

BRB No. 02-0814 BLA

PERCY J. WILLIAMS)

Claimant-Respondent)

v.)

DRUMMOND COMPANY,)
INCORPORATED)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE
ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Kevin W. Patton (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (01-BLA-0029) of Administrative Law Judge Gerald M. Tierney 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 The administrative law judge credited claimant with twenty-two years of coal mine employment, and found the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis established. Accordingly, claimant’s request for modification was granted and benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis and disability causation established. Employer also contends that claimant’s request for modification in this case was untimely and should have been denied on that basis. Claimant responds, urging affirmance of the Decision and Order as supported by substantial evidence, and also contends that the request for modification was timely. The Director, Office of Workers’ Compensation Programs, (the Director) responds, contending that claimant’s request for modification was timely, but not otherwise addressing the administrative law judge’s findings or the parties arguments.

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 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 prove 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 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)(*en banc*).

Employer first asserts that the administrative law judge erred in finding the existence of pneumoconiosis established based on the opinions of Drs. Cohen and Sherman.

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 are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Specifically, employer contends that the administrative law judge erred in relying on the opinions of Drs. Cohen and Sherman because Dr. Cohen never examined claimant and relied on a negative x-ray, while Dr. Sherman's opinion was speculative. Employer also contends that the administrative law judge failed to provide an adequate explanation for rejecting the better reasoned and documented opinions of Drs. Hasson, Russakoff, and Goldstein, whose qualifications were equal to those of Dr. Cohen, in employer's opinion.

While acknowledging that Drs. Hasson, Cohen and Goldstein were Board-certified pulmonary specialists, the administrative law judge noted that Dr. Cohen's curriculum vitae also demonstrated his extensive experience in the specific area of pneumoconiosis. The administrative law judge further noted that Dr. Cohen's opinion was supported by the opinion of Dr. Sherman. The administrative law judge found Dr. Cohen's opinion most impressive because he provided extensive documentation and a persuasive rationale to support his conclusion that claimant's chronic respiratory impairment arose out of coal mine employment. The administrative law judge noted that Dr. Hasson did not directly challenge the medical literature relied on by Drs. Cohen and Sherman, nor did Dr. Hasson deny the possibility that asthma could have been aggravated or triggered by coal mine employment. Moreover, the administrative law judge observed that even if claimant's condition were asthma, there was credible medical evidence suggesting that it might have arisen from coal mine employment. Accordingly, based on the medical opinion evidence of record, the administrative law judge found the existence of pneumoconiosis established at Section 718.202(a)(4). This was rational. See *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-266, 2-280-81 (7th Cir. 2001) ("It was rational to give greater weight to Dr. Cohen's views, particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research."); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Blakely v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 1223, 18 BLR 2-105, 2-109-110 (7th Cir. 1994) (It is the sole province of the administrative law judge to weigh the evidence and resolve conflicts therein); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985).

² Drs. Cohen, Sherman, Russakoff, Hasson and Goldstein agreed that claimant suffers from an obstructive lung disease. Dr. Hasson stated the disease was not due to coal dust exposure, Drs. Cohen and Sherman found that the disease was due to coal dust inhalation, Dr. Russakoff diagnosed asthma which was likely to have been aggravated by coal dust, and Dr. Goldstein did not address whether the disease could be caused by or aggravated by coal dust.

Employer likewise contends that the administrative law judge erred in finding disability causation established because the record did not contain any reasoned and documented evidence that pneumoconiosis was a substantially contributing factor to claimant's total disability, citing *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Employer also contends that the administrative law judge's finding that disability causation can be inferred from the evidence is error since it is claimant's burden to prove the elements of entitlement. Additionally, employer argues that the administrative law judge applied an incorrect legal standard in determining that causation was established when he relied on the amended regulation set forth at Section 718.204(c), rather than the standard set forth in *Lollar, supra*, by the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises.

In determining that disability causation was established, the administrative law judge found that claimant had shown that his total disability was due to pneumoconiosis by relying on Dr. Cohen's opinion that claimant's chronic respiratory condition was substantially related to his over twenty years of coal mine employment and Dr. Cohen's opinion was supported by the opinion of Dr. Sherman, who accepted the possibility that claimant might have asthma, but nonetheless found that coal mine employment played a significant role in causing claimant's severe respiratory impairment. The administrative law judge thus concluded that it could be inferred from these opinions that Drs. Cohen and Sherman each considered claimant's coal mine dust exposure to have had a material adverse effect on, or more than a negligible, inconsequential or insignificant contribution to, claimant's respiratory or pulmonary condition. Decision and Order at 11.

Dr. Cohen found that claimant had a severe degree of impairment and that he could not carry out the heavy exertional duties of a coal miner. Director's Exhibit 41. In a subsequent evaluation, Dr. Cohen noted that claimant's coal workers' pneumoconiosis and chronic respiratory condition were substantially related to his over twenty year coal mine employment history. Claimant's Exhibit 1. Dr. Sherman, while acknowledging the possibility of underlying asthma, nonetheless concluded that coal mine employment would have played a significant role in causing claimant's severe respiratory impairment. Based on these opinions, contrary to employer's argument, we cannot say that the administrative law judge erred in inferring that disability causation was established pursuant to the standard set forth in both 20 C.F.R. §718.204(c) and *Lollar, supra*.

³ Further, the opinions of Drs. Hasson, Russakoff, and Goldstein, that claimant's respiratory impairment was not related to coal mine employment, do not overcome the opinions of Drs. Cohen and Sherman for the reasons discussed by the administrative law judge in his finding of pneumoconiosis at Section 718.202(a)(4). Accordingly, we affirm the administrative law judge's finding that disability causation was established. 20 C.F.R. §718.204(c); *Lollar, supra*; see *Summers, supra*; *Anderson, supra*; *Worley, supra*.

³ Both the Department's amended regulation and the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, require that pneumoconiosis be a substantially contributing cause of claimant's total disability. 20 C.F.R. §718.204(c); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

The administrative law judge is empowered to weigh the medical evidence 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, see *Clark, supra*; *Anderson, supra*. We, therefore, affirm the administrative law judge's findings that the evidence established the existence of pneumoconiosis and disability causation.

Finally, we reject employer's argument that claimant's modification request was not timely filed. Employer contends that the modification request was untimely because the case was denied on June 16, 1998, but the request for modification was not filed until June 18, 1999, although claimant's letter is dated June 16, 1999. Director's Exhibit 35. Claimant and the Director respond, however, that since the district director's decision and order denying the claim did not become "final" until thirty days after its issuance, claimant's request for modification was timely. We agree. Director's Exhibit 33; 20 C.F.R. §§725.310 (2000), 725.419; *Youghioghney and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951, 22 BLR 2-46 (6th Cir. 1999); *Wooten v. Eastern Assoc. Coal Corp.*, 21 BLR 1-194, 1-199 (1996).

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge