BRB No. 03-0186 BLA

CURTISS WILLIAM MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PATIENCE, INCORPORATED	)	DATE ISSUED: 09/10/2003
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS= PNEUMOCONIOSIS FUND	)	
	)	
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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers= Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Employer appeals the Decision and Order granting modification and awarding

benefits (2002-BLA-27) of Administrative Law Judge Gerald M. Tierney 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 noted that the instant claim was before him pursuant to a request for modification and concluded that claimant established a mistake in a determination of fact. Decision and Order at 1-4. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718,[2] the administrative law judge found that claimant had at least fifteen years of coal mine employment and, that employer was the properly named responsible operator. The administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ''718.202(a) and 718.203(b) in light of the standard set forth in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Decision and Order at 2, 4. The administrative law judge further determined that claimant established that he was totally disabled due to

[1]The Department of Labor 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]Claimant filed his claim for benefits on January 22, 1998, which was finally denied on November 17, 2000, as claimant failed to establish that his total disability was due to pneumoconiosis. Director=s Exhibits 1, 30, 41. Claimant filed a request for modification which is the subject of the instant appeal, on January 10, 2001. Director=s Exhibit 42.

pneumoconiosis pursuant to 20 C.F.R. '718.204(b), (c). Decision and Order at 3-5. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding that claimant demonstrated a mistake in fact as the opinion of Dr. Rasmussen is unreasoned and therefore insufficient to establish that claimant=s total disability was due to pneumoconiosis pursuant to 20 C.F.R. '718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers= Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[3]

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 the 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 to benefits in a living miner=s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. ''718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[3]The administrative law judge=s length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. ''718.202(a), 718.203(b) and 718.204(b) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

When modification is requested, the relevant standard set forth by the United States Court of Appeals for the Fourth Circuit in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), requires that the administrative law judge determine whether a change in conditions or a mistake in a determination of fact has been made, even where no specific allegation has been made.[4] Furthermore, in determining whether the requesting party has established modification pursuant to 20 C.F.R. ' 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge, within his discretion as fact-finder, rationally determined that the evidence of record was sufficient to establish that claimant=s totally disabling respiratory impairment was due to pneumoconiosis. *See DeHue Coal Co. v. Ballard,* 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995)*; Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225, (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director=s Exhibits 2, 3.

Employer contends that the administrative law judge erred in finding that claimant established that his total disability was due to pneumoconiosis pursuant to Section 718.204(c). Employer=s Brief at 3-5. Specifically, employer contends that the administrative law judge impermissibly accorded greater weight to the medical opinion of Dr. Rasmussen. Employer asserts that the administrative law judge erred in finding a mistake in fact based upon Dr. Rasmussen=s most recent opinion as it is inconsistent with his previous opinion regarding disability causation.[5] Employer=s Brief at 5. We disagree.

The administrative law judge reviewed Dr. Rasmussen=s past reports and noted that the March 24, 1999 opinion by Dr. Rasmussen was found by the prior administrative law judge to be too equivocal to meet claimant=s burden of proof and that this finding was

[5]In an opinion dated March 24, 1999, Dr. Rasmussen stated that the three risk factors for claimant=s totally disabling impairment were his coal dust exposure, his cigarette smoking and significantly, his right pneumonectomy. The physician opined that the bulk of the impairment can be attributed to his pneumonectomy and that his coal mine dust and cigarette smoking combined may have produced a minimal degree of his impaired function; however the degree of impairment produced by these two combined toxic substances would probably not be sufficient to render this patient disabled. Director=s Exhibit 27. In a subsequent opinion dated January 4, 2001, Dr. Rasmussen opined that while claimant=s dust exposure and cigarette smoking alone may not have produced totally disabling respiratory insufficiency, the combined effects of his pneumonectomy and his cigarette smoking and occupational dust exposure render him totally disabled and thus, his dust exposure is a significant contributing factor to this totally disabling respiratory insufficiency. The physician explained that based upon the pulmonary function studies, claimant clearly has a measurable degree of loss of function secondary to his occupational dust exposure and smoking. Director=s Exhibit 42.

affirmed by the Board. Decision and Order at 2; Director=s Exhibits 27, 41; *Martin v. Patience, Inc.*, BRB No. 99-1236 BLA (Nov. 17, 2000)(unpublished). Reviewing the most recent opinion by Dr. Rasmussen, the administrative law judge rationally determined that the physician clarified his earlier opinion and provided the necessary rationale to justify his conclusion. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); Decision and Order at 3; Director=s Exhibit 42. The administrative law judge acted within his discretion in according weight to Dr. Rasmussen=s opinion since he was fully aware of the physician=s statements with respect to disability causation and it is within the administrative law judge=s scope of authority as fact-finder to assign weight to the evidence of record. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*)*; Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Mabe*, 9 BLR 1-67; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 3-5; Director=s Exhibit 42. As employer makes no other specific challenge to the administrative law judge=s findings with respect to Dr. Rasmussen=s opinion, we affirm the administrative law judge=s credibility determination. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe*, 9 BLR 1-67; *Hutchens*, 8 BLR 1-16; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

The administrative law judge is empowered to weigh the medical 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*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge=s finding that the evidence of record is sufficient to establish that claimant=s total disability was due to pneumoconiosis pursuant to Section 718.204 as it is supported by substantial evidence and is in accordance with law. *See Ballard*, 65 F.3d 1189*; Hobbs*, 917 F.2d 790; *Robinson*, 914 F.2d 35*; Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge