrative law judge considered the instant claim, which was filed on March 15, 1999, under the applicable regulations at 20 C.F.R. Part 718 (2000). The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) (2000) and 718.203(b) (2000), and total disability pursuant to 20 C.F.R. §718.204(c) (2000). The administrative law judge further found the evidence of record insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000), however, and, accordingly, denied benefits. On appeal, claimant challenges the administrative law judge's weighing of the evidence under Section 718.204(b) (2000). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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); *Gee v. W.G. Moore and Sons*, 9

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, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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 claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

On appeal, claimant contends that the administrative law judge improperly discounted the medical opinions of Drs. Jaworski and Rasmussen in favor of the contrary medical opinion of Dr. Renn in finding the evidence of record insufficient to establish total disability due to pneumoconiosis under Section 718.204(b) (2000). Claimant asserts that the administrative law judge should have granted determinative weight to the opinions of Drs. Jaworski and Rasmussen, which indicate that claimant's pneumoconiosis is a contributing factor to his totally disabling respiratory impairment, Director's Exhibit 14, Claimant's Exhibit 1, because Drs. Jaworski and Rasmussen examined claimant. Claimant also generally asserts that it was irrational for the administrative law judge to credit Dr. Renn's opinion, which indicates that claimant's totally disabling respiratory impairment is due to cigarette smoking and is not at all attributable to pneumoconiosis, Employer's Exhibit 1, because Dr. Renn was retained by employer for the sole purpose of defeating the claim, and was thus unfairly biased against claimant. Claimant's contentions lack merit.

Dr. Renn, like Drs. Jaworski and Rasmussen, conducted a complete pulmonary examination of claimant. Employer's Exhibit 1. The administrative law judge properly accorded greater weight to Dr. Renn's opinion on the basis that Dr. Renn provided the most specific rationale among the three physicians for his opinion on the etiology of claimant's totally disabling respiratory impairment. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). The administrative law judge correctly found that Dr. Jaworski did not provide an explanation for his opinion on the issue, and that Dr. Renn provided a more specific rationale than Dr. Rasmussen with regard to etiology by explaining that certain pulmonary function study results, such as claimant's in the instant case, reveal patterns consistent with a tobacco induced impairment, while certain other results reveal patterns consistent with an impairment resulting from pneumoconiosis. Decision and Order at 4-5; Director's Exhibit 14; Claimant's Exhibit 1; Employer's Exhibit 1. Moreover, the administrative law judge properly accorded greater weight to Dr. Renn's opinion because the record reflects that Dr. Renn is Board-certified in pulmonary medicine, and does not reflect that Drs. Jaworski and Rasmussen are similarly-qualified. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Roberts v. Bethlehem Mining Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5; Employer's Exhibit 1. Finally, contrary to claimant's suggestion, the administrative law judge did not err in failing to find Dr. Renn's opinion to be biased. A finding that a physician is biased must be supported by evidence in the record. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991). Claimant does not specify why he believes that Dr. Renn was biased against him in the instant case, other than to state that Dr.

As the administrative law judge noted, the record does not include the curricula vitae of Drs. Jaworski and Rasmussen. Decision and Order at 5.

Renn was retained by employer for the purpose of litigation. There is no showing of evidence supportive of a finding of bias on Dr. Renn's part in this case. We thus affirm the administrative law judge's finding that the weight of the medical opinion evidence was insufficient to establish total disability due to pneumoconiosis under Section 718.204(b) (2000). *See* 20 C.F.R. §718.204(c); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Since the administrative law judge properly found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000), *see* 20 C.F.R. §718.204(c), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits. *Trent, supra; Perry, supra; Gee, 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

REGINA C. McGRANERY
Administrative Appeals Judge