

BRB No. 97-0520 BLA

KENNETH L. SUMMERLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Sheldon R. Lipson, Administrative Law Judge, United States Department of Labor.

Samuel Maples, Birmingham, Alabama, for claimant.

Stephen E. Brown and J. Alan Truitt (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-1430) of Administrative Law Judge Sheldon R. Lipson 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 is the second time that this case has been before the Board. Claimant filed a claim for benefits in January 1993. Director's Exhibit 1. The administrative law judge, reviewing the claim pursuant to 20 C.F.R. Part 718, found that claimant established fifteen years of coal mine employment, and established the existence of pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.202(a)(1), 718.203(b). Further, the administrative law judge found that claimant established total disability due to pneumoconiosis. See 20 C.F.R. §718.204(c),

(b). Accordingly, benefits were awarded, commencing January 1, 1993.

Employer appealed, and the Board issued a Decision and Order vacating the administrative law judge's finding that claimant established total disability due to pneumoconiosis at Section 718.204(b). On remand, noting the proper standard set forth in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990), the Board specifically instructed the administrative law judge, in weighing Dr. Hasson's opinion at Section 718.204(b), to consider his deposition testimony, including his assessment that pneumoconiosis was a minimal contributing factor in claimant's total disability. As the administrative law judge had failed to specifically consider and weigh the deposition testimony, when finding Dr. Hasson's opinion that claimant was ten to twenty percent impaired by his pneumoconiosis sufficient to establish total disability due to pneumoconiosis at Section 718.204(b), remand was required. The Board also affirmed the administrative law judge's decision to credit claimant with fifteen years of coal mine employment and the date of onset of total disability as well as his findings pursuant to Sections 718.202(a)(1), 718.203(b), and 718.204(c) as unchallenged on appeal. *Summerlin v. Jim Walter Resources, Inc.*, BRB No. 95-1893 BLA (Feb. 16, 1996)(McGranery, J., dissenting)(unpub.). Judge McGranery voted to affirm the administrative law judge's decision, pointing out that Dr. Hasson had discussed pneumoconiosis' contribution in percentage terms to clarify his statement that pneumoconiosis was not a substantially contributing cause. She stated that the administrative law judge properly found that pneumoconiosis' contribution of ten to twenty percent to claimant's total disability would satisfy the *Lollar* standard of the United States Court of Appeals for the Eleventh Circuit. *Lollar, supra*.

On remand, the administrative law judge discussed Dr. Hasson's opinion and found that it was sufficient to meet claimant's burden of establishing total disability due to pneumoconiosis under Section 718.204(b). Accordingly, the administrative law judge awarded benefits. Employer appeals, arguing that the administrative law judge erred in his consideration of Dr. Hasson's opinion under Section 718.204(b). Claimant responds, supporting affirmance of the administrative law judge's Decision and Order on Remand. Employer has filed a reply brief expanding on its contentions. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the Petition for Review in the present 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 applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 substantial evidence supports the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b). The Eleventh Circuit,

within whose jurisdiction the instant case arises, has held that in order to meet his burden under Section 718.204(b), a claimant must establish that his pneumoconiosis was a substantial contributing factor in the causation of his total pulmonary disability. See *Lollar, supra*. In finding that Dr. Hasson's statement, that pneumoconiosis contributed to claimant's total disability ten to twenty percent, was sufficient to meet the standard enunciated in *Lollar*, the administrative law judge adequately discussed the more general characterization provided by Dr. Hasson. The administrative law judge permissibly found that Dr. Hasson's finding in terms of percentage of pneumoconiosis' contribution to claimant's total disability was more definite and reliable than Dr. Hasson's statement that the contribution of pneumoconiosis to total disability was not substantial. See generally *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Employer also argues that the administrative law judge erred in his treatment of Dr. Hasson's opinion in light of the opinions of Drs. Patil, Truett and Lopez. Employer's Brief at 12-13; Employer's Reply Brief at 4-5; Claimant's Exhibit 2; Director's Exhibits 10, 11, 26. The Board affirmed the administrative law judge's treatment of the opinions of Drs. Patil, Truett and Lopez as unchallenged in the first appeal. *Summerlin*, BRB No. 95-1893 BLA, slip opinion at 2 n.2. Inasmuch as employer failed to challenge the administrative law judge's treatment of these opinions, it is precluded from doing so now. See *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991). Employer's remaining contentions with regard to the administrative law judge's treatment of Dr. Hasson's opinion amount to a request to reweigh the evidence, which the Board is not empowered to do.<sup>1</sup> See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We, therefore, affirm the administrative law judge's finding that claimant established that pneumoconiosis is a substantial contributing factor in the causation of his total disability under Section 718.204(b). See *Lollar, supra*.

---

<sup>1</sup> Employer's argument that the administrative law judge's Decision and Order on Remand is inconsistent with the Board's Decision and Order is without merit. Employer's Reply Brief at 5. The majority opinion instructed the administrative law judge to consider specifically Dr. Hasson's finding that pneumoconiosis was a minimal contributing factor to his total disability and provide further explanation for crediting Dr. Hasson's opinion that claimant was ten to twenty percent impaired by his pneumoconiosis. *Summerlin v. Jim Walter Resources, Inc.*, BRB No. 95-1893 BLA (Feb. 16, 1996)(McGranery, J., dissenting)(unpub.).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge