BRB No. 99-1114 BLA

IKIE BRYANT	)	
Claimant-Petitioner	)	DATE ISSUED:
v.	)	
ARCH OF WEST VIRGINIA DIVISION, APOGEE COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand-Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Ikie Bryant, Logan, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand-Denying Benefits (95-BLA-1425) of Administrative Law Judge Mollie W. Neal rendered 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). This case involving a duplicate claim pursuant to 20 C.F.R. §725.309(d) is before the Board for the second time.

In a Decision and Order issued on March 28, 1997, the administrative law judge credited claimant with eight years and four months of coal mine employment, and found that the evidence developed since the denial of claimant's previous claim did not establish that he suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b). Because claimant did not establish either element previously decided against him, the administrative law judge found that claimant did not demonstrate a material change in conditions as required by 20 C.F.R. §725.309(d), and denied benefits. *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).

Pursuant to claimant's appeal, the Board vacated the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(c)(4) because the administrative law judge did not properly analyze the medical evidence. *Bryant v. Arch of West Virginia Div.*, BRB No. 97-1000 BLA (Mar. 26, 1998)(unpub.). The Board therefore also vacated the administrative law judge's finding that claimant did not establish disability causation pursuant to Section 718.204(b), and remanded the case for the administrative law judge to reweigh the new evidence, determine whether it established a material change in conditions, and address the merits of entitlement, if reached.

On remand, the administrative law judge reweighed the relevant evidence and found that the new evidence did not establish that claimant is totally disabled, and therefore did not demonstrate a material change in conditions. Additionally, the administrative law judge found that, even assuming that the new medical evidence established total disability and thus a material change in conditions, the record as a whole did not support a finding that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b).

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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[1] Claimant filed this claim on December 10, 1993, more than one year after the final denial of his previous claim. Director's Exhibits 1, 29, 30; *see* 20 C.F.R. §725.309(d).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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 law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Considering the merits of the claim pursuant to Section 718.204(b), the administrative law judge correctly inquired whether claimant demonstrated that pneumoconiosis is at least a contributing cause of his total disability. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195-96, 19 BLR 2-304, 2-320 (4th Cir. 1995); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990). The administrative law judge's finding that claimant did not prove this fact is supported by substantial evidence, is rational, and is in accordance with law.

The administrative law judge relied upon the opinions of Drs. Zaldivar and Altmeyer, who the record indicates are Board-certified in Internal Medicine and Pulmonary Disease, and the corroborating opinion of Dr. Crisalli. These physicians opined that claimant is totally disabled by bullous emphysema due solely to smoking. Director's Exhibits 29, 30; Employer's Exhibits 4, 5. Because the administrative law judge found that Drs. Zaldivar and Altmeyer were "highly qualified," and offered "well reasoned opinions as to why the miner's disabling respiratory condition was in no way due to pneumoconiosis," she found that the opinions of Drs. Zaldivar, Altmeyer, and Crisalli outweighed the opinions of Drs. Acosta, Lesaca, Rasmussen, Ranavaya, and Rao attributing the miner's disability to pneumoconiosis. Decision and Order on Remand at 9.

The administrative law judge properly considered the physicians' qualifications in assessing the reliability of the competing medical opinions. *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). The record documents the high pulmonary qualifications of Drs. Zaldivar and

Altmeyer, but does not contain the credentials of Drs. Acosta, Rasmussen, Ranavaya, and Rao. Additionally, a form listing Dr. Lesaca's professional qualifications does not list any Board-certifications and indicates only that he specializes in General Practice and Obstetrics and Gynecology. Director's Exhibit 29.

In addition, substantial evidence supports the administrative law judge's finding that Drs. Zaldivar and Altmeyer based their opinions on a "complete medical history." Decision and Order on Remand at 9; *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986)(administrative law judge may consider whether a physician had a more complete picture of a miner's health). Dr. Zaldivar examined and tested claimant twice, and, like Dr. Altmeyer, twice reviewed extensive medical data. Director's Exhibit 30; Employer's Exhibits 4, 5. Review of the record indicates that no other physician had the same opportunity. Furthermore, the administrative law judge reasonably considered that Drs. Zaldivar and Altmeyer relied on an accurate coal mine employment history, whereas Dr. Ranavaya cited an inflated history of twenty-two years of coal dust exposure as a basis for concluding that pneumoconiosis contributed to claimant's total disability. Director's Exhibit 13 at 4; *see Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

Finally, the administrative law judge acted within her discretion to find that Drs. Zaldivar and Altmeyer gave "credible and persuasive" explanations that adequately addressed the causative impact of claimant's smoking and coal dust exposure histories. Decision and Order on Remand 9; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). By contrast, the administrative law judge was not persuaded by Dr. Rasmussen's unexplained assertion that claimant's coal dust exposure must be considered a cause of his total disability, Director's Exhibit 30, and was troubled by the failure of Dr. Rao, claimant's treating physician, to "address the role, if any, [that] the [c]laimant's smoking played in his pulmonary impairment." Decision and Order on Remand at 8; Director's Exhibit 26; Claimant's Exhibits 1, 2; *see Hicks, supra*; *Akers, supra*. Substantial evidence supports the administrative law judge's analysis of these opinions.

In sum, substantial evidence supports the administrative law judge's finding that claimant did not carry his burden to prove that pneumoconiosis is at least a contributing cause of his total disability. *See Ballard, supra*. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(b).

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[2] The administrative law judge noted Dr. Zaldivar's conclusion that claimant's elevated carboxyhemoglobin level indicated that he was still smoking as of Dr. Zaldivar's March 29, 1995 examination. Employer's Exhibit 4.

Because claimant has failed to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order on Remand-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