BRB No. 97-1855 BLA

DENNIS V. RACER Claimant-Respondent v. PEABODY COAL COMPANY Employer-Petitioner 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 on Remand of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Laura Metcloff Klaus (Arter & Hadden), Washington D.C., for employer.

Richard A. Seid (Marvin Krislov, Deputy Solicitor for National Operations; 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (90-BLA-2178) of Administrative Law Judge Robert G. Mahony 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). This case is on appeal to

the Board for the third time. Claimant filed the present duplicate claim on January 5, 1989.[1] Director's Exhibit 1. The district director denied benefits on the ground that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. Claimant directly appealed the denial of benefits to the Board and in light of *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), the Board remanded this case to the Office of Administrative Law Judges for a hearing on the merits. *See Racer v. Peabody Coal Company*, BRB No. 89-2602 BLA (Order June 29, 1990)(unpub.).

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[1] Claimant filed his initial application for benefits in April 1979. The district director awarded benefits and employer timely requested a hearing. Director's Exhibit 18. Following a hearing on the merits, Administrative Law Judge Thomas G. Egan found the evidence of record sufficient to invoke the interim presumption at 20 C.F.R. §727.203(a)(3) and to rebut the presumption at 20 C.F.R. §727.203(b)(1) and (2). Accordingly, benefits were denied. *Id.* In an Order dated August 11, 1982, Judge Egan denied, as untimely, claimant's petition for modification, which was filed on June 14, 1982. *Id.* Claimant took no further action until he filed his second claim in May 1983. *Id.* The district director denied this claim in June 1984 and claimant timely requested a hearing. *Id.* On September 16, 1987, prior to the hearing on the merits, claimant withdrew his claim for benefits. *Id.*

Following a hearing on the merits, Administrative Law Judge Robert J. Feldman issued a Decision and Order on January 8, 1992. Judge Feldman denied employer's Motion to Exclude Claimant's Exhibit 7. Based on the filing date, Judge Feldman adjudicated this claim pursuant 20 C.F.R. Part 718 and credited claimant with twenty-four years and two months of coal mine employment. Considering the newly submitted evidence, Judge Feldman determined that claimant established a material change in conditions at 20 C.F.R. §725.309. Based on the application of the true doubt rule, Judge Feldman found the x-ray evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R.§718.202(a)(1). Judge Feldman also found that the medical opinion evidence was sufficient to show the presence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Judge Feldman then concluded that the evidence of record was sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Accordingly, benefits were awarded.[2] On appeal, the Board vacated Judge Feldman's denial of employer's Motion to Exclude Claimant's Exhibit 7, containing the reports of Drs. Ranavaya and Rasmussen and remanded the case for the administrative law judge to determine if this evidence was necessary for the full presentation of the case. The Board also vacated the findings of the administrative law judge at Sections 718.202(a)(1), (4), 718.204(c)(4) and 718.204(b) and remanded this case for further consideration of these issues. The Board affirmed the findings of Judge Feldman on the length of coal mine employment and at 20 C.F.R. §§718.202(a)(2), (3), 718.204(c)(1)-(3) and 725.309 as well as his findings that claimant's work as a motorman was heavy labor and that the medical opinions of Drs. Gaziano, Ranavaya, Rasmussen, MacCallum and Leef established a totally disabling respiratory impairment. *See Racer v. Peabody Coal Company*, BRB No. 92-0936 BLA (May 31, 1995)(unpub.).

In addressing on remand whether Claimant's Exhibit 7 was necessary for the full presentation of the case, Administrative Law Judge Robert G. Mahony, found that the report of Dr. Ranavaya was appropriate rebuttal to the opinion of Dr. Tuteur but the report of Dr. Rasmussen was inappropriate rebuttal to Dr. Tuteur's opinion as it exceeded the scope of 20 C.F.R. §725.456(b)(3).[3] The administrative law judge, however, admitted the report of Dr. Rasmussen along with claimant's death

[2] Based on his award of benefits, Judge Feldman awarded claimant's counsel attorney fees in an Order dated November 5, 1993.

[3] On remand, this case was assigned to Judge Mahony as Judge Feldman was no longer with the Office of Administrative Law Judges. The parties were notified of the change in judges and no objection was filed. *See* Decision and Order at 1.

certificate and the medical opinions of Drs. Mellen and Kleinerman after reopening the record to allow employer the opportunity to develop additional evidence. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b). The administrative law judge also found the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Accordingly, benefits were awarded on remand. In the instant appeal, employer challenges the findings of the administrative law judge at 20 C.F.R. §§725.309, 718.202(a)(2), 718.204(c)(4) and 718.204(b) as well as its designation as responsible operator. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter response only to the issue of responsible operator.

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 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 prove 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. Failure 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)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, 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. Initially, we disagree with employer's contention that the administrative law judge erred when he found the evidence of record was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2). In reaching his decision, the administrative law judge properly concluded that Dr. Mellen, the autopsy prosector, diagnosed anthracotic deposits and particles of anthracotic pigment consistent with simple coal workers' pneumoconiosis, and that Dr. Kleinerman's notation of a very rare nodule of simple nodular silicosis fell within the statutory definition of

pneumoconiosis. *See* 20 C.F.R.§718.201; Decision and Order at 8. The administrative law judge permissibly accorded determinative weight to the report of Dr. Mellen as the finding of silicosis by Dr. Kleinerman in his review of the autopsy slides supports the diagnosis of Dr. Mellen. *Terlip v. Director, OWCP*, 8 BLR 1-744 (1985). As the record contains no contrary evidence, we affirm the finding of the administrative law judge at Section 718.202(a)(2) as it is supported by substantial evidence and is in accordance with law.

Employer further asserts that the administrative law judge erred in weighing the medical opinions at Section 718.204(c)(4). Contrary to employer's assertion, the administrative law judge acted within his discretion when he accorded determinative weight to the medical opinions of Drs. Ranavaya, Rasmussen, Gaziano and Thavaradhara because these physicians based their opinions upon their personal observations of claimant on examination as well as claimant's symptoms, history and the results of their objective testing.[4] *See Lucostic v. United States Steel Corporation*, 8 BLR 1-43 (1985); *see generally Fields v. Island Creek Coal Company*, 10 BLR 1-19 (1987). Likewise the administrative law judge permissibly accorded less weight to the opinion of Dr. Kleinerman, a pathologist who reviewed the medical records and autopsy slides and opined that claimant did not suffer from a disabling respiratory impairment in contrast to the opinions of the other physicians of record, because he did not examine claimant. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 511 n.1 (4th Cir. 1991); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123, 2-129 n.6 (4th Cir. 1993). As the administrative law judge has provided a proper rationale for according less weight to the report of Dr. Kleinerman, we need not address employer's contentions concerning the other reasons given for the weight accorded this opinion. *See Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984). Finally, the administrative law judge properly rejected the medical opinion of Dr. Zaldivar that, despite a moderate impairment, claimant's breathing capacity was sufficient to allow claimant to perform the work of a motorman, because claimant's work was heavy labor and Dr. Zaldivar's conclusion conflicts with the total disability findings of the other examining physicians who diagnosed a moderate impairment.

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[4] At 20 C.F.R. §718.204(c)(4), we affirm, as unchallenged on appeal, the following determinations of the administrative law judge: that Dr. Thavaradhara's limitations of lifting and carrying were tantamount to a diagnosis of total disability as claimant's most recent employment entailed heavy labor; his decision to discredit the medical opinion of Dr. Tuteur because the physician did not have a complete understanding of the nature of claimant's work; and his decision to accord less weight to the opinion of Dr. Starr since the record contained more recent evidence, by nine to eleven years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

See Egan, supra; *Grizzle, supra*. We, therefore, affirm the findings of the administrative law judge that the evidence of record was sufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(4) as it is supported by substantial evidence and is in accordance with law.

Lastly, claimant must establish that his pneumoconiosis caused or contributed to his totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). The administrative law judge discredited the opinions of Drs. Zaldivar, Tuteur and Kleinerman, all of which stated that claimant did not suffer from pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis, because he found these opinions contrary to his determination that claimant had pneumoconiosis and a totally disabling respiratory impairment. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As employer only challenges the discrediting of these opinions on the basis of pneumoconiosis, we affirm the administrative law judge's rejection of these reports because the physicians did not diagnose a totally disabling respiratory impairment. *See Toler, supra*; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, as the administrative law judge did not find the positive x-rays readings of Drs. Ranavaya and Rasmussen discredited, but rather outweighed by the preponderance of negative x-ray readings, the administrative law judge did not err when he found the medical opinions of Drs. Ranavaya and Rasmussen sufficient to meet claimant's burden of proof. *See Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Furthermore, the administrative law judge is not required to rely on claimant's testimony as to the cause of his disability as such testimony is not conclusive as to medical determinations. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields, supra*. We, therefore, affirm the finding of the administrative law judge at 20 C.F.R. §718.204(b) as it is supported by substantial evidence and is in accordance with law.

Subsequent to the issuance of our prior Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, issued its decision in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). In *Rutter*, the court held that claimant must prove, under all of the probative evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him. As claimant established all the elements of entitlement, we find that claimant has demonstrated a material change in conditions pursuant to Section 725.309 as a matter of law because claimant failed to establish the any elements of entitlement in his prior claim. *See* 20 C.F.R. §725.309; *Rutter*.

Finally, employer requests that it be dismissed as the responsible operator because its due process rights have been violated. Employer asserts that since the administrative law judge preferred the most recent reports of Drs. Ranavaya and Rasmussen, its due process rights were denied because it was not provided with an opportunity to defend this case at a reasonable time as claimant died before employer could develop the type of additional rebuttal evidence the administrative law judge would deem necessary. Employer further contends that the decision of the administrative law judge to deny its Motion to Exclude Claimant's Exhibit 7, the reports of Drs. Ranavaya and Rasmussen, claimant's response evidence to the opinion of Dr. Tuteur, resulted in a breakdown of the rules of fair play. We disagree. Due process requires notice and some opportunity to respond to the evidence submitted. *See Owens v. Jewell Smokeless Coal Co.*, 14 BLR 1-47 (1990); *Shedlock v. Bethlehem Mines Corporation*, 9 BLR 1-195 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*). In the instant case, employer received notice of this claim by letter dated January 27, 1989, three weeks after claimant filed his application on January 5, 1989. *See* Director's Exhibits 1, 16. After receiving notice, employer actively defended its claim as shown by the evidence of record. Prior to the hearing in 1991, employer had claimant examined by Dr. Zaldivar and submitted numerous x-ray rereadings. Less than twenty-days prior to the hearing, employer introduced the consulting medical report of Dr. Tuteur.[5] At the hearing, employer cross-examined claimant. Following remand, the administrative law judge reopened the record which allowed employer to submit the consulting autopsy opinion of Dr. Kleinerman. *See* Employer's Exhibits 1-8, post-hearing report of Dr. Kleinerman.

In his decision and order on remand, the administrative law judge found the medical report of Dr. Rasmussen inappropriate response evidence; he, however, admitted the report into evidence in the interest of justice and to allow the parties to develop the theory of their case. Like Drs. Gaziano, Ranavaya, MacCallum and Leef, Dr. Rasmussen diagnosed a moderate pulmonary impairment which he found disabled claimant from performing his usual coal mine employment. *See* Director's

[5] Claimant objected to the admission of this report on the grounds that it violated the 20-day rule. *See* Hearing Transcript at 19. After listening to employer's explanation for its lateness, Judge Feldman allowed the report into evidence and gave claimant an opportunity to respond. *See* Hearing Transcript at 22.

Exhibits 10, 18; Claimant's Exhibits 5, 7. Dr. Kleinerman not only reviewed the autopsy slides; he also reviewed the medical records of claimant and concluded that this evidence did not establish a totally disabling pulmonary or respiratory impairment, a conclusion reached by Drs. Zaldivar and Tuteur. *See* Employer's Exhibits 2, 7; post-hearing report of Dr. Kleinerman. Due process requires that a party be given an opportunity to respond to late evidence and to develop rebuttal evidence "as may be required for a full and true disclosure of the facts". *See Bethlehem Mines Corp. v. Henderson*, 939 F.3d 143, 16 BLR 2-1 (4th Cir. 1991); *Owens, supra*; *Shedlock, supra*. Satisfaction of due process does not mandate that a party must be given the right to a physical examination as a response. *Id.* In the instant case, Dr. Kleinerman's review of the medical evidence and resulting opinion on the presence of a totally disabling respiratory impairment met the requirements of due process. *Id.* We, therefore, affirm the designation of employer as the responsible operator as it is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge