BRB No. 96-0395 BLA

ABRAHAM HAINES)
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Charles S. Murry (Sunbelt Advocacy Services, Inc.), Bessemer, Alabama, for claimant.

Cathryn Celeste Helm (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (95-BLA-0151) of Administrative Law Judge John C. Holmes denying benefits on a claim filed pursuant to the

[1]Claimant is Abraham Haines, the miner, who filed a claim for benefits on July 22, 1983. Director's Exhibit 1.

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 claim is before the Board for the third time. Initially, Administrative Law Judge A. A. Simpson, Jr. credited claimant with two and three-quarter years of qualifying coal mine employment and found that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's finding regarding coal mine employment between 1944 and 1951, but remanded the case for further consideration of claimant's pre 1944 coal mine employment. The Board also dismissed employer as a party, affirmed the administrative law judge's findings pursuant to Section 718.202(a)(1)-(3), vacated his findings pursuant to Section 718.202(a)(4), and remanded the case for the administrative law judge to consider the opinions of Drs. Montgomery, Sullivan, and Risman, and the Social Security Administration decision pursuant to Section 718.202(a)(4). *Haines v. Jim Walter Resources, Inc.*, BRB No. 88-2349 BLA (Jul. 31, 1990)(unpub.).

On remand, Judge Simpson credited claimant with twelve and three quarter years of coal mine employment, and found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Accordingly, benefits were again denied. On appeal, the Board affirmed the administrative law judge's finding pursuant to Section 718.202(a)(4) and the denial of benefits. *Haines v. Director, OWCP*, BRB No. 92-0116 BLA (Jul. 20, 1993)(unpub.). Claimant filed a petition for modification on August 2, 1993.

On modification, Judge Holmes determined that claimant failed to establish the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis. The administrative law judge also found that neither a mistake in the determination of fact nor the existence of cor pulmonale with right-sided congestive heart failure had been established. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinions of record. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand the case for further consideration.

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 considering the modification issue, the administrative law judge must conduct an independent assessment of the newly submitted evidence to determine whether the newly submitted evidence, including any evidence submitted subsequent to the district director's determination, is sufficient to establish the

requisite change in conditions or mistake in a determination of fact. *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).[2]

Pursuant to Section 725.310, the administrative law judge considered the opinions of Drs. Branscomb and Aguilar. Decision and Order at 2. Dr. Branscomb, in an opinion dated January 9, 1985, stated:

> The chest x-ray shows changes of hyperinflation plus a minimal degree of nodular change in the left upper chest consistent with pneumoconiosis. In my judgment the findings are consistent with pneumoconiosis of minimal extent. The emphysema and chronic bronchitis which I believe to be totally disabling are probably secondary to previous smoking and other factors and are not the result of occupational exposure.

Director's Exhibit 55. The administrative law judge assigned Dr. Branscomb's opinion little weight because it is "not well reasoned, but rather tentative and conclusionary." Decision and Order at 2.

Whether a physician's opinion is sufficiently documented and reasoned is a credibility determination to be made by the trier of fact. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Inasmuch as the administrative law judge may assign less weight to an opinion which he determines to be unreasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and to opinions which are conclusory or lack supporting medical documentation, *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), we affirm the administrative law judge's weighing of Dr. Branscomb's opinion.

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[2]The administrative law judge erroneously cites 20 C.F.R. §725.309(d) and *Lisa Lee Mines v. Director, OWCP* [Rutter], 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *aff'd*, No. 94-2523 (June 19, 1996), because this case involves a petition for modification filed pursuant to Section 725.310. The error is harmless, however, as the administrative law judge ultimately determined that claimant failed to establish modification pursuant to Section 725.310. Decision and Order at 3.

Dr. Aguilar, in an opinion which consisted of brief answers to a series of questions posed by claimant's counsel, did not respond to the question regarding whether claimant has pneumoconiosis. Decision and Order at 2; Director's Exhibit 58. Thus, the administrative law judge properly found that Dr. Aguilar did not diagnose pneumoconiosis. Decision and Order at 2.

However, the administrative law judge failed to consider a report dated December 19, 1990, which claimant states was submitted by Dr. Wilbert. Director's Exhibit 40. This report was not accepted at the hearing, but was submitted with claimant's petition for modification to the district director. Inasmuch as the administrative law judge must weigh all of the evidence of record, *see Lafferty*, *supra*, and may not misconstrue the quantity or quality of the relevant evidence, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate the administrative law judge's finding pursuant to Section 725.310 and remand the case for the administrative law judge to consider the December 19, 1990 medical opinion pursuant to Section 725.310.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge