BRB No. 98-0275 BLA

THOMAS R. BAKER)
)
Claimant-Respondent)
)
v.)
)
FREEMAN UNITED COAL MINING)
COMPANY)
) 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 of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

John A. Washburn (Gould & Ratner), Chicago, Illinois, for claimant.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for employer.

Before: , and , Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-370) of Administrative Law Judge Ellin M. O'Shea awarding 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). The administrative law judge found that claimant[1] established total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(c)(1), (4) and, thus, a mistake in a

[1]Claimant is Thomas R. Baker, the miner, who filed a claim for benefits on March 10, 1994, which was denied on June 28, 1994. Director's Exhibits 1, 17. Claimant filed a petition for modification on May 16, 1995. Director's Exhibit 18.

determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in weighing the medical opinion and pulmonary function study evidence of record pursuant to Sections 718.202(a)(4) and 718.204(b), (c)(1), (4). Claimant responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining 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.*, 380 U.S. 359 (1965).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of

---

[2]We affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.203(b) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Further, pursuant to Section 725.310, claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), modifying 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Employer first contends that the administrative law judge erred in relying on Dr. Keller's opinion to support Dr. Cohen's opinion that claimant has pneumoconiosis pursuant to Section 718.202(a)(4). Employer's Brief at 6-7. Dr. Cohen opined that claimant has pneumoconiosis and is totally disabled therefrom. Claimant's Exhibit 4. Dr. Keller, in treatment notes dating from 1980 until 1994, indicates that claimant was diagnosed with, and treated for, pneumoconiosis on several occasions. Employer's Exhibit 14 at 18, 30. The administrative law judge acted within his discretion in finding that Dr. Cohen's opinion is comprehensive, documented and well-reasoned. Decision and Order at 12; *Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989)*; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Hutchens v. Director,* OWCP, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The

administrative law judge then rationally concluded that Dr. Keller's treatment records support Dr. Cohen's diagnosis of pneumoconiosis. Decision and Order at 12; *Lafferty, supra; Piccin v. Director, OWCP,* 6 BLR 1-616 (1983). Because the administrative law judge merely found that Dr. Keller's records support Dr. Cohen's opinion, without finding that Dr. Keller's records constitute a well-reasoned and well-documented opinion, we reject employer's contention regarding the administrative law judge's reliance upon Dr. Keller's opinion.

Employer next contends that the administrative law judge erred in assigning greater weight to Dr. Cohen's opinion than he did to Dr. Selby's opinion. Employer's Brief at 7-8. Dr. Selby opined that claimant does not have pneumoconiosis and that he has the respiratory and/or pulmonary capacity to perform any and all previous coal mine duties. Employer's Exhibit 1. Pursuant to Sections 718.202(a)(4), the administrative law judge acted within his discretion in assigning less weight to Dr. Selby's opinion because Dr. Selby's statement that claimant has, and received treatment for, bronchial asthma is not supported by Dr. Keller's treatment records or claimant's testimony and because Dr. Selby did not explain how he arrived at his conclusion that claimant has bronchial asthma. Decision and Order at 13; *Lafferty, supra; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984). The administrative law judge also rationally found that, although Dr. Selby has board-certifications equal to Dr. Cohen, Dr. Cohen's curriculum vitae reflects a "very extensive, detailed, wide-ranging pulmonary-occupational disease professional experience, practice and publication listing which, when weighed with Dr. Selby's, adds more probative and persuasive weight to Dr. Cohen's opinions." Decision and Order at 13-14; Employer's Exhibit 8, Claimant's Exhibit 4; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989); *McMath v. Director, OWCP*,

12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, pursuant to Section 78.204(c)(4), the administrative law judge acted within his discretion in finding Dr. Selby's opinion regarding total respiratory disability to be not as comprehensive or documented as Dr. Cohen's opinion, and thus entitled to less weight, because Dr. Selby did not obtain a valid pulmonary function study and he did not review the results of any other pulmonary function study. Decision and Order at 16; *Lafferty, supra; Clark, supra; King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Thus, we reject employer's contentions that the administrative law judge erred in weighing the opinions of Drs. Selby and Cohen.

Finally, employer; contends that the administrative law judge erred in failing to consider Dr. Selby's comments concerning the evidentiary value of his invalid 1995 pulmonary function study. Employer's Brief at 8-9. Dr. Selby performed a pulmonary function study on September 19, 1995 which he considered to be invalid. Employer's Exhibit 1. Dr. Selby commented that "no use of this data can be made for the purposes of determining the patient's best effort, but at least we know a minimum that he can achieve, and it is an invalid spirometric testing." Employer's Exhibit 1. The noted Dr. Selby's comments regarding this pulmonary function study and acted within his discretion in finding that it was of no probative value. Decision and Order at 9, 16; *Lafferty, supra; Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Runco v. Director, OWCP,* 6 BLR 1-945 (1984). The administrative law judge is empowered to weigh the 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.* Thus, we affirm the administrative law

judge's finding that claimant established total disability due to pneumoconiosis and, thus, a mistake in a determination of fact pursuant to Sections 718.202(a)(4), 718.203(b), 718.204(b), (c)(1)(4) and 725.310, and the award of benefits, as they are supported by substantial evidence and in accordance with law.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

____

Administrative Appeals Judge

____

Administrative Appeals Judge

____

Administrative Appeals Judge