BRB No. 02-0388 BLA

FRANK BELCHER	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL	)	DATE ISSUED:
CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order- Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Eugene Pecora, Beckley, West Virginia, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-0265) of Administrative Law Judge Daniel L. Leland denying 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).[1] This case involves a

[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). All citations to the regulations, unless otherwise noted, refer to

request for modification of a duplicate claim and has been before the Board previously.[2] The administrative law judge considered the newly submitted evidence relevant to the issue of total disability due to pneumoconiosis, and concluded that a change in conditions pursuant to 20 C.F.R. 725.310 (2000) has been established as the evidence now demonstrates that claimant suffers from a totally disabling respiratory impairment pursuant to 20 C.F.R. 718.204(b)(2).[3] The administrative law judge then considered the medical opinions regarding the cause of claimant's totally disabling impairment, accorded greater weight to the opinions of Drs. Tuteur and Zaldivar, based upon their status as Board-certified pulmonologists, and found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge then denied the request for modification as claimant failed to establish "a mistake of fact or a change in conditions which supports a different result than that reached by Judge Kichuk." Decision and Order at 9.

Claimant contends that the administrative law judge erred in according determinative weight to Dr. Zaldivar's opinion and by failing to accord dispositive weight to the opinions by Drs. Rasmussen and Green. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not 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 supported by substantial evidence, is rational,

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the amended regulations.

[2]In its most recent decision in this case, the Board rejected claimant's contention that Administrative Law Judge Clement J. Kichuk erred in failing to accord dispositive weight to Dr. Rasmussen's opinion, and Judge Kichuk's determination that Dr. Tuteur's opinion was entitled to greater weight based on his superior qualifications as a physician who is Board-certified in internal medicine and pulmonary disease. Thus, the Board affirmed Judge Kichuk's finding that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000) and the denial of benefits. *See Belcher v. Eastern Associated Coal Corp.*, BRB No. 98-0353 BLA (Nov.19, 1998)(unpub.). On September 21, 1999, claimant submitted additional evidence in support of a request for modification. Director's Exhibit 72.

[3]The administrative law judge declined to consider the x-ray interpretations and CT scans submitted by employer, finding that under the law of the case, the existence of pneumoconiosis has been established and is therefore not an issue on modification. Decision and Order at 4 n. 3.

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. 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).

After consideration of the administrative law judge's Decision and Order - Denying Benefits, 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 contains no reversible error. Pursuant to Section 718.204(c), and based upon a consideration of all of the evidence of record, the administrative law judge concluded that claimant did not prove that he is totally disabled due to pneumoconiosis. Claimant contends that the administrative law judge erred in crediting Dr. Zaldivar's opinion, as Dr. Zaldivar's conclusion that claimant's total respiratory disability is due to smoking is inconsistent with his finding that claimant's pulmonary function study demonstrated an irreversible impairment. In support of his assertion, claimant cites the pulmonary function studies obtained by Dr. Rasmussen, which show that claimant's impairment responds to bronchodilator medication. Claimant's argument is without merit. Dr. Zaldivar determined, based upon a review of the medical evidence of record, including the pulmonary function tests obtained by Dr. Rasmussen, that a portion of claimant's pulmonary impairment waxes and wanes, as it is attributable to asthma, which is unrelated to dust exposure in coal mine employment. Dr. Zaldivar explicitly concluded that the fixed portion of claimant's impairment was due to emphysema caused by cigarette smoking. Employer's Exhibit 4; *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

We also reject claimant's contention that the administrative law judge should have determined that Dr. Zaldivar's opinion is unreasoned and undocumented. The administrative law judge acted rationally in crediting Dr. Zaldivar's opinion, as Dr. Zaldivar based his conclusions upon his physical examination of claimant, as well as a review of the medical record, and explained how the data supported his conclusions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Additionally, claimant's contention that the administrative law judge applied the incorrect disability causation standard is without merit. Contrary to claimant's assertion, the administrative law judge noted the correct standard, as set forth in Section 718.204(c)(1), and considered whether the evidence of record, in its entirety, was sufficient to establish that pneumoconiosis was a substantially contributing cause of

claimant's total respiratory disability. Decision and Order at 7; 20 C.F.R. §718.204(c)(1); *see also Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

We also reject claimant's contention that the administrative law judge did not accord any weight to the opinion in which Dr. Green diagnosed total disability due to a combination of chronic obstructive pulmonary disease and pneumoconiosis. Director's Exhibits 72, 77. The administrative law judge considered the opinion but found that Dr. Green was not Board-certified in pulmonary diseases and, thus, was not as qualified as the Board-certified pulmonologists of record in determining the nature of claimant's pulmonary impairment. Decision and Order at 8; *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); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Lastly, claimant refers to Dr. Rasmussen's opinion as being sufficient to establish total disability due to pneumoconiosis under Section 718.204(c), but does not identify any error in the administrative law judge's consideration of Dr. Rasmussen's opinion. This constitutes a request that the Board assess the probative weight of Dr. Rasmussen's conclusions, a function that the Board is not empowered to perform. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

We affirm, therefore, the administrative law judge's findings under Section 718.204(c), as the administrative law judge acted within his discretion in according greatest weight to the opinions in which Drs. Zaldivar and Tuteur concluded that claimant's total respiratory disability was caused solely by cigarette smoking, based upon their status as physicians who are Board-certified in both internal medicine and pulmonary disease.[4] Decision and Order at 9; Employer's Exhibit 4; *see Hicks*, *supra*; *Akers*, *supra*; *McMath*, *supra*. We also affirm the administrative law judge's finding that the evidence of record, as a whole, is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). *See* 20 C.F.R. §718.204(c); *Robinson*, *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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because we have affirmed the

[4]Dr. Fino, who is also Board-certified in internal medicine and pulmonary disease, attributed the cause of claimant's respiratory disability to his cigarette smoking. However, the administrative law judge accorded little weight to Dr. Fino's opinion, finding that the physician did not unequivocally acknowledge that pneumoconiosis is a progressive disease. Decision and Order at 8; Employer's Exhibits 9, 10.

administrative law judge's finding that claimant did not establish, by a preponderance of the evidence of record as a whole, that he is totally disabled due to pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits.[5] *See Trent*, *supra*; *Perry*, *supra*.

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

[5]In light of our affirmance of the administrative law judge's findings under Section 718.204(c), we decline to consider whether the administrative law judge's modification analysis comports with 20 C.F.R. §725.310 (2000), nor will we address employer's contentions regarding the administrative law judge's weighing of the opinions of Drs. Rasmussen and Fino. Error, if any, in these findings is harmless in light of our disposition of this appeal. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).