BRB No. 97-1365 BLA

CHARLES O. GROSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order and Order on Reconsideration of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Order on Reconsideration (96-BLA-0326) of Administrative Law Judge Michael P. Lesniak denying 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). Initially, Administrative Law Judge Stuart A. Levin credited claimant with twenty years of coal mine employment and accepted employer's concession that claimant suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Director's

Exhibit 64. The administrative law judge found, however, that the medical evidence failed to establish the existence of pneumoconiosis or that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(b). *Id*. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding pursuant to Section 718.204(b) as supported by substantial evidence and, accordingly, affirmed the denial of benefits. *Gross v. Consolidation Coal Corporation*, BRB No. 91-1763 BLA (Mar. 25, 1993)(unpub.); Director's Exhibit 78. The Board denied claimant's motion for reconsideration. *Gross v. Consolidation Coal Corporation*, BRB No. 91-1763 BLA (Jun. 30, 1993)(Order)(unpub.); Director's Exhibit 83.

Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional evidence. On modification, Administrative Law Judge Michael P. Lesniak found that the evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4) or that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(b). The administrative law judge concluded therefore that the record failed to demonstrate either a change in conditions or a mistake in a determination of fact pursuant to Section 725.310, and denied benefits. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Claimant moved for reconsideration, and the administrative law judge, upon reconsideration, reaffirmed his Decision and Order denying benefits.

On appeal, claimant contends that the administrative law judge erred in his weighing of the x-ray readings pursuant to Section 718.202(a)(1). Claimant further asserts that the administrative law judge failed to accord proper weight to the opinion of claimant's treating physician pursuant to Sections 718.202(a)(4) and Section 718.204(b). In addition, claimant alleges that the administrative law judge failed to discuss the objective medical study evidence. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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 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).

Pursuant to Section 718.202(a)(1), claimant contends that the administrative

law judge failed to provide a rationale for his finding that the x-ray evidence failed to establish the existence of pneumoconiosis. Claimant's Brief at 8. The record contains forty readings of nine x-rays. There were eleven positive readings, twenty-six negative readings, and three reports classifying an x-ray as unreadable. Twenty-four of the negative readings were by physicians certified as Board-certified radiologists, B-readers, or both, while eight of the positive readings were by Board-certified radiologists, B-readers, or both.[1] Contrary to claimant's contention, the administrative law judge explained that he found the "preponderance of the [B]oard-certified radiologists and B-readers or the B-readers alone opinions [sic] are negative for the existence of pneumoconiosis." Decision and Order at 3-4; *see Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). On reconsideration, the administrative law judge again explained that he found the weight of the readings by the most qualified physicians to be negative for pneumoconiosis. Order on Reconsideration at 2-3. Because the administrative law judge provided a valid rationale for his weighing of the x-ray readings, *see Adkins, supra*, and substantial evidence supports his finding pursuant to Section 718.202(a)(1), we reject claimant's contention.

Claimant alleges that the administrative law judge should have accorded additional weight to the x-ray readings by Drs. Gaziano and Ranavaya in recognition of their impartiality as experts retained by the Department of Labor. Claimant's Brief at 11. The Board has held that, unless the opinions of the physicians retained by the parties are properly held to be biased, based on specific evidence in the record, the opinions of Department of Labor physicians should not be accorded greater weight due to their perceived impartiality. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-36 (1991)(*en banc*). Claimant points to no evidence of bias, and the administrative law judge found "no evidence in the record that would support a finding that the physicians hired by either party are biased." Order on Reconsideration at 2. Thus, the administrative law judge did not err in declining to accord greater weight to the readings of Drs. Gaziano and Ranavaya merely because they were retained by the Department of Labor. *See Melnick, supra*. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Sections 718.202(a)(4) and Section 718.204(b), claimant contends that the administrative law judge failed to accord proper weight to the opinion of Dr. Knitter, claimant's treating physician. Dr. Knitter was deposed twice in

[1] The x-ray readings and the physicians' radiological credentials were summarized in the parties' joint stipulation of the medical evidence, which the administrative law judge referred to in discussing the medical evidence. Decision and Order at 3; Joint Stipulation at 2-13 (unstamped exhibit).

1995 and testified that he first treated claimant in October 1993 but had not seen him in the office as a patient since February 1994. Director's Exhibits 112 at 7, 126 at 3. Dr. Knitter opined that claimant's severe airways obstruction was due in part to coal dust exposure. Director's Exhibit 112.

Contrary to claimant's contention, the administrative law judge permissibly found that, although a treating physician's opinion may be accorded additional weight, *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992), Dr. Knitter's opinion did not merit such weight because the record indicated that he had treated claimant only briefly. Decision and Order at 6. The administrative law judge reasonably concluded that:

> This brief period of treatment was not sufficient to give Dr. Knitter the distinction of having monitored [c]laimant over a long period of time or being more familiar with [c]laimant and his history th[a]n the other two physicians who conducted thorough physical examinations, reviewed his medical and work histories and reviewed the medical evidence developed in this case.

Order on Reconsideration at 3. In so doing, the administrative law judge noted claimant's July 1996 hearing testimony that Dr. Knitter was still his treating pulmonary specialist, [1996] Hearing Transcript at 19-20, but accurately noted that there was no medical evidence in the record of treatment since 1994. Decision and Order at 2, 6 n.4; Order on Reconsideration at 3-4. Because the administrative law judge adequately considered Dr. Knitter's treating status and permissibly declined to accord his opinion additional weight, *see Grizzle, supra; Berta, supra*, we reject claimant's contention.

Finally, claimant asserts that the administrative law judge erred by failing to discuss the qualifying[2] pulmonary function and blood gas studies. Claimant's Brief at 12. As the administrative law judge noted, total respiratory disability as defined in Section 718.204(c) was already established in this case. Thus, there was no need for the administrative law judge to weigh the objective studies insofar as they related to the presence of total respiratory disability. Regarding the existence of

[2] For purposes of establishing total respiratory disability, a "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

pneumoconiosis and disability causation, the medical opinions considered by the administrative law judge at Sections 718.202(a)(4) and 718.204(b) contained ample discussion of the clinical significance of the objective study data. Director's Exhibits 17, 28, 34, 87, 112-14; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge permissibly determined to credit the opinions of Drs. Renn and Fino based on their qualifications, the quality and consistency of their reasoning, and the benefit they had in both examining claimant and reviewing the medical evidence of record.[3] Decision and Order at 5-6; Order on Reconsideration at 4; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*). Therefore, we reject claimant's contention and we affirm the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(b). *See Hicks, supra*; *Akers, supra*; *see also Robinson v. Pickands Mather and Co*., 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

In light of the foregoing, we also affirm the administrative law judge's finding that the record failed to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. Decision and Order at 6; *see Jessee, supra*.

[3] Drs. Renn and Fino opined that claimant did not have pneumoconiosis and that his disabling respiratory impairment was due solely to his lengthy smoking history. Director's Exhibits 34, 57, 114; Employer's Exhibits 1, 3-5.

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration denying benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge