BRB No. 01-0777 BLA

WILLIAM A. TENNANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
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 and Decision on Motion for Reconsideration of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits and Decision on Motion for Reconsideration (99-BLA-0849) of Administrative Law Judge Gerald M. Tierney on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health

[1] Claimant, William A. Tennant, filed his first application for benefits on September 16, 1985, which was finally denied by the district director on March 5, 1986 because the evidence failed to establish that claimant was totally disabled by pneumoconiosis. Director's Exhibit 28. Claimant did not pursue this denial. On February 16, 1999, claimant filed a duplicate application for benefits, which is the subject of the appeal before us. Director's Exhibit 1.

and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge credited claimant with at least thirty-eight years of qualifying coal mine employment, found that claimant established total respiratory disability, but failed to establish total disability due to pneumoconiosis and, therefore, a material change in conditions. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in not resolving the conflicting medical evidence of record and in not finding a material change in conditions and total disability due to pneumoconiosis established. Employer responds, urging affirmance of the denial of benefits.[3] The Director, Office of Workers' Compensation Programs, as party-in-interest, is not participating in this appeal.

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 the 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).

[2] 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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Employer filed a cross-appeal of the administrative law judge's Decision and Order on July 9, 2001, which the Board designated as BRB No. 01-0777 BLA-A. On November 20, 2001, however, employer requested that its appeal be withdrawn. Accordingly, the Board granted employer's request and dismissed its appeal on November 27, 2001.

Claimant first argues that the administrative law judge abdicated his duty to resolve conflicting medical opinion evidence by failing to determine which medical opinions of record were better reasoned and failing to resolve a number of factual issues regarding claimant's totally disabling lung condition which would affect the credibility of the physicians' opinions, *i.e.*, whether claimant has interstitial lung disease and, if so, whether it is due to pneumoconiosis, and the cause of claimant's chronic obstructive pulmonary disease. Claimant contends that the opinions of Drs. Jaworski, Rasmussen and Cohen are more probative on the issue of disability causation than the opposite opinions of Drs. Renn, Morgan and Fino.[4]

Contrary to claimant's contention, however, the administrative law judge rationally determined that Drs. Jaworski, Rasmussen, Cohen, Renn, Morgan, and Fino, all of whom were equally qualified pulmonary specialists, "not only [did] not agree whether coal mine dust played a contributing role in Claimant's total pulmonary disability, but also [could] not agree as to the involvement of smoking, asthma, and/or possibly Crohn's disease in this case." Decision and Order at 9. Hence, the administrative law judge found that he could not conclude that claimant established disability causation because such a finding would impermissibly constitute a substitution of his opinion for that of a physician. This was rational. *See Amax Coal Co. v. Director, OWCP [Rehmel]*, 993 F.2d 600, 17 BLR 2-91 (7th Cir. 1993); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992) (administrative law judge cannot substitute his expertise for that of qualified physician and, absent countervailing clinical evidence or valid legal basis for doing so, cannot disregard medical conclusions of qualified physician); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d

[4] Claimant also argues that the administrative law judge erred in not finding a material change in conditions established when he found a totally disabling respiratory impairment established citing *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). However, because the administrative law judge considered all the evidence relevant to disability causation and found that that element of entitlement was not established, we will not consider claimant's argument concerning material change in this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

158, 9 BLR 2-1 (3d Cir. 1986); *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *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 administrative law judge, therefore, permissibly concluded that claimant failed to carry his burden of establishing disability causation. *See* 20 C.F.R. §718.204(c); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant next argues that the administrative law judge implicitly found that the opinions of Drs. Renn, Morgan, and Fino were well-reasoned when he found them entitled to the same weight as the opinions of Drs. Jaworski, Rasmussen and Cohen, and that the administrative law judge erred by failing to begin his consideration of the medical opinion evidence with an analysis of the inconsistencies he found in the former opinions and a discussion of the extent to which those inconsistencies undermined the ultimate conclusions of the physicians, thereby, failing to provide a reasoned explanation for his analysis of the evidence.

Contrary to claimant's argument, however, the administrative law judge's analysis of the medical opinion evidence is sufficient in this case as he permissibly found that he could not make a determination on disability causation because the medical opinions contained inconsistencies. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12, 1-14 (1984). Accordingly, as the administrative law judge rationally found that the medical opinion evidence was internally inconsistent, he implicitly determined that the medical opinions were not credible, and hence, insufficient to affirmatively establish disability causation. *See Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201, 1-204 (1986).

Finally, claimant argues that the disability causation opinions of Drs. Renn, Morgan and Fino are substantially undermined since they relied on x-rays which did not show the existence of pneumoconiosis even though the administrative law judge had found that a preponderance of the x-ray evidence established the existence of pneumoconiosis. Thus, claimant contends that this x-ray evidence is relevant to the issue of disability causation.

Contrary to claimant's argument, however, the Board has consistently held that the administrative law judge may not discredit the opinion of a physician solely on the ground that it is based, in part, upon an x-ray reading which is at odds with the administrative law judge's finding with respect to the x-ray evidence. *See Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8, 13-14 (1996); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985). Moreover, in considering the opinions of Drs. Morgan, Renn and Fino, the administrative law judge noted that he credited their opinions because, in addition to reaching their own findings, they reviewed the other evidence of record, including

other physicians' opinions, which found both the existence of pneumoconiosis and that claimant's disability was due to pneumoconiosis, but nonetheless still concluded that there was no causal nexus between claimant's pulmonary disability and his coal mine dust exposure. This was rational. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 115, 19 BLR 2-70, 83 (4th Cir. 1995). Claimant's argument is, therefore, rejected.

It is well established that "to prove by a preponderance of the evidence each element of a claim before an administrative agency, the claimant must present *reliable, probative, and substantial evidence* of such sufficient quality that a reasonable administrative law judge could conclude that the existence of the facts supporting the claim are more probable than their nonexistence." *Jarrell* at 187 F.3d at 389, 21 BLR at 2-648 (4th Cir. 1999)(emphasis added). In this case, the administrative law judge reasonably found that claimant did not meet his burden of establishing disability causation as equally-qualified physicians disagreed as to the etiology of claimant's disabling pulmonary impairment and because opinions supportive of claimant's claim were "contradictory and somewhat inconsistent." Decision On Motion For Reconsideration at 2. Accordingly, the administrative law judge's determination that claimant failed to satisfy his burden of establishing disability causation, a requisite element of entitlement, is supported by the record. *See Ondecko, supra*; *Jarrell, supra*; *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); Decision on Motion for Reconsideration at 2. We, therefore, affirm the administrative law judge's determination that the evidence of record has failed to establish disability causation as this finding is rational. *See* 20 C.F.R. §718.204(c).

Accordingly, the Decision and Order - Denying Benefits and Decision on Motion for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge