U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0367 BLA

LUKE LAPOTSKY Claimant-Petitioner v. PAGNOTTI ENTERPRISES, INCORPORATED and STATE WORKERS' INSURANCE FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/30/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification and Denying Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

John J. Gaughan (Zimmer Kunz, P.L.L.C.), Pittsburgh, Pennsylvania, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Lystra A. Harris's Decision and Order Denying Request for Modification and Denying Benefits (2018-BLA-05351) rendered on a claim filed on February 10, 2013,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves Claimant's third request for modification of the denial of his claim.[2]

Claimant has established 9.75 years of coal mine employment,[3] the existence of clinical pneumoconiosis arising out of coal mine employment,[4] and total disability. 20 C.F.R. §§718.202(a)(1), 718.203, 718.204(b)(2). *Lapotsky v Pagnotti Enterprises, Inc.*, BRB No. 16-0040 BLA (July 20, 2012) (unpub.). The administrative law judge found Claimant did not establish he is totally disabled due to clinical pneumoconiosis and thus did not establish a basis for modification. 20 C.F.R. §§725.310, 718.204(c). Accordingly, she denied benefits.

On appeal, Claimant contends the administrative law judge erred in rejecting Dr. Kraynak's opinion that Claimant is totally disabled due to clinical pneumoconiosis. Employer and its Carrier respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated

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[1] We incorporate the procedural history of the claim as set forth in the Benefits Review Board's prior decisions. *Lapotsky v Pagnotti Enterprises, Inc.*, BRB No. 16-0040 BLA, slip op. at 2-3 (Sept. 28, 2016) (unpub.); *Lapotsky v. Pagnotti Enterprises, Inc.*, BRB Nos. 12-0580 BLA/A, slip op. at 2-3 (July 30, 2013) (unpub).

[2] Claimant timely filed his current modification request on June 7, 2017. Director's Exhibit 192.

[3] Because Claimant's coal mine employment occurred in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist Claimant to establish these elements when certain conditions are met, but failure to establish any one precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

The administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310. An administrative law judge has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Keating v. Director, OWCP*, 71 F.3d 1118 (3d Cir. 1995).

The only issue before the administrative law judge with regard to this modification request was disability causation. To establish this element of entitlement, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii). Claimant must establish the cause of his total disability "by means of a physician's documented and reasoned medical report." 20 C.F.R. §718.204(c)(2).

The administrative law judge found no mistake in a determination of fact regarding the prior denial of Claimant's claim for failure to establish disability causation. Decision and Order at 10. She also considered whether Claimant's new evidence was sufficient to establish clinical pneumoconiosis was a "substantially contributing cause" of Claimant's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1).

In support of his modification request, Claimant submitted two reports from Dr. Kraynak and a July 19, 2017 pulmonary function test. Director's Exhibits 195, 196. The administrative law judge found Dr. Kraynak's two reports are contradictory and he did not adequately explain his opinion regarding the cause of Claimant's respiratory disability. Decision and Order at 11-2. Claimant asserts the administrative law judge "provided innocuous reasons" for rejecting Dr. Kraynak's opinion and "imposed an unduly burdensome and harsh requirement" upon him to explain his opinion. Claimant's Brief at 7. We disagree.

In his July 24, 2017 report, Dr. Kraynak indicated he had recently examined Claimant and had obtained a pulmonary function test on July 19, 2017, that showed Claimant's respiratory condition had "worsened." Director's Exhibit 195. He noted Claimant had a smoking history of "60-80 pack years with cessation 22 years ago." *Id*. According to Dr. Kraynak, while Claimant had a significant exposure to cigarette smoke, his nine and one-half years of coal mine employment was a significant contributing factor in his disabling respiratory impairment. *Id*. Noting restrictive defects present throughout Claimant's pulmonary function studies and, in particular, in the July 19, 2017 study, Dr. Kraynak explained "it is well known that the deleterious effects of smoking tend to improve over time" and that smoking "tends to give an obstructive pulmonary defect versus a restrictive one." *Id*. Further, he noted that while Claimant has a significant smoking history that "would give rise to some element of obstructive pulmonary disease," he considered Claimant's respiratory disease to be "multifactorial with coal workers' pneumoconiosis playing a substantial contributing part in it." *Id*. He concluded Claimant's recent pulmonary function study showed "a severe degradation of his pulmonary system attributable to coal workers' pneumoconiosis versus his smoking history which stopped twenty years ago." *Id*. Dr. Kraynak reiterated coal workers' pneumoconiosis is a progressive disease, "whereas the adverse effects of smoking on the lungs tend to improve over time." *Id*.

Contrary to Claimant's contention, we see no error in the administrative law judge finding Dr. Kraynak's July 24, 2017 report does not adequately explain why the pulmonary function study evidence established Claimant's respiratory disability is due to coal workers' pneumoconiosis. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 577-78 (3d Cir. 1997). The administrative law judge accurately observed that Dr. Kraynak attributes Claimant's respiratory disability to coal workers' pneumoconiosis based on his belief that because Claimant stopped smoking twenty years ago, the adverse effects of his smoking habit improved over time while his coal workers' pneumoconiosis progressed. Decision and Order at 11. She permissibly found Dr. Kraynak's rationale unpersuasive because he "did not cite to any medical articles or studies to support his statement that the adverse effects of Claimant's acknowledged smoking history of 60 to 80-pack years would improve over time." *Id.*; *see Soubik v. Director, OWCP*, 366 F.3d 226, 234; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). She further noted Dr. Kraynak did not adequately address "the fact that on 2003 and 2007 carboxyhemoglobin tests, Claimant demonstrated values that indicated he was still smoking as opposed to Claimant's statement he had quit smoking in 1995." Decision and Order at 12, *citing* Director's Exhibits 135 at 4, 152, 195; Employer's Exhibit 5 at 13-15. Because the administrative law judge permissibly found, within her discretion, Dr. Kraynak's statements distinguishing the adverse effects of smoking from coal workers' pneumoconiosis on Claimant's respiratory disability are "unsubstantiated," we affirm her finding that Dr. Kraynak's opinion expressed in his July 24, 2017 report is

not credible.[5] Decision and Order at 11; *see* 20 C.F.R. §718.204(c)(2); *Balsavage*, 295 F.3d at 396.

In his September 6, 2017 report, Dr. Kraynak stated he has been treating Claimant for his "severe Black Lung Disease" and Claimant "is totally and permanently disabled due to [c]oal [w]orkers' [p]neumoconiosis contracted during his employment in the Anthracite coal industry." Director's Exhibit 196. He further stated Claimant's "condition has worsened over time." *Id*. The administrative law judge permissibly found Dr. Kraynak's statements "conclusory" and appeared to contradict his earlier report to the extent he previously had stated Claimant's respiratory disability was multifactorial, but suggested in his September 6, 2017 report that all of Claimant's respiratory disability is due to coal workers' pneumoconiosis. Decision and Order at 12; *see Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). We therefore affirm the administrative law judge's findings, as within her discretion, that Dr. Kraynak's opinion is not adequately reasoned to support Claimant's burden of proof. See *Balsavage*, 295 F.3d at 396; Decision and Order at 12.

Additionally, we reject Claimant's contention that Dr. Kraynak's opinion should be credited because he was Claimant's treating physician. Claimant's Brief at 11. Having found Dr. Kraynak's opinion inadequately reasoned, the administrative law judge was not required to give it additional weight. *See* 20 C.F.R. §718.204(d); Decision and Order at 13.

The administrative law judge need not accept the opinion of any particular medical witness or expert, but must weigh all the evidence and draw his or her own conclusions and inferences. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). We consider Claimant's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding, as within her discretion, that Claimant did not establish clinical pneumoconiosis is a substantial contributing cause of his respiratory disability and that he

[5] Because the administrative law judge gave permissible reasons for rejecting Dr. Kraynak's opinion, it is not necessary that we address Claimant's contention that she erred in finding discrepancies between Dr. Kraynak's treatment notes describing a "[s]evere restrictive defect" and the computerized print-out for the July 19, 2017 pulmonary function study that described "[v]ery severe obstruction [and] [s]evere restriction." *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 11; Claimant's Brief at 7-8. We note Claimant contends the administrative law judge's only explanation for rejecting Dr. Kraynak's opinion had to do with the discrepancies between his treatment notes and the print-out results. As we set forth above, that simply is not the case.

did not establish a basis for modification. 20 C.F.R. §§718.204(c), 725.310; *see Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification and Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge