BRB No. 04-0436 BLA

LEO W. AMBROSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/31/2005
	)	
SIMCO-PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 of the Decision on Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, for claimant.

Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits and the Decision on Motion for Reconsideration (2002-BLA-0549) of Administrative Law Judge Rudolf L. Jansen rendered 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).[1] This case has been before the Board previously. In the original Decision and Order, Administrative Law Judge J. Michael O'Neill credited claimant with thirty-nine years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on the filing date of claimant's March 19, 1990, application for benefits. Judge O'Neill found that the medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)(2000). In addition, Judge O'Neill found that while the evidence demonstrated total respiratory disability pursuant to 20 C.F.R. §718.204(c)(2000), the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, Judge O'Neill denied benefits. Director's Exhibit 34.

On appeal, the Board affirmed Judge O'Neill's denial of benefits, holding that he reasonably found that the relevant evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2000), a necessary element of entitlement under 20 C.F.R. Part 718. *Ambrose v. Simco-Peabody Coal Co.*, BRB No. 92-2700 BLA (Apr. 29, 1994)(unpub.); Director's Exhibit 35.

Claimant subsequently filed a request for modification on April 20, 1995, along with new medical evidence. Director's Exhibit 36. Modification was denied by the district director and claimant requested a hearing on his claim. Director's Exhibits 38, 39. Judge Jansen held a hearing, considered claimant's modification request, and issued a Decision and Order denying benefits on February 10, 1998. Director's Exhibit 45. In considering claimant's request for modification, the administrative law judge found that the newly submitted evidence of record did not establish either the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4)(2000) or that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b)(2000). Accordingly, benefits were denied. *Id.*

On appeal, the Board affirmed the administrative law judge findings and the denial of benefits. *Ambrose v. Simco-Peabody Coal Co.*, BRB No. 98-0831 BLA (Sept. 29, 1999)(unpub.); Director's Exhibit 46.

[1] 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 apply to this claim filed on February 17, 2001. *See* 20 C.F.R. Parts 718, 722, 725, and 726.

Subsequently, in a letter dated August 31, 2000, within a year of the Board's decision, claimant requested modification. Director's Exhibits 47. The district director denied modification on January 3, 2001. Director's Exhibit 51. Claimant requested a formal hearing on his modification request on January 12, 2002. Director's Exhibit 53. The case was referred to the Office of Administrative Law Judges on January 24, 2001. Director's Exhibits 54, 56, 57.

Several procedural orders then followed in which the administrative law judge attempted to schedule a hearing. In a Notice of Hearing issued by the administrative law judge on October 17, 2001, a hearing was scheduled on February 5, 2002. In a letter dated December 27, 2001, claimant filed a motion requesting a continuance and that the hearing be rescheduled. In an Order of Postponement issued by the administrative law judge on January 3, 2002, the scheduled hearing was postponed indefinitely. On June 19, 2002, the administrative law judge issued a Notice of Hearing rescheduling the hearing for August 27, 2002. At the request of the parties, however, the administrative law judge issued another Order of Postponement on August 19, 2002, to allow the parties additional time to develop their medical evidence. He stated that "[t]he case will be rescheduled for hearing in approximately four or five months and counsel are directed to complete all discovery and to have this case ready to go to hearing at the time it is next scheduled." Order of Postponement, Aug. 19, 2002 at 2. The next Notice of Hearing was issued on October 18, 2002, and it rescheduled the hearing for February 12, 2003. On February 11, 2003, the administrative law judge issued an Order of Postponement and Notice of Rescheduling, noting that due to inclement weather, it was necessary to again postpone the hearing. Accordingly, the hearing was rescheduled for April 2, 2003. The administrative law judge emphasized that "[t]he parties are directed to have all of their evidence ready for submission on April 2, 2003. No requests will be entertained for the introduction of evidence post-hearing." Order of Postponement, Feb. 11, 2003, at 1.

The administrative law judge held the formal hearing on April 2, 2003, at which he admitted into the record evidence which had been exchanged by the parties, but sustained employer's objection to claimant's oral motion to submit a post-hearing supplemental medical opinion by Dr. Cohen in response to recently submitted medical opinion evidence contained in deposition transcripts by employer's experts as untimely since the Prehearing Order specified that motions were to made ten days before the hearing. Hearing Transcript at 12-13; Administrative Law Judge Exhibit 2.

Subsequent to the hearing, but prior to the issuance of the administrative law judge's Decision and Order, claimant moved for reconsideration of the administrative law judge's denial of his request to submit a post-hearing supplemental medical opinion by Dr. Cohen. On July 25, 2003, the administrative law judge issued his Order Denying Motion for Reconsideration wherein he noted that in his last Order of Postponement and

Notice of Rescheduling in this case, the parties were advised that no additional evidence would be accepted post-hearing.

The administrative law judge issued a Decision and Order denying benefits on October 16, 2003. In that decision, the subject of this appeal, the administrative law judge determined that a change in conditions was established, based on employer's concession that claimant was totally disabled, but found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). Accordingly, benefits were denied. The administrative law judge issued a Decision on Motion for Reconsideration denying claimant's motion for reconsideration on January 21, 2004.

On appeal, claimant asserts that the administrative law judge abused his discretion and violated claimant's due process rights by refusing to allow the submission of a post-hearing medical report by claimant's medical expert. On the merits, claimant also contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief 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 applicable law, they are binding upon this 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'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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

Claimant alleges that the administrative law judge erred by not permitting him the opportunity to submit post-hearing rebuttal evidence in response to "three supplemental reports and deposition testimony from [employer's] four medical experts, all of whom criticized Dr. Cohen's opinion." Claimant's Brief at 5. Claimant argues that employer's

evidence was exchanged shortly before the scheduled hearing and "left no room for the Claimant to obtain and submit a response from Dr. Cohen by the deadline for submission of documentary evidence." *Id.*

Prior to or at the hearing held on April, 2, 2003, counsel for employer submitted a report of a physical examination by Dr. Cook, consultative medical reports by Drs. Tuteur, Renn, Fino and Rosenberg and deposition testimony by Drs. Tuteur, Renn and Rosenberg, all dated between December 27, 2001, and March 31, 2003. Decision and Order at 6-9; Employer's Exhibits 8, 22, 24-25, 28, 31-33, 35, 37-38. Dr. Cohen's December 6, 2002 and February 6, 2003, medical reports were exchanged well in advance of the hearing. Decision and Order at 5-6; Claimant's Exhibit 1.

At the hearing, claimant's counsel requested an opportunity to have Dr. Cohen respond to testimony by Drs. Tuteur and Rosenberg in their February 4, 2003, and March 31, 2003, depositions, noting that these physicians' opinions touched on Dr. Cohen's original opinion. Hearing Transcript at 12. The administrative law judge denied claimant's request to obtain and submit a new pulmonary expert's report in response to these depositions, pointing out that claimant had had the opportunity at any time prior to the hearing to request the opportunity to submit a post-hearing report from Dr. Cohen addressing the comments of Drs. Tuteur and Rosenberg.[2] Hearing Transcript at 12-13.

We reject claimant's contention that his right to due process was denied. The regulation at 20 C.F.R. §725.456(b)(1) provides that any evidence not submitted to the district director may be received in evidence subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing. *See* 20 C.F.R. §725.456(b)(1). Moreover, an administrative law judge is generally afforded broad discretion in dealing with procedural matters, so long as the administrative law judge ensures a full and fair hearing on all the issues presented. *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Claimant's allegation that he was surprised by employer's submission of the depositions of Drs. Tuteur and Rosenberg is misplaced since claimant's counsel participated in the depositions of both Drs. Tuteur and Rosenberg. In addition, claimant already obtained a supplemental report from Dr. Cohen which addressed Dr. Tuteur's criticisms. Claimant's Exhibit 1. With respect to Dr. Rosenberg's deposition, employer mailed the notice of deposition on February 19, 2003 and, although the transcript was exchanged on April 1, 2003, claimant did not

[2] We note that the administrative law judge provided alternative reasons for denying claimant's request. He concluded that claimant's request was untimely at the hearing whereas in the denial on reconsideration, the administrative law judge noted that he had instructed the parties that no post-hearing evidence would be allowed.

object to its admission into evidence at the hearing.[3] Hearing Transcript at 12; *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1986). In addition, the administrative law judge determined that Dr. Rosenberg's opinions in his report and deposition were inconsistent because he reached a different diagnosis in each case and failed to explain his conclusions, and the administrative law judge thus found that Dr. Rosenberg's opinion was "poorly reasoned" and entitled to less weight. Decision and Order at 15; Employer's Exhibits 33, 38. Since the administrative law judge did not rely on Dr. Rosenberg's opinion and claimant does not specify how his report was prejudicial, any error by the administrative law judge in admitting Dr. Rosenberg's report and disallowing a rebuttal of the report by Dr. Cohen was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, we hold that the administrative law judge did not abuse his discretion in denying claimant the opportunity to submit an entirely new report from Dr. Cohen in response to the medical opinions of employer's experts, and we affirm the administrative law judge's procedural ruling in this regard. *See* 20 C.F.R. §725.456.

On the merits of entitlement, we also reject claimant's argument that the administrative law judge provided an invalid reason for finding that Dr. Tuteur's diagnosis of severe airway obstruction due to gastroesophogeal reflux disease and arterioscelerotic heart disease unrelated to coal mine employment, was better reasoned and more persuasive than the diagnosis of legal pneumoconiosis rendered by Drs. Garcia and Cohen. The administrative law judge permissibly found that Dr. Tuteur's diagnosis was persuasive because his opinion was consistent with the record as a whole and because Dr. Tuteur addressed the suddenness of claimant's decline in lung function, whereas Drs. Cohen and Garcia did not explain the rapid decline in lung function in light of their diagnoses. Decision and Order at 15-16; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge acted within his discretion in according determinative weight to the opinion of Dr. Tuteur, who is a pulmonary specialist and whose opinion was found well documented and reasoned. Decision and Order at 14; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's finding that the newly submitted medical opinions of record are insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) is supported by substantial evidence, and thus is affirmed.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence

[3] Claimant's counsel was specifically asked by the administrative law judge whether he objected to any of employer's exhibits and responded that he did not, except that he was not waiving objections he had made to specific questions posed within the depositions. Hearing Transcript at 9.

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. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Trent*, 11 BLR at 1-27. Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. In view of our disposition of this appeal, we need not address claimant's argument that the administrative law judge erred in failing to find that claimant is totally disabled due to pneumoconiosis.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge