BRB No. 01-0324 BLA

TRACEY BROWNING, JR.	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Donald C. Wandling (Avis, Witten & Wandling), Logan, West Virginia, for claimant.

Jeffrey S. Goldberg (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (1999-BLA-01067) of Administrative Law Judge Robert J. Lesnick 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).[1] The administrative law judge found that claimant's work as an independent contractor-construction inspector for the United States Department of the Interior and as an inspector for the State of West Virginia qualifies as twenty-six years of coal mine employment under the Act. After consideration of the medical evidence, the administrative law judge determined that claimant established the

[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, 725, 726 (2001).

Pursuant to a lawsuit challenging revision 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). 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 47 (D.D.C. 2001).

existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000), but failed to establish a totally disabling respiratory disability pursuant to 20 C.F.R. §718.204 (2000). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge's findings pursuant to 20 C.F.R. 718.204(c)(2)(2000) and his consideration of the medical opinions pursuant to 20 C.F.R. 718.204(c)(4)(2000) are erroneous.[2] The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the decision.

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 (2001). 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*).

[2]The administrative law judge's findings regarding the length of coal mine employment and the existence of pneumoconiosis are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1- 710 (1983).

After consideration of the administrative law judge's Decision and Order, and the issues raised on appeal, we hold that the administrative law judge's findings are rational and in accordance with law. On appeal, claimant first contends that the administrative law judge erred in his consideration of the arterial blood gas studies pursuant to Section 718.204(c)(2)(2000).[3] The administrative law judge found that the record contained the results of two blood gas studies dated January 23, 1998 and November 29, 1999. Decision and Order at 9; Director's Exhibits 9. 26. The administrative law judge further found the resting results of both studies were non-qualifying but that the post-exercise results of the November 1999 study were qualifying. Contrary to claimant's contention that the qualifying result in November 1999 should have been accorded greater weight as it was the most recent, the administrative law judge could have considered this factor but was not required to do so. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992);*Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). *Conley v. Roberts and Shaefer Co.*, 7 BLR 1-309 (1984). In a proper consideration of the blood gas study evidence, the administrative law judge rationally concluded that the preponderance of the evidence, as supported by the non-qualifying results in January 1998 and November 1999, fails to establish total disability pursuant to Section 718.204(c)(2)(2000). *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant next contends that the administrative law judge erred in his consideration of the medical opinions at Section 718.204(c)(4)(2000). The record contains the opinions of Dr. Rao, who opined that claimant is totally disabled, Dr. Ranavaya, who did not find a pulmonary or respiratory disability, and Dr. Thavaradhara, who stated that claimant had a minimal degree of ideopathic pulmonary fibrosis. Director's Exhibits 6 - 8, 18; Claimant's Exhibit 1. Dr. Rasmussen also submitted an opinion that claimant's pneumoconiosis resulted in a moderate loss in lung function that would preclude heavy to very heavy manual labor. Director's Exhibits 23, 24. The administrative law judge found that claimant's position as a mine inspector or construction-reclamation inspector required light to medium exertion. Decision and Order at 10. In making this

[3]The administrative law judge applied the total disability regulation set forth at 20 C.F.R. 718.204(c)(2000). After revision of the regulations, the total disability regulation is now set forth at Section 718.204(b)(2)(2001).

determination, the administrative law judge took administrative notice of the exertional requirements as they were described by claimant and as they are articulated in the Dictionary of Occupational Titles (DOT), finding that the DOT entry for mine inspector is "light". *Id*. The administrative law judge further determined that because claimant also climbed in and out of ditches or ascended mounds, he was at times engaging in "medium" exertion. *Id*. On this basis, the administrative law judge found that Dr. Rasmussen's opinion that claimant could not engage in heavy to very heavy manual labor was insufficient to establish total respiratory disablity.

The administrative law judge then stated that he had carefully considered Dr. Rao's status as claimant's treating physician and gave "serious consideration of his assessment of total respiratory disablity." Decision and Order at 10. The administrative law judge found, however, that the opinions of Drs. Rasmussen and Ranavaya are more extensively documented and their examinations are more thorough, and therefore, more persuasive. Decision and Order at 10 -11. Therefore, the administrative law judge found that claimant has not demonstrated total respiratory disability pursuant to Section 718.204(c)(4)(2000). After considering the medical evidence as a whole, the administrative law judge concluded that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(2000).

Initially, we reject claimant's contention that the administrative law judge erred in determining that his employment required only light to medium labor. Claimant contends that because the Board affirmed the administrative law judge's determination in *Bradley v. Westmoreland Coal*, BRB No. 98-1188 BLA (Jan.18, 2000) (unpub.) that the job of a mine inspector is moderately strenuous, the same must be true in this case as well. In *Bradley*, however, claimant testified that his employment as a mine inspector required him to walk and crawl in low coal for eight hours a day, causing him to sweat a lot. *Bradley*, slip op. At 9. In the instant case, claimant stated that he never lifted more than five pounds, spent forty percent of his work day sitting, and only thirty percent walking and climbing on hills. Director's Exhibit 3. In light of these factual differences, and claimant's failure to articulate how his job duties were similar to the claimant in *Bradley*, we affirm the administrative law judge's finding that claimant's previous coal mine employment as a mine inspector required light to medium exertion.

Next, we reject claimant's contention that the administrative law judge erred in relying upon the opinions of Drs. Rasmussen and Ranavaya, neither of whom according to claimant was aware of the exertional requirements of claimant's usual coal mine employment. Contrary to claimant's contention, Dr. Rasmussen indicated his awareness of claimant's previous employment, noting that claimant did some manual labor as he was required to climb and walk as he inspected abandoned mines. Director's Exhibit 23, 24. Dr. Ranavaya's medical opinion indicates his knowledge that claimant was last employed

as a contracting inspector. By contrast, the record does not indicate that Dr. Rao was aware of claimant's job title, or the exertional requirements of claimant's usual coal mine work. Director's Exhibits 6, 18; Claimant's Exhibit 1.

Drs. Rasmussen and Ranavaya both relied upon pulmonary function and blood gas study results in arriving at their conclusions.[4] Director's Exhibits 7, 9, 25, 26. Dr. Rao, however, did not perform any objective tests which would further support his opinion that claimant is totally disabled. Thus, the administrative law judge acted within his discretion in determining that Drs. Rasmussen and Ranavaya provided better documented and more thorough opinions than that of Dr. Rao. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

We also reject claimant's contention that the administrative law judge should have accorded greater weight to Dr. Rao based on his status as treating physician. The administrative law judge noted Dr. Rao's status, but in light of his determination that Drs. Rasmussen and Ranavaya provided better opinions, rationally declined to accord determinative weight to Dr. Rao's opinion. *See Grizzle v. Pickands Mather and Co./Chisolm Mines*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993);*Tussy v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Halsey v. Richardson*, 441 F.2d 1230, 1236 (6th Cir. 1971). *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Inasmuch as we have affirmed the administrative law judge's determination that claimant failed to establish total disability pursuant to Section 718.204(c)(2)(2000) and (c)(4)(2000), we affirm his finding that the medical evidence as a whole at Section

[4]On January 23, 1998, Dr. Ranavaya performed pulmonary function and blood gas studies, which yielded non-qualifying values. Director's Exhibits 7, 9. On November 29, 1999, Dr. Rasmussen performed a pulmonary function study, which was non-qualifying. Director's Exhibit 25. The blood gas studies he performed yielded a non-qualifying value on the pre-exercise result, and a qualifying value on the post-exercise result. Director's Exhibit 26.

718.204(c)(2000) failed to establish that claimant is totally disabled. *See Anderson v. Valley of Utah, Inc.*, 12 BLR 1-111 (1989); *Gee, supra.*

The administrative law judge is empowered to weigh the medical 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.* As the administrative law judge properly considered the medical evidence pursuant to Section 718.204(c)(2000), we affirm his conclusion that claimant failed to establish total disability pursuant to this subsection. Inasmuch as claimant has failed to establish a requisite element of entitlement, the denial of benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge