BRB No. 10-0521 BLA

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| STEVEN HOMOLA | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| READING ANTHRACITE COMPANY | ) | |
| | ) | |
| and | ) | |
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| STATE WORKERS INSURANCE FUND | ) | DATE ISSUED: 05/19/2011 |
| | ) | |
| 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 Granting Request for Modification and Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Edward K. Dixon and Ryan Krescanko (Zimmer Kunz PLLC), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Request for Modification and Awarding Benefits (Decision and Order on Modification) (08-BLA-5697) of Administrative Law Judge Ralph A. Romano on a claim[1] filed pursuant to the

[1] Claimant, Steven Homola, filed his application for benefits on October 12, 2004. Director's Exhibit 2.

provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] By Decision and Order issued on September 28, 2006, Administrative Law Judge Robert D. Kaplan adjudicated this claim pursuant to 20 C.F.R. Part 718, and credited claimant with twenty-seven years of qualifying coal mine employment. Judge Kaplan found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On September 26, 2007, claimant filed a petition for modification, and the case was ultimately assigned to Administrative Law Judge Ralph A. Romano (the administrative law judge), who conducted a formal hearing on October 9, 2008. The administrative law judge accepted the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-seven years, and found no mistake in Judge Kaplan's prior determinations of fact pursuant to 20 C.F.R. §725.310. Considering the evidence submitted in support of modification in conjunction with the earlier evidence, however, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge concluded, therefore, that modification was appropriate, based on a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge abused his discretion in closing the record before employer was able to fully develop its medical evidence and obtain an independent medical examination (IME) of claimant. In addition, employer challenges the administrative law judge's finding that the medical opinion evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis at Section 718.204(b), (c), justifying modification pursuant to Section 725.310. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.[3]

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[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director's Exhibit 2.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-seven years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order on Modification at 4, 5, 10-13.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

Initially, employer argues that the administrative law judge abused his discretion by closing the record before employer was able to develop its evidence and obtain an IME of claimant. Employer contends that the administrative law judge's refusal to hold the record open resulted in severe prejudice to employer, and deprived it of a meaningful opportunity to submit evidence responsive to claimant's evidence on modification, thereby violating employer's due process rights.[5] Employer's argument lacks merit.

The record reflects that, by Order issued on June 1, 2009, the administrative law judge denied claimant's Motion to Dismiss Employer/Carrier's Request for Hearing, and ordered the record to remain open "for Employer to take a medical exam and for Claimant to respond thereto" within sixty days of the issuance of the order. Order at 5. In a letter dated June 25, 2009, employer notified claimant that it had scheduled an IME of claimant for August 10, 2009 with Dr. Levinson. On July 30, 2009, claimant objected to employer's examination request and refused to attend the IME on the ground that employer had failed to comply with the administrative law judge's June 1, 2009 order requiring that the examination be scheduled no later than August 1, 2009. Immediately thereafter, on August 4, 2009, employer filed a Motion for Enlargement of Time and Motion to Compel Claimant's Attendance at IME. In an Order of Record Closure and Briefing Schedule issued on August 17, 2009, the administrative law judge noted that the record was held open until August 1, 2009 for claimant to undergo a medical examination

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[5] Employer additionally argues that claimant's refusal to submit to the examination scheduled for August 10, 2009 was tantamount to not acting in "good faith." Employer asserts that, prior to the formal hearing, claimant similarly refused to submit to two medical examinations that were scheduled with Dr. Levinson on May 8, 2008 and September 4, 2008 and, in so doing, failed to provide an explanation for his absence or to notify employer thereof. Employer maintains, therefore, that claimant's failure to immediately challenge the post-hearing date scheduled by employer for an independent medical examination of claimant, and his subsequent refusal to undergo a scheduled examination for the third time, denied employer its right to a full and fair hearing in this matter. Employer's Brief at 9.

on behalf of employer. However, because claimant's examination was scheduled for August 10, 2009, without leave granted therefor, the administrative law judge denied employer's motions, ordered the record closed, and set the briefing schedule. On September 4, 2009, employer requested reconsideration of the August 17, 2009 Order, which the administrative law judge denied on September 18, 2009.

Contrary to employer's assertion, the administrative law judge did not abuse his discretion by denying employer's Motion for Enlargement of Time and Motion to Compel Claimant's Attendance at IME. The reasonableness of a party's refusal to participate in discovery is a determination within the administrative law judge's discretion, which must be exercised within the parameters of 20 C.F.R. §725.456(e), requiring an opportunity for a full and fair hearing. In the present case, however, the administrative law judge did not deprive employer of an opportunity to submit evidence responsive to claimant's evidence on modification; rather, employer failed to schedule the post-hearing IME of claimant within the time allowed by the administrative law judge. It is undisputed that employer failed to timely request leave to schedule the IME beyond the August 1, 2009 deadline, and that employer only requested an enlargement of time after claimant objected and the deadline had passed.[6] Hence, employer was not deprived of its right to due process in this case. *See generally Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Thomas v. Director, OWCP*, 9 BLR 1-239, 1-241-242 (1987); Decision and Order on Modification at 3.

Turning to the merits of entitlement, employer maintains that the administrative law judge erred in finding that claimant had met his burden on modification of demonstrating that his condition had changed pursuant to Section 725.310, by establishing that he was now totally disabled by pneumoconiosis pursuant to Section 718.204(b), (c). Employer asserts that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by crediting the opinion of Dr. Kraynak, that claimant was totally disabled due to pneumoconiosis, without performing a meaningful analysis of the physician's underlying rationale, and without explaining why the opinion was well-reasoned and the most persuasive. Employer's Brief at 12-13. Because Dr. Kraynak did not state whether

[6] Contrary to employer's argument, while claimant did not object to the date scheduled for the independent medical examination (IME) until just before the deadline imposed by the administrative law judge had passed, claimant was under no compulsion to immediately notify employer of his objection and reason therefor. Rather, employer was obligated to obtain leave from the administrative law judge to extend the deadline for obtaining the IME, if employer could not schedule it within the time allowed.

claimant's condition had changed, and did not take most of the evidence of record into account, relying instead "almost entirely on his own evidence," employer argues that the administrative law judge improperly credited Dr. Kraynak's opinion without noting "these deficiencies." Employer's Brief at 14. Further, employer maintains that the administrative law judge's decision to "adopt" Judge Kaplan's credibility assessment of the 2005 opinions of Drs. Tarapchak and Krol was contrary to law. Employer's Brief at 12-13. Employer also contends that the administrative law judge failed to quantify the degree to which the comparative qualifications of the physicians were factored into his decision, and erroneously discounted Dr. Krol's opinion after initially accepting his conclusions. Employer's Brief at 16-18. Employer's arguments lack merit.

In evaluating the medical opinions of record, the administrative law judge accurately set forth the physicians' respective qualifications, conclusions, and underlying documentation. Decision and Order on Modification at 8-10. Contrary to employer's arguments, the administrative law judge permissibly concurred with Judge's Kaplan's finding that the 2005 opinion of Dr. Tarapchak, that claimant was totally disabled due to pneumoconiosis, was unreasoned, undocumented, and entitled to no weight, despite her status as claimant's treating physician, because Dr. Tarapchak failed to identify what medical evidence she relied upon in reaching her conclusions. Decision and Order on Modification at 10, 13; Director's Exhibits 27, 29 at 6-7, 9; *see* 20 C.F.R. §718.104(d)(5); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge also properly agreed with Judge Kaplan's finding that Dr. Krol's 2005 opinion, that claimant did not have pneumoconiosis and had no respiratory impairment, was reasoned and supported by its underlying documentation, as it was based on a physical examination, medical, employment and smoking histories, symptoms, a negative x-ray, an abnormal electrocardiogram, and a pulmonary function study and blood gas study revealing no significant abnormalities.[7] Decision and Order on Modification at 10; Director's Exhibits 11, 29 at 6-7; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). However, the administrative law judge acted within his discretion in finding that Dr. Krol's opinion was ultimately entitled to less weight because the physician relied, in part, on the sole negative x-ray interpretation of record and a non-qualifying pulmonary function study to support his conclusions, whereas the administrative law judge found that the weight of the x-ray evidence was positive for pneumoconiosis, and that Dr. Krol's pulmonary function study was invalid. Decision and Order on Modification at 13-

[7] However, Administrative Law Judge Robert D. Kaplan ultimately concluded that Dr. Krol's opinion was entitled to little weight on the issues of pneumoconiosis at Section 718.202 and total disability at Section 718.204(b)(2)(iv), as the physician relied in part on a negative x-ray that Judge Kaplan found to be positive for pneumoconiosis, and a pulmonary function study that Judge Kaplan found to be invalid. Director's Exhibit 29 at 5, 7-10.

14; Director's Exhibit 11; *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). By contrast, the administrative law judge determined that the 2008 opinion of Dr. Kraynak, submitted in support of modification and finding that claimant was totally disabled due to pneumoconiosis, was based on the positive x-ray interpretation of a dually-qualified Board-certified radiologist and B reader, his own findings on physical examination, pertinent histories and symptoms, and the results of a valid and qualifying pulmonary function study, which supported his conclusions. Accordingly, the administrative law judge permissibly found that the opinion of Dr. Kraynak, who had been treating claimant since January 5, 2006, was well-reasoned, well-documented, and entitled to determinative weight. *See* 20 C.F.R. §718.104(d)(5); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Modification at 10, 13-14; Claimant's Exhibit 1.

Based on his rational credibility determinations, the administrative law judge properly found that the weight of the evidence was sufficient to establish that claimant is totally disabled due to pneumoconiosis at Section 718.204(b), (c), and we affirm his findings thereunder, as supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that modification is appropriate pursuant to Section 725.310, and that claimant is entitled to benefits.

Accordingly, the Decision and Order Granting Request for Modification and Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge