BRB No. 98-0605 BLA

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| JOHN J. KONYAR | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| READING ANTHRACITE COMPANY | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| LACKAWANNA CASUALTY COMPANY | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION AND ORDER |

Appeal of the Decision and Order - Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

James E. Pocius and John J. Notarianni (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1907) of Administrative Law Judge Ralph A. Romano 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). The administrative law judge, as stipulated by the parties, credited claimant with twenty-eight years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The

administrative law judge found that claimant established the existence of a totally disabling respiratory impairment due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, citing *Shedlock v. Bethlehem Mines Corp.,* 9 BLR 1-195 (1986), *aff'd*, 9 BLR 1-236 (1987)(*en banc*), employer asserts that it was denied the right to a fair hearing because the administrative law judge allowed claimant to submit new medical evidence just prior to the deadline imposed by 20 C.F.R. §725.456(b), thereby, denying employer the right to rebut this evidence. Employer also contends that the administrative law judge erred in finding that the medical opinions of Drs. Kruk, Kraynak and Simelaro were sufficient to establish the existence of both pneumoconiosis and a totally disabling respiratory impairment due to pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, as a party-in-interest, has participated in this appeal.[1]

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 applicable 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).

[1] We affirm the administrative law judge's findings that pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(3), that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), that claimant failed to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1)-(3), and that the onset date of total disability was December 1, 1994, as these findings were unchallenged by any party on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

At the outset, we note that *Shedlock* is not controlling in the instant case since, unlike the facts in *Shedlock*, claimant submitted Dr. Simelaro's opinion twenty one days prior to the hearing and it was therefore on its face not violative of the 20 day rule imposed by Section 725.456(b). In *Shedlock*, employer did not attempt to submit its evidence until the day of the hearing, and the administrative law judge initially ruled that employer had not established good cause for the untimely submission of this evidence.[2] Thus, in the instant case, unlike *Shedlock*, there was never a question as to the timely submission of Dr. Simelaro's opinion and the administrative law judge properly admitted it into the record.

Regarding employer's argument that Dr. Simelaro's opinion was submitted so close to the 20 day deadline imposed by Section 725.456(b) that it constituted "surprise" evidence so that employer could not respond, we disagree. In the instant case, employer was allowed at least two earlier opportunities to obtain medical examinations in response to examinations obtained by claimant. Moreover, we note that at least one of these examinations by Dr. Dittman on April 16, 1997 was conducted close in time to Dr. Simelaro's May 1, 1997 examination. Also, we note that the administrative law judge did not rely exclusively on Dr. Simelaro's opinion in finding entitlement, as discussed *infra*. Further, employer was provided the opportunity to procure and submit other medical opinions in support of his position and participated in a post-hearing deposition of Dr. Kraynak. Claimant's Exhibit 7. Thus, we reject employer's argument that it was unfairly denied due process because the administrative law judge's refusal to strike Dr. Simelaro's opinion from the record or his refusal to allow employer to obtain a new medical examination of claimant to rebut this evidence. *See Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

We next address the merits of entitlement. 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 to prove any one of these items precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

[2] The Board ultimately reversed the administrative law judge's Decision and Order and held that employer had been deprived of its right to a fair hearing since it was unable to respond to claimant's evidence, and on reconsideration, the Board ordered the administrative law judge to admit employer's evidence.

On appeal pursuant to Sections 718.202(a)(4) and 718.204(b), (c), employer contends that the administrative law judge erred in crediting the opinions of Drs. Kraynak, Kruk and Simelaro over the opinions of Drs. Green, Dittman and Levinson. In support, employer argues that the opinions of Drs. Kraynak, Kruk and Simelaro are not supported by the objective evidence of record. We reject employer's contentions.

In analyzing the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(b), (c), the administrative law judge found that Drs. Kraynak, Kruk and Simelaro diagnosed the existence of a totally disabling respiratory impairment due to pneumoconiosis; whereas Drs. Green, Dittman and Levinson did not. Although the administrative law judge noted the qualifications of the physicians, he nonetheless rationally accorded greatest weight to claimant's treating physician, Dr. Kraynak, since he had been examining claimant every two months since 1995 and, thus "he is more likely to be familiar with the miner's condition than a physician who examines him episodically," Decision and Order at 9. The administrative law judge further found that Dr. Kraynak's opinion was corroborated by the opinions of Drs. Kruk and Simelaro, whom he noted possess excellent qualifications. *Id*.

In determining whether a medical opinion is reasoned and should be credited over conflicting evidence, the administrative law judge, as trier of fact, has broad discretion and his finding will be affirmed if supported by substantial evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Sisak v. Helen Mining Co.*, 7 BLR 1-178 (1984). In the instant case, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Kraynak not only because he was claimant's treating physician, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d. 438, 21 BLR 2-269, 2-275 (4th Cir. 1998); *see also Millburn Colliery Co. v. Hicks*, No. 96-2438 F.3d , 21 BLR 2-323 (4th Cir. March 6, 1998), but because his opinion was corroborated by the opinions of Drs. Kruk and Simelaro. Moreover, contrary to employer's assertion, the administrative law judge rationally found that the opinions of Drs. Kraynak, Kruk and Simelaro were well-reasoned and well-documented inasmuch as they based their conclusions on their physical examinations, symptoms, and diagnostic studies performed. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Inasmuch as the administrative law judge has broad discretion in weighing the evidence, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), and his credibility determinations will not be overturned unless patently unreasonable or inherently incredible, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), we affirm the

administrative law judge's findings that claimant established the existence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to Sections 718.202(a) and 718.204(b), (c). *See Trent*, *supra*; *Perry*, *supra*. Consequently, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding 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