BRB No. 03-0719 BLA

JOSEPH KERSTETTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KERRIS & HELFRICK, INCORPORATED	)	DATE ISSUED: 07/19/2004
	)	
and	)	
	)	
LACKAWANNA INSURANCE GROUP, A/K/A LACKAWANNA CASUALTY COMPANY	)	
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

BEFORE: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (02-BLA-0349) of Administrative Law Judge Janice K. Bullard rendered on this duplicate 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 noted

[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

that the existence of pneumoconiosis arising out of coal mine employment had been established in prior claims, but that total disability and total disability due to pneumoconiosis had not been established. Decision and Order at 5. After review of the evidence, the administrative law judge concluded that it failed to establish total disability. Accordingly benefits were denied.

On appeal, claimant contends that the administrative law judge erred in several respects: excluding Dr. Cable's post-hearing report, which was offered to rebut employer's review of claimant's April 18, 2001 pulmonary function study; denying claimant the opportunity to rebut the deposition testimony of Dr. Levinson, the transcript of which was sent by employer to claimant after the twenty-day deadline for the exchange of evidence; failing to discuss sufficiently the medical evidence relevant to total disability; and failing to address disability causation. Neither employer, nor the Director, Office of Workers' Compensation Programs, has responded to this appeal on the merits.[2]

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. 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*).

Claimant first argues that the administrative law judge erred in excluding Dr. Cable's post-hearing report which was proffered to rebut employer's invalidation of claimant's April 18, 2001 pulmonary function study. Although claimant contends that the administrative law judge erred in excluding Dr. Cable's post-hearing report, he ultimately concedes that any error in this regard was harmless because the administrative law judge found that all of the pulmonary function study evidence was valid and qualifying and established total disability. Since claimant concedes that error, if any, made by the administrative law judge in excluding Dr. Cable's report was harmless, we

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] By Order dated January 14, 2004, the Board dismissed employer's motion to quash claimant's appeal for failure to file a timely Petition for Review and brief.

need not resolve the question of whether or not the administrative law judge's ruling was error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant next argues that the administrative law judge erred in not providing him an opportunity to respond to Dr. Levinson's deposition testimony, which contained surprise and novel evidence[3] concerning the cause of claimant's disability, a requisite element of entitlement, to which he needed additional time to respond. Claimant contends that pursuant to Section 725.456(b)(3) he must be allowed at least thirty days to respond to Dr. Levinson's deposition testimony because the transcript of that deposition was not given to claimant's counsel twenty days prior to the hearing. Claimant contends, therefore, that his due process rights have been violated.

In rejecting claimant's request for time to submit evidence to rebut Dr. Levinson's deposition testimony, the administrative law judge stated that claimant's counsel had been present at the deposition and had had an opportunity to cross-examine Dr. Levinson. The administrative law judge additionally found that the concerns expressed by counsel regarding Dr. Levinson's statements would be addressed by the weight the administrative law judge accorded Dr. Levinson's testimony. The administrative law judge stated that Dr. Levinson's statements were no more than hypotheses concerning the cause of claimant's disability and there was sufficient other medical evidence already in the record addressing the cause of disability. The administrative law judge, therefore, denied claimant's request for additional time to respond to Dr. Levinson's deposition testimony. This was proper. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985).

Finally, claimant argues that the administrative law judge erred in finding total disability was not established: he did not sufficiently discuss his findings and conclusions regarding the total disability evidence; he did not weigh together all of the evidence regarding total disability, including the pulmonary function study evidence which he found to be qualifying; and he did not properly evaluate the medical opinion evidence. These contentions are without merit.

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[3] In his deposition, Dr. Levinson testified that claimant's impairment was due to his "…multitude of medical illnesses…[including]…limitations of his breathing in terms of his back." Employer's Exhibit 2, p.14. Upon cross-examination, Dr. Levinson addressed the low (but not qualifying) blood gas study results, saying: "The back has a definite effect on his PO2 dropping…his breathing is limited because of this pain." *Id*. at 32. In his earlier medical report, Dr. Levinson opined in his report that claimant's symptomatology was a result of his "combination of complicated and multiple medical problems…" which included "cancer, spinal fusion, obesity, diabetes, [and] evidence of inferior wall myocardial infarction." Employer's Exhibit 1.

Contrary to claimant's argument, the administrative law judge found that while the pulmonary function study evidence supported a finding of total disability at Section 718.204(b)(2)(ii), on weighing it along with all the other evidence relevant to total disability, as he was required to do, the preponderance of the evidence failed to establish total disability. This was proper. *See* Decision and Order at 15; 20 C.F.R. §718.204(b)(2)(i)-(iv); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff'd on recon*. 9 BLR 1-236 (1987).

Claimant also argues that the administrative law judge mischaracterized the opinions of claimant's treating physicians, Dr. Mathew Kraynak, Dr. Raymond Kraynak and Dr. Greco, and erred in not crediting their opinions, which were clear, comprehensive, and well-reasoned. Specifically, claimant argues that the opinion of Dr. Matthew Kraynak was based on, in addition to claimant's symptoms, his past medical and surgical histories, social history, occupational history, current medications, pulmonary function testing, x-ray readings, and physical findings. Likewise, claimant contends that Dr. Raymond Kraynak and Dr. Greco, did consider how claimant's back problems and other nonrespiratory conditions affected his breathing capacity.

In declining to give controlling weight to the opinions of the treating physicians, the administrative law judge found that they were not well-reasoned. Regarding the opinion of Dr. Greco, the administrative law judge concluded that it was inconceivable to him that Dr. Greco, who had stated that he had seen claimant every three to four months since May of 1988, would have been unfamiliar with claimant's diabetes, and would not have addressed, in his July 29, 2001 report, claimant's sleep apnea and significant spinal disorder, evidence of which was contained in the record. Regarding the opinion of Dr. Matthew Kraynak, the administrative law judge found it unreasoned because it appeared to be based solely on claimant's symptoms and the doctor failed to explain the relationship between claimant's symptoms and his condition or to discuss the objective testing or other evidence which supported his opinion that claimant had a pulmonary disability. Similarly, regarding the opinion of Dr. Raymond Kraynak, while finding that Dr. Raymond Kraynak acknowledged that claimant's severe and debilitating back condition limited his mobility, the administrative law judge concluded that Dr. Raymond Kraynak did not provide a persuasive opinion: he did not discuss how the back condition affected claimant's exertional capacity; he did not consider a cause other than pneumoconiosis for claimant's qualifying pulmonary function studies; he failed to discuss how claimant's ball bladder surgery, stomach surgeries, prostate cancer, hydrocele, blood clot, and back surgeries and subsequent debilitating condition would affect claimant's breathing capacity. Additionally, the administrative law judge concluded that Drs. Matthew and Raymond Kraynak were not entitled to the status of treating physicians because the evidence failed to establish the length, duration, and extent of their treatment of claimant.

Instead, the administrative law judge credited the opinion of Dr. Levinson, who addressed claimant's cardiac condition, his surgeries, and the results of his objective tests and who concluded that claimant's reduced pulmonary function was not indicative of a pulmonary impairment, but was due to the combined effects of his medical problems. The administrative law judge concluded that this opinion was more consistent with the evidence and better reasoned than the opinions of Dr. Greco, Dr. Matthew Kraynak and Dr. Raymond Kraynak. This was rational. 20 C.F.R. §718.104(d); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8, 1-12 (1996); *Clark*, 12 BLR at 1-155. The administrative law judge further accorded greater weight to Dr. Levinson's opinion because his qualifications as a board-certified internist and pulmonologist were superior to the qualifications of the other physicians. This was proper. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988).

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*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Claimant's arguments in this case are no more than a request that we reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR 1-113. The administrative law judge's finding that claimant failed to establish total respiratory disability is, therefore, affirmed. Because claimant has failed to establish total respiratory disability, as an essential element of entitlement, we need not address his argument concerning causation. *See Beatty*, 49 F.3d 993, 19 BLR 2-136; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

REGINA C. McGRANERY
Administrative Appeals Judge