BRB No. 98-1132 BLA

REX YONCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CSX TRANSPORTATION, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
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 and the Supplemental Decision and Order Denying Employer's Motion for Reconsideration and Awarding Attorney's Fees of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Allen C. Trimble (Trimble & Mann), Corbin, Kentucky, for claimant.

Rodney L. Baker II (Huddleston, Bolen, Beatty, Porter & Copen), Huntington, West Virginia, 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 - Awarding Benefits and the Supplemental Decision and Order Denying Employer's Motion for Reconsideration and Awarding Attorney's Fees (96-BLA-1860) of Administrative Law Judge Donald W. Mosser 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). In a decision dated December 22, 1997, the administrative law judge credited

claimant with six years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4) and 718.203(c). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits, which he ordered to commence as of September 1995. In a subsequent decision dated April 20, 1998, the administrative law judge denied employer's request for reconsideration and awarded attorney's fees.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c). Employer also contends that the administrative law judge erred in awarding attorney's fees because it was not given an opportunity to object to claimant's counsel's application for attorney's fees.[1] Claimant responds, urging affirmance of the administrative law judge's awards of benefits and attorney's fees. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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.*,

[1]Employer filed a brief in reply to claimant's response brief, which reiterates its prior contentions.

[2]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4), 718.203(c) and 718.204(b) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c). Specifically, employer asserts that the administrative law judge erred in finding that Dr. Baker's 1995 pulmonary function study produced qualifying values because the administrative law judge irrationally found claimant's height to be sixty-nine inches rather than sixty-five and one-quarter inches, which was noted in the 1995 study. We disagree. The administrative law judge considered the three pulmonary function studies of record dated November 14, 1990, October 12, 1995 and March 18, 1997. The administrative law judge observed that claimant's "height was measured as 66.25 inches in 1990, 65.25 inches in 1995, and 69 inches in 1997." 1997 Decision and Order at 15. The administrative law judge also observed that "[a]t his deposition, [claimant] testified that he was 69 inches tall." *Id*. Where there are substantial differences in the recorded heights among all of the pulmonary function studies of record, the administrative law judge must make a factual finding to determine claimant's actual height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Here, the administrative law judge, as trier of fact, rationally concluded that claimant's actual height is sixty-nine inches because claimant's testimony and the 1997 study corroborate each other with respect to finding claimant's height to be sixty-nine inches.[3] *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, since the administrative law judge rationally found claimant's height to be sixty-nine inches rather than sixty-five and one-quarter inches, which was noted in 1995 study, we reject employer's assertion that the administrative law judge erred in finding that Dr. Baker's 1995 pulmonary function study produced qualifying values. *See Protopappas, supra*.

[3]The administrative law judge found claimant's actual height to be sixty-nine inches "because Dr. Burki measured him at this height, and [claimant] testified in a deposition that this was his height." 1998 Decision and Order at 2. The administrative law judge observed that "Dr. Burki's measurement [was] validated by [claimant's] deposition testimony." *Id.* The administrative law judge also observed that "there was no validating evidence for Dr. Baker's conflicting reports." *Id*.

After weighing all of the relevant medical evidence of record, the administrative law judge found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c). The administrative law judge stated, "I based this finding primarily on the qualifying 1995 pulmonary function study."[4] 1997 Decision and Order at 16. In addition, the administrative law judge stated that the "qualifying readings [of the 1995 study] are supported by the report of Dr. Baker in which the physician found [claimant] to have a moderate disability," though the administrative law judge acknowledged that Dr. Baker's opinion alone did not establish total disability.[5] *Id*. Moreover, the administrative law judge found "the lack of qualifying arterial blood gas studies[6] or cor pulmonale are insufficient to outweigh this evidence, especially in light of the absence of any medical report finding that [claimant] is not disabled."[7] *Id*. Since the administrative law judge properly weighed all of the contrary probative evidence of record, like and unlike, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9

[4]Of the three pulmonary function studies of record, the 1995 and 1997 studies yielded qualifying values, Director's Exhibits 11, 13, and the 1990 study yielded non-qualifying values, Employer's Exhibit 1. The administrative law judge stated, "I accept the readings from the 1995 study as sufficient to prove the claimant is totally disabled from a respiratory standpoint." 1997 Decision and Order at 15. The administrative law judge observed that "[a]lthough the claimant's effort was reported only as fair [in the 1995 study], the testing physician did indicate that the [claimant's] cooperation was 'good.'" *Id*. Additionally, the administrative law judge properly discounted the 1997 study "because [claimant's] effort was characterized as 'poor.'" *Id*.; *see Runco v. Director, OWCP*, 6 BLR 1-945 (1984).

[5]The administrative law judge also stated that "[t]he symptoms reported by Drs. Baker and Burki regarding [claimant's] difficulties on exertion, including his problems in performing the spirometry tests also support this finding." 1997 Decision and Order at 16.

[6]The administrative law judge correctly stated that "[n]one of the three arterial blood gas studies produced qualifying values." 1997 Decision and Order at 15; Director's Exhibits 13, 16; Employer's Exhibit 1.

[7]The administrative law judge observed that "[i]n this case, only Dr. Baker addressed [claimant's] disability, and then he did so only in his 1995 report." 1997 Decision and Order at 16. The administrative law judge also observed that "Dr. Rogers mentioned that [claimant] was disabled, but did not state [whether] this was a respiratory disability or a disability caused by [claimant's] arthritis." *Id*.

BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), we hold that substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c).

Finally, employer contends that the administrative law judge erred in awarding attorney's fees to claimant's counsel because it was not given an opportunity to object to claimant's counsel's application for attorney's fees. Employer's contention has merit. Claimant's counsel filed his application for attorney's fees on January 20, 1998. The pertinent regulation provides that "[t]he application [for attorney's fees] shall be filed and **served** upon the claimant and all other parties within the time limits allowed by the deputy commissioner, administrative law judge, or appropriate appellate tribunal." 20 C.F.R. §725.366(a) (emphasis added). The administrative law judge observed that "[i]n the original decision and order, the other parties and the claimant were given thirty days following service of the application to file objections." 1998 Decision and Order at 2. The administrative law judge also observed that the "thirty-day period has expired, and no objection has been received." *Id*. However, the record does not indicate that employer was served with claimant's counsel's application for attorney's fees within the time limit allowed by the administrative law judge. Thus, we vacate the administrative law judge's award of attorney's fees and remand the case for further consideration of the evidence in accordance with 20 C.F.R. §725.366(a).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed. The administrative law judge's Supplemental Decision and Order Denying Employer's Motion for Reconsideration and Awarding Attorney's Fees is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge