BRB No. 02-0831 BLA

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| HENRY P. MAIDENFORD | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| INTERNATIONAL ANTHRACITE | ) | DATE ISSUED: 09/29/2003 |
| CORPORATION | ) | |
| | ) | |
| and | ) | |
| | ) | |
| STATE WORKERS= INSURANCE FUND | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order -- Denying Request for Modification and Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer and carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order -- Denying Request for Modification and Denying Benefits (2001-BLA-00640) of Administrative Law Judge Paul H. Teitler 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 determined that the new evidence submitted in support of modification, as well as the earlier evidence, was insufficient to establish any element of entitlement. Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge=s findings pursuant to 20 C.F.R.
725.310 (2000), 718.202(a)(1), (4), and 718.204(b)(2)(i), (iv). Employer responds, urging affirmance. 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 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 under 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 of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant initially contends that the administrative law judge erred in limiting the parties to the submission of an equal number of x-ray interpretations in the instant modification proceedings, and then, without adequate explanation and in violation of

[1]The Department of Labor (DOL) 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]We affirm, as unchallenged on appeal, the administrative law judge=s finding that the evidence of record is insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(2), (3), or total respiratory disability at 20 C.F.R. '718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

claimant=s due process right to be fully and fairly heard, the administrative law judge relied solely upon this limitation to find the evidence equally balanced and insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Claimant=s arguments are without merit. The record reflects that on April 26, 2002, with the hearing before the administrative law judge scheduled for May 16, 2002, claimant filed a motion to exclude one out of seven x-ray interpretations submitted by employer of a film dated September 22, 2000, on the ground that claimant had only been able to submit six readings of the film as of that date, and that the excessive number of readings obtained by employer represented a needless presentation of cumulative evidence. In the alternative, claimant sought an extension of time to submit additional readings. It does not appear that the administrative law judge formally ruled on claimant=s motion, but rather that the parties reached an agreement prior to the hearing and stipulated to the evidence which would be admitted into the record. *See* Hearing Transcript at 5-14. We therefore reject claimant=s argument that his due process rights were violated.

At Section 718.202(a)(1), the administrative law judge accurately reviewed the newly submitted x-ray evidence and the qualifications of the readers, and determined that this evidence was evenly balanced because equally credible readings by highly qualified physicians reached opposite results.[3] Decision and Order at 3-4, 6. The administrative law judge thus properly found that claimant failed to meet his burden of persuasion by a preponderance of the evidence. Decision and Order at 6; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). The administrative law judge also incorporated by reference the evidence set forth in the prior denial of April 13, 2000, and determined that the x-ray evidence submitted prior to claimant=s request for modification was similar to the evidence submitted in support of modification, in that equally credible readings by highly qualified physicians reflected opposite conclusions. Decision and Order at 3, 6. Upon consideration of the newly submitted x-ray reports with the prior reports of record, the administrative law judge reasonably found that the evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 6; *Ondecko*, 512 U.S. 267, 18 BLR 2A-1. Consequently, we affirm the administrative law judge=s findings at Section 718.202(a)(1), as they are supported by substantial evidence.

[3]The administrative law judge determined that the newly-submitted x-ray evidence consisted of six positive interpretations for pneumoconiosis and six negative interpretations of a single film, and that all of the readers were dually qualified as Board-certified radiologists and B readers. Decision and Order at 3-4.

Claimant next argues that, in finding the weight of the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge mischaracterized the record and erroneously failed to discuss relevant evidence, in that he did not consider Dr. Kraynak=s deposition testimony of October 5, 2001. Claimant=s arguments are not supported by the record. In evaluating the newly submitted medical opinions, the administrative law judge determined that Dr. Kraynak=s diagnosis of pneumoconiosis was based on findings similar to those included in the physician=s earlier reports, and that the only new objective evidence submitted with Dr. Kraynak=s report of December 12, 2000 in support of modification was a pulmonary function study, whereas the conflicting opinion of Dr. Dittman, that claimant did not have pneumoconiosis, was supported by normal results obtained on a new x-ray, pulmonary function study, blood gas study and physical examination. Decision and Order at 6-7. The administrative law judge additionally reviewed Dr. Kraynak=s deposition testimony and determined that the physician had relied on the positive x-ray interpretations of Dr. Smith, that Dr. Kraynak had stated that claimant demonstrated normal results on blood gas study and was overweight, and that the doctor=s finding of cyanotic lips on physical examination of claimant was intermittent. Decision and Order at 6. The administrative law judge further determined that Dr. Kraynak did not provide any basis for his testimony that claimant=s condition had worsened; an explanation for this opinion was necessary since the physician had agreed that the values demonstrated on claimant=s most recent pulmonary function study exceeded the values demonstrated on earlier pulmonary function studies. Decision and Order at 6-7. Considering Dr. Kraynak=s status as claimant=s treating physician under 20 C.F.R. ' 718.104(d), the administrative law judge noted that the physician testified that he had seen claimant only twice in 2000 and twice in 2001, and the administrative law judge found that Dr. Kraynak=s reports were not as thorough, detailed or well supported as those of Dr. Dittman. Decision and Order at 7. The administrative law judge thus concluded that, in light of its reasoning and documentation, the contrary probative evidence, and the record as a whole, Dr. Kraynak=s opinion was neither credible nor entitled to controlling weight. *Id.*; *see* 20 C.F.R. ' 718.104(d)(5). The administrative law judge then acted within his discretion as trier of fact in according greater weight to the opinion of Dr. Dittman on the ground that it was more persuasive, better supported by objective evidence and better reasoned than the opinion of Dr. Kraynak. Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Weighing the new evidence with the earlier medical opinions of record,[4] the administrative law judge properly concluded that claimant failed to

[4]In his Decision and Order issued on April 13, 2000, Administrative Law Judge Ralph A. Romano found the weight of the medical opinions of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a)(4), as he found that the opinion of Dr.

establish the existence of pneumoconiosis at Section 718.202(a)(4), and we affirm his findings thereunder as supported by substantial evidence.

As the administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), an essential element of entitlement, benefits are precluded. *See Anderson*, 12 BLR 1-111. Consequently, we affirm the administrative law judge=s denial of benefits, and need not reach claimant=s arguments on the issue of total respiratory disability at Section 718.204(b)(2)(i), (iv).

Accordingly, the administrative law judge=s Decision and Order -- Denying Request for Modification and Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

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Dittman, as supported by the opinion of Dr. Rashid that claimant did not have pneumoconiosis, was better reasoned and documented than the contrary opinion of Dr. Kraynak. We reject claimant=s argument that Judge Teitler failed to assess the earlier evidence *de novo* and determine whether a mistake in a prior determination of fact was made. Claimant=s Brief at 6-7. In view of the administrative law judge=s weighing of the new evidence submitted in support of modification, it is clear that he concurred in the prior findings of fact and conclusions of law.