BRB No. 98-0705 BLA

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| DOMINIC LaSALA | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: |
| BISHOP COAL COMPANY | ) | |
| | ) | |
| | ) | |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | DECISION and ORDER |
| Party-in-Interest | ) | |

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Douglas A. Smoot, Kathy L. Snyder (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0639) of Administrative Law Judge Michael P. Lesniak denying 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). Initially, Administrative Law Judge David A. Clarke, Jr., credited claimant with forty-two years of coal mine employment, found the existence of pneumoconiosis arising out of coal mine employment established

pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) under the true doubt rule,[1] but concluded that the medical evidence failed to establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 42. Accordingly, he denied benefits.

Pursuant to claimant's appeal, the Board affirmed as unchallenged the administrative law judge's finding that pneumoconiosis was established at Section 718.202(a)(1), and affirmed as supported by substantial evidence his finding that total respiratory disability was not established pursuant to Section 718.204(c). *LaSala v. Bishop Coal Co*., BRB No. 88-3951 BLA (Feb. 22, 1991)(unpub.); Director's Exhibit 48. Accordingly, the Board affirmed the denial of benefits. Thereafter, claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 49.

On modification, Judge Clarke found that the medical evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4), concluded that his prior finding of pneumoconiosis was a mistake in a determination of fact pursuant to Section 725.310, and therefore modified his earlier decision to

[1] The true doubt rule was an evidentiary rule applicable to the administrative law judge's conclusion concerning the weight of the evidence. "True doubt" was said to arise only when equally probative but contradictory evidence was presented in the record, where selection of one set of facts would resolve the case against the claimant, but selection of the contrary set of facts would resolve the case for claimant. *See Wilt v. Wolverine Mining Co*., 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378 (1983). The United States Supreme Court invalidated the true doubt rule in *Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

reflect his determination that the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 105. Accordingly, he denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis. *LaSala v. Bishop Coal Co*., BRB No. 94-3889 BLA (Aug. 22, 1995)(unpub.); Director's Exhibit 114. Accordingly, the Board affirmed the denial of benefits. Claimant again requested modification, and submitted new medical evidence that he contended demonstrated a change in his physical condition. Director's Exhibit 115.

On second modification, Administrative Law Judge Michael P. Lesniak found that the new medical evidence considered in conjunction with the previously submitted evidence failed to establish the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis pursuant to Sections 718.202(a), 718.204, and concluded therefore that the record did not establish a change in conditions pursuant to Section 725.310. Additionally, the administrative law judge found that the record did not demonstrate a mistake in a determination of fact. Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his weighing of the x-ray readings, medical opinions, and objective study evidence pursuant to Sections 718.202(a)(1), (4) and 718.204(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Section 725.310 provides that a party may request modification of the award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Fourth

Circuit, within whose jurisdiction this case arises, has held pursuant to Section 725.310 that the administrative law judge has the authority to consider all of the evidence on modification to determine whether there has been a change in conditions or a mistake in a determination of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge merely counted heads instead of weighing the x-ray readings. Claimant's Brief at 2. Claimant's contention lacks merit. On second modification, seventeen readings of five new x-rays were submitted into the record. There were two positive readings, twelve negative readings, and three readings not classified for the presence or absence of pneumoconiosis under the ILO system. Both of the positive readings were rendered by Dr. Alexander, whom the administrative law judge noted accurately is a Board-certified radiologist and B-reader, Claimant's Exhibits 1, 18, and the twelve negative readings were rendered by physicians qualified as Board-certified radiologists, B-readers, or both. Employer's Exhibits 1-3.

The administrative law judge noted that "Dr. Alexander identified pneumoconiosis" on the August 13, 1996 and January 7, 1997 chest x-rays, but observed that "those same chest x-rays, plus an earlier September 19, 1995 chest x-ray, were read by fellow [B]oard-certified radiologists and B-readers Drs. Wiot, Wheeler, and Scott as not establishing pneumoconiosis." Decision and Order at 2. In this context, the administrative law judge permissibly relied upon "the opinions of the majority of the radiological experts" to find that the preponderance of the chest x-ray evidence was negative for pneumoconiosis. Decision and Order at 2-3; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990). Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge failed to accord proper weight to the opinion of claimant's treating physician, Dr. Cardona. Claimant's Brief at 3. The administrative law judge noted that Dr. Cardona, who is Board-eligible in Internal Medicine, diagnosed pneumoconiosis in a previously-submitted 1987 report, and that in the current modification Dr. Cardona submitted several sets of progress notes relating to his treatment of claimant's shortness of breath and cough between July 1996 and May 1997. Claimant's Exhibits 2, 17, 20. In the August 13, 1996 progress note, Dr. Cardona noted that claimant "is suppose[d] to have black lung but he does not

receive . . . benefits," and indicated that "today a B-reader will look at the chest x-ray." Claimant's Exhibit 2. In light of this notation, the administrative law judge found that, although Dr. Cardona did not specifically diagnose pneumoconiosis in the progress notes, the two positive chest x-ray readings by Dr. Alexander accompanying Dr. Cardona's notes indicated a diagnosis of pneumoconiosis by Dr. Cardona. Decision and Order at 4. The administrative law judge then weighed Dr. Cardona's opinion against those of Drs. Castle, Tuteur, and Fino.

Dr. Castle, who is Board-certified in Internal Medicine and Pulmonary Disease and is a B-reader, examined and tested claimant on January 7, 1997 and reviewed medical data. Employer's Exhibit 1. Dr. Castle opined that the examination results and medical data indicated that claimant does not have pneumoconiosis but does have mild obstructive airways disease due to smoking and suffers from hypertensive cardiovascular disease. *Id*. Dr. Castle was deposed and explained his opinion in greater detail. Employer's Exhibit 6. Drs. Fino and Tuteur, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, reviewed claimant's medical data and concluded that he does not have pneumoconiosis but does have a mild obstructive ventilatory defect related to smoking. Employer's Exhibits 4, 5. Dr. Tuteur additionally diagnosed cardiovascular disease with peripheral vascular obstruction. *Id*.

The administrative law judge afforded "special consideration to the opinion of Dr. Cardona as [c]laimant's current treating physician," Decision and Order at 4; *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992), but was persuaded by the contrary opinions of Drs. Castle, Fino, and Tuteur based in part upon their superior qualifications and "specialized expertise in the area of pulmonary medicine," Decision and Order at 5, the thoroughness of their reviews of claimant's entire medical record,[2] the reasonedness of their opinions, and because Dr. Castle had the benefit of a recent examination. *See 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); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*). Additionally, the administrative law judge rationally questioned the basis of Dr. Cardona's diagnosis because the two x-ray readings by Dr. Alexander, upon which Dr. Cardona apparently relied, were subsequently re-read as negative by several other radiological specialists. *See Hicks, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Therefore, we hold that the administrative law judge

[2] The administrative law judge noted that Drs. Castle, Fino, and Tuteur reviewed claimant's medical records previously in this case. Director's Exhibits 35, 74, 77, 78.

adequately considered Dr. Cardona's treating status and provided valid reasons for the greater weight that he accorded to the contrary medical opinions.[3] *See Grizzle, supra; Hicks, supra; Akers, supra*.

Claimant, however, asserts that the opinions of Drs. Castle and Fino merited no weight because Dr. Castle did not apply the legal definition of pneumoconiosis and because both physicians premised their opinions upon erroneous assumptions regarding the nature of pneumoconiosis. Claimant's Brief at 4. Review of the record indicates that Dr. Castle testified that he applied the legal definition of pneumoconiosis in rendering his opinion, Employer's Exhibit 6 at 28, and that Drs. Castle and Fino did not assume that pneumoconiosis never causes obstruction or that pneumoconiosis is not progressive. Employer's Exhibits 1, 4, 5; *see Stiltner v. Island Creek Coal Co*., 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Therefore, we reject claimant's contention. Claimant adds that the opinions of Drs. Castle, Tutuer, and Fino finding no pneumoconiosis are irrational because claimant has forty-two years of coal mine employment. Claimant's Brief at 3. The length of a miner's exposure to coal dust is relevant but is not dispositive, *see Hicks*, 138 F.3d at 533, 535, 21 BLR at 2-336, 2-340, and the administrative law judge permissibly credited the opinions of medical experts who considered claimant's forty-two years of coal mine employment but also took into account the medical evidence and what they indicated was a significant smoking history to conclude that claimant has a mild pulmonary disorder due to smoking, and hypertension, but does not have pneumoconiosis. Employer's Exhibits 1, 4, 5. The Board is not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988) and substantial evidence supports the administrative law judge's finding. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

[3] The administrative law judge gave the same reasons for crediting these opinions over that of Dr. Jones, a Board-certified pathologist who reviewed claimant's medical records. Claimant's Exhibit 7.

Pursuant to Section 718.204(c)(1), claimant contends that the administrative law judge ignored evidence of physical worsening when he failed to compare the August 13, 1996 pulmonary function study results, which claimant asserts are qualifying,[4] with the results of the non-qualifying pulmonary function studies submitted previously. Claimant's Brief at 2. Four new pulmonary function studies were submitted on modification. The September 19, 1995 pulmonary function study was non-qualifying, Claimant's Exhibit 7, and, contrary to claimant's contention, the August 13, 1996 pulmonary function study yielded non-qualifying values. Claimant's Exhibit 3. Two later studies administered on January 7, 1997 and February 11, 1997 were also non-qualifying. Claimant's Exhibit 10; Employer's Exhibit 1. Review of the record indicates that all but one of the eleven earlier studies were non-qualifying. Director's Exhibits 7, 8, 23, 24, 27, 29, 49, 52, 59. Therefore, we affirm the administrative law judge's finding that the preponderance of the pulmonary function study evidence did not establish total respiratory disability pursuant to Section 718.204(c)(1).

Pursuant to Section 718.204(c)(2), claimant similarly contends that the administrative law judge ignored clear evidence of physical worsening in the recent blood gas study scores. Claimant's Brief at 4. Of the three new blood gas studies submitted on modification, the September 19, 1995 study was non-qualifying, while the August 13, 1996 and January 7, 1997 studies yielded partially qualifying values. Claimant's Exhibits 8, 11; Employer's Exhibit 1. All but one of the twenty-three earlier studies were non-qualifying. Director's Exhibits 12, 13, 24, 27, 29, 49, 52, 59. Substantial evidence supports the administrative law judge's finding that the preponderance of the blood gas study evidence did not indicate the presence of total respiratory disability, and we therefore affirm the administrative law judge's finding pursuant to Section 718.204(c)(2).

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge erroneously credited the non-disability opinions of physicians who ignored the strenuous nature of claimant's job duties as an electrician. Claimant's Brief at 2. The administrative law judge credited as well-reasoned, documented, and "based on a totality of factors" the opinions of Drs. Castle and Fino that claimant is not disabled from a respiratory standpoint by his mild obstructive impairment. Decision and Order at 5. As noted above, *see* note 2, *supra*, the administrative law judge was aware that Drs. Castle and Fino reviewed claimant's medical information and work history previously in this claim. Both physicians previously recorded claimant's

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

description of his job duties, Director's Exhibits 74 at 5, 78 at 3-4, and they specifically referred to their prior reports in their current record reviews. Employer's Exhibits 1, 4, 5. Additionally, Dr. Castle in his 1997 examination report recorded claimant's description of his job duties, which included the requirement that he carry tools to the repair sites. Employer's Exhibit 1 at 1-2.

After examining and testing claimant and reviewing medical records, Dr. Castle concluded that claimant has a mild respiratory abnormality "which would not cause him significant respiratory impairment," and that he "retain[s] the respiratory capacity alone to perform his usual coal mining employment duties . . . ." Employer's Exhibit 1 at 8. Dr. Castle indicated, however, that claimant is "probably permanently and totally disabled as a result of hypertensive cardiovascular disease, and peripheral vascular disease. . . ." *Id*. After reviewing medical records, Dr. Fino concluded that claimant has a "mild obstructive abnormality that is not disabling." Employer's Exhibit 4 at 11. Because Drs. Castle and Fino were familiar with the exertional requirements of claimant's job duties as an electrician, the administrative law judge acted within his discretion in crediting their opinions as well-reasoned. *See Walker v. Director, OWCP*, 927 F.2d 181, 183, 15 BLR 2-16, 2-22 (4th Cir. 1991). As substantial evidence supports the administrative law judge's finding, we affirm his finding pursuant to Section 718.204(c)(4).

In light of the foregoing, we affirm the administrative law judge's finding that a change in conditions or a mistake in a determination of fact was not established pursuant to Section 725.310.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge