BRB No. 00-0132 BLA

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| WILLIAM H. FRYE | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| CANNELTON INDUSTRIES, INC. | ) | 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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Fairmont, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-789) of Administrative Law Judge Richard T. Stansell-Gamm 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 case has been before the Board previously.[1] In the original Decision and Order, the administrative law judge found, and the

[1]Claimant filed his initial application for benefits on November 14, 1980, which was denied on August 24, 1981. Director's Exhibit 31. Claimant took no further action until he

parties stipulated to, twenty-nine and one-half years of coal mine employment. The administrative law judge noted that this was a duplicate claim and found that a material change in conditions was established pursuant to 20 C.F.R. §725.309 in light of the standard enunciated by *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).[2] Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203 and 718.204(b),(c). Accordingly, benefits were awarded. Employer appealed and the Board affirmed the administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.203, 718.204(c)(1)-(3) as well as the administrative law judge's weighing of the opinions of Drs. Forehand, Rasmussen and Zaldivar. The Board remanded the case for the administrative law judge to reconsider the opinion of Dr. Fino and to weigh the contrary probative evidence pursuant to 20 C.F.R. §718.204. *Frye v. Cannelton Industries, Inc.*, BRB No. 98-0693 BLA (April 21, 1999)(unpublished).

On remand, the administrative law judge concluded that Dr. Fino's opinion was outweighed by the preponderance of the evidence and that the contrary probative evidence did not outweigh the evidence establishing total disability. Decision and Order on Remand at 7-8. The administrative law judge further found that claimant established that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order

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filed the present claim on November 24, 1995. Director's Exhibit 1. Benefits were awarded on January 15, 1998 and on appeal, the Benefits Review Board affirmed in part, vacated in part and remanded the case for further findings on April 21, 1999. *Frye v. Cannelton Industries, Inc.*, BRB No. 98-0693 BLA (April 21, 1999)(unpublished).

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

on Remand at 8-9. Accordingly, benefits were awarded beginning November 1, 1995, the month in which the duplicate claim was filed. In the instant appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1), that claimant established that he was totally disabled pursuant to Section 718.204(c)(4) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

Employer initially contends that the administrative law judge erred in considering the x-ray evidence of record and determining that it was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Employer's Brief at 10-13. This contention lacks merit as the Board addressed employer's contentions with respect to the x-ray evidence in its prior Decision and Order and thus we decline to review the administrative law judge's findings at Section 718.202(a)(1) as they constitute law of the case. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We note, however, that subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the United States Court of Appeals for the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000). Consequently, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section 718.202(a), and remand the case for the administrative law judge to weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Compton, supra*.

With respect to Section 718.204(c)(4), (b), employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), in determining that the evidence of record was sufficient to establish that claimant was totally disabled and that the total disability was due to pneumoconiosis.[3] Employer's Brief at 13-22. We disagree. In finding that claimant established total disability and that the disability was due to pneumoconiosis, the administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

With respect to the weighing of the evidence, employer contends that the administrative law judge erred in finding total disability established pursuant to Section 718.204(c)(4) as he impermissibly accorded less weight to Dr. Fino's opinion and greater weight to the opinions of Drs. Forehand and Rasmussen. Employer argues that the administrative law judge selectively analyzed the medical opinion evidence when he accorded less weight to the report of Dr. Fino on the ground that the doctor's opinion was based on a non-conforming arterial blood gas study. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). In the instant case, the administrative law judge considered the relevant evidence of record and permissibly determined that Dr. Fino's opinion, if fully credited, was outweighed by the preponderance of the remaining opinions. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order on Remand at 8. Since the administrative law judge articulated more than one reason for finding the medical evidence sufficient to establish total disability, and employer fails to make a specific challenge to the administrative law judge's finding that the preponderance of the evidence outweighs Dr. Fino's opinion, we affirm the administrative law judge's finding that the medical opinion evidence establishes total disability. *See*

[3]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Decision and Order on Remand at 7-8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-1445 (1984); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Furthermore, in determining if total disability was established, the administrative law judge noted the existence of contrary probative evidence in the record, but permissibly concluded that this evidence did not outweigh the evidence supportive of a total disability finding. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order on Remand at 4-8. Consequently, inasmuch as the administrative law judge permissibly found that the arterial blood gas study evidence and the medical opinions of record were sufficient to establish total respiratory disability upon weighing all of the relevant evidence, we affirm the administrative law judge's finding of total disability pursuant to Section 718.204(c). See *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock, supra*; *Gee, supra*.

Employer further asserts that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Employer contends that the administrative law judge erred in rejecting the medical opinions that did not diagnose pneumoconiosis. We disagree. As an administrative law judge may permissibly accord less weight to an opinion regarding causation where it is based on a faulty underlying premise regarding the presence or absence of pneumoconiosis, *Trujillo v. Kaiser Steel Corporation*, 8 BLR 1-472 (1986), we reject employer's contention. *See See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Bobick v. Saginaw Mining Company*, 13 BLR 1-52 (1989). The administrative law judge is empowered to weigh the medical opinion evidence of record 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*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We note, however, that inasmuch as we vacated the administrative law judge's finding with respect to the existence of pneumoconiosis, the administrative law judge's rationale for rejecting the opinions is not valid. We, therefore, vacate the administrative law judge's causation determination pursuant to Section 718.204(b). On remand, the administrative law judge is instructed to reconsider all of the medical opinion evidence to determine whether claimant's pneumoconiosis is at least a contributing cause of his total disability. *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge