BRB No. 01-0191 BLA

JOSEPH T. SMOUSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
MARSOLINO COOLSPRING QUARY	)	
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	
	)	
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2000-BLA-3811) of Administrative Law Judge Michael P. Lesniak 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). Based on a stipulation by the parties, the administrative law judge credited claimant with seven years, eight and one-half months of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge judge found that the evidence of record was sufficient to establish that claimant suffers from pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(c) and 718.204(b), (c) (2000). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in his evaluation of the medical opinion evidence in determining that claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204(b) (2000). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation

[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 (2001).

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 issued an order on August 3, 2001, 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*, 160 F.Supp.2d 147 (D.D.C. 2001). On August 10, 2001, the Board issued an Order rescinding its August 3, 2001, order.

[2] The administrative law judge's findings regarding the responsible operator and that claimant established the existence of pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b) (2000) and total disability pursuant to 20 C.F.R. §718.204(c) (2000) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Programs, responds, urging affirmance of the award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated 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 to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 (2000). Failure of claimant 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).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Employer argues that the administrative law judge erred in discrediting Dr. Fino's opinion with respect to the issue of disability causation. *See* 20 C.F.R. §718.204(c)(1) (2001). In a report dated January 3, 2000, Dr. Fino opined that claimant did not suffer from coal workers' pneumoconiosis, but attributed claimant's disability to smoking and idiopathic pulmonary fibrosis. Director's Exhibit 36. During a March 30, 2000, deposition, Dr. Fino stated his opinion that claimant's disability was due to idiopathic pulmonary fibrosis. Employer's Exhibit 1. In a supplemental report dated June 7, 2000, Dr. Fino reiterated his opinion that there was insufficient evidence to diagnose pneumoconiosis and that claimant's disabling respiratory impairment was due to smoking and idiopathic pulmonary fibrosis. Employer's Exhibit 2. The administrative law judge accorded less weight to Dr. Fino's opinion regarding the etiology of claimant's total disability because he failed to diagnose pneumoconiosis, whereas the administrative

[3] The administrative law judge cited the decision of the United States Court of Appeals for the Fourth Circuit in *Toler v. Eastern Asso. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), in his consideration of the disability causation issue. Employer, on appeal, argues that the Fourth Circuit's subsequent holding in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995)(Butzner, J., dissenting), is controlling authority and supports its position. This case, however, arises within the jurisdiction of the United States Court of Appeals for the Third Circuit since all of claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 2. Consequently, the court's holding is not controlling authority in the instant case.

law judge had found the existence of pneumoconiosis established by a preponderance of the evidence, a finding which is not challenged herein. Decision and Order at 11-12. Moreover, the administrative law judge concluded that Dr. Fino's assessment was predicated upon his conclusion that claimant did not have pneumoconiosis. Decision and Order at 12. Thus, in finding that claimant established that his pneumoconiosis was a substantial contributor to his total disability, the administrative law judge permissibly gave Dr. Fino's opinion on causation less weight than Dr. Garson's contrary opinion because Dr. Fino did not diagnose pneumoconiosis. 20 C.F.R. §718.204(c)(2)(2001); *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *see also Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and to determine whether an opinion is documented and reasoned, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987)*; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Inasmuch as the administrative law judge's function is to resolve the conflicts in the medical evidence, *see Lafferty*, *supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *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's credibility determination regarding the probative value of Dr. Fino's opinion is affirmed. Consequently, we affirm the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis. *Anderson*, *supra*; *Trent*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge