BRB No. 10-0408 BLA

| | | |
|---|---|---|
| JOSEPH KOWALCHICK | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: 02/28/2011 |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Granting Request for Modification and Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Barbara L. Feudale, Gordon, Pennsylvania, for claimant.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Request for Modification and Denying Benefits (09-BLA-00003) of Administrative Law Judge Ralph A. Romano (the administrative law judge), rendered on a claim filed on February 26, 1998, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge granted claimant's

[1] The Director, Office of Workers' Compensation Programs (the Director), correctly submits that the 2010 amendments to the Black Lung Benefits Act do not apply to the instant case, which was filed before January 1, 2005. Director's Exhibit 1.

request for modification pursuant to 20 C.F.R. §725.310 because he found that he had made a mistake in a determination of fact at 20 C.F.R. §718.202(a), concerning Dr. Kraynak's qualifications, in his previous decision denying benefits.[2] Turning to the merits of the case, he found fifteen years of coal mine employment established, based on claimant's stipulation, but that the evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement. Benefits were, accordingly, denied.

On appeal, claimant assigns error to the administrative law judge's finding of fifteen years of coal mine employment, and his evaluation of the x-ray and medical opinion evidence of record at 20 C.F.R. §718.202(a)(1) and (4).[3] The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge rationally reviewed the relevant x-ray and medical opinion evidence, and properly concluded that the record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4). Therefore, the Director urges affirmance of the denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

---

[2] The lengthy procedural history of this case is set forth in the administrative law judge's current decision. The case includes numerous requests for modification by claimant. Claimant's previous request for modification was denied and benefits were denied by the administrative law judge on September 6, 2006. That decision was affirmed by the Board. *J.K.* [*Kowalchick*] *v. Director, OWCP*, BRB No. 07-0122 BLA (Sept. 28, 2007) (unpub.). Claimant requested modification on May 6, 2008.

[3] The administrative law judge's finding pursuant to 20 C.F.R. §725.310, and his finding that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) and (3) are affirmed, as unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, because claimant was employed in coal mining in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

**Years of Coal Mine Employment**

Claimant initially contests the administrative law judge's finding of fifteen years of coal mine employment, and asserts that he should have been credited with twenty-two years of coal mine employment, based on his testimony. The Director responds, contending that the administrative law judge properly adhered to his previous determination to accept claimant's stipulation to fifteen years of coal mine employment.[5]

The administrative law judge found that claimant had fifteen years of coal mine employment based on his previous stipulation. Decision and Order at 4-5; Director's Exhibits 45, 113, 118. Moreover, the administrative law judge found that claimant offered no documentary evidence to support his allegation of twenty-two years of coal mine employment.

In this case, the record reflects that claimant was represented by counsel at the hearing on April 21, 1999, before Administrative Law Judge Ainsworth H. Brown, where he stipulated to fifteen years of coal mine employment. Director's Exhibit 45 at 4, 13-14. Further, claimant does not contest the administrative law judge's finding that he has not offered documentation supporting his assertion of twenty-two years of coal mine employment. We are, therefore, unpersuaded by claimant's unsupported assertion that his stipulation to fifteen years of coal mine employment should not be binding. *See* Hearing Transcript at 6, 22-23; 29 C.F.R. §18.51 (2003); *Mitchell v. Daniels Co.*, BRB Nos. 01-0364 BLA and 03-0134 BLA (Feb. 12, 2004)(unpub.), (discussing *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), and *Sullivan v. Newport News Shipbuilding and Dry Dock Co.*, No. 96-1922, 1997 WL 425686 (4th Cir. Jul. 30, 1997)); *Wellmore Coal Corp. v. Stiltner*, 81 F.3d 490, 497, 20 BLR 2-211, 2-224-25 (4th Cir. 1996); *Fairway Constr. Co. v. Allstate Modernization, Inc.*, 495 F.2d 1077, 1079 (6th Cir. 1974); *Nippes v. Florence Mining* Co., 12 BLR 1-108, 1-109 (1985). Accordingly, we conclude that the administrative law judge rationally relied on claimant's stipulation

[5] Moreover, we agree with the Director that any error regarding length of coal mine employment would be harmless, since claimant was properly credited with fifteen years of coal mine employment and any additional years of coal mine employment would not give him any advantage, based on the facts and issues in this case. Director's Brief at 4.

to fifteen years of coal mine employment. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

**Pneumoconiosis – 20 C.F.R. §718.202(a)(1)**

Claimant next contends that the administrative law judge erred in finding that the x-ray evidence of record did not establish pneumoconiosis at Section 718.202(a)(1), when the most recent x-ray evidence showed the existence of pneumoconiosis. Specifically, claimant argues that the positive x-ray interpretations of Dr. Smith, a dually-qualified reader and Dr. Stempel, a Board-certified radiologist, "should have been given controlling weight in determining the presence of pneumoconiosis[,]" and that the administrative law judge "committed error in not giving Dr. Stempel's opinion any weight at all." Claimant's Brief at 6-8. The Director responds, asserting that the administrative law judge rationally reviewed the relevant x-ray evidence, and properly concluded that the record failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1).

In weighing the x-ray evidence, the administrative law judge specifically discussed the interpretations of the most recent x-rays of record,[6] namely the x-rays taken on January 31, 2007, October 25, 2007, and March 25, 2009. Decision and Order at 6. The administrative law judge found that the January 31, 2007 x-ray was read as positive by Dr. Smith, a dually-qualified physician, and as negative by Dr. Navani, a dually-qualified physician. Director's Exhibits 123, 126. Similarly, the administrative law judge found that the October 25, 2007 x-ray was read as positive by Dr. Smith, and as negative by Dr. Navani. *Id*. The administrative law judge rationally concluded, therefore, that the January 31, 2007 and October 25, 2007 x-rays were neither positive nor negative for the presence of pneumoconiosis, but were in equipoise, as they resulted in conflicting positive and negative readings by equally-qualified physicians. Decision and Order at 7; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Turning to the March 25, 2009 x-ray, the administrative law judge found that it was read as positive by Dr. Smith, as negative by Dr. Navani, and as showing "[p]leural abnormalities consistent with pneumoconiosis" by Dr. Stempel, a Board-certified radiologist. *Id*.; Director's Exhibits 138, 140; Claimant's Exhibit 2. Noting that he was not required to defer to the numerical superiority of x-ray

[6] Although the administrative law judge specifically discussed only the most recent x-ray and medical opinion evidence, namely the evidence submitted in support of claimant's request for modification, Decision and Order at 6-10, the administrative law judge stated that he has reviewed all of the evidence of record in making his determinations. Decision and Order at 4.

evidence, the administrative law judge rationally accorded less weight to the reading of Dr. Stempel, because he was not as well-qualified as Drs. Smith and Navani. The administrative law judge rationally concluded, therefore, that the March 25, 2009 x-ray did not establish the existence of pneumoconiosis because it was in equipoise. Decision and Order at 7; *see Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989); *see also Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004) (*en banc*); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).[7]

As substantial evidence supports the administrative law judge's finding that the most recent x-ray evidence was in equipoise, claimant has failed to carry his burden of proof. *Ondecko*, 512 U.S. at 269, 281, 18 BLR at 2A-3-12. Thus, we reject claimant's assertion that the administrative law judge impermissibly evaluated the most recent x-ray evidence, and we affirm his finding that the x-ray evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

**Pneumoconiosis – 20 C.F.R. §718.202(a)(4)**

Additionally, claimant contends that the administrative law judge erred in finding that the most recent medical opinion evidence failed to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[8] Claimant asserts that the administrative law judge should have credited the medical opinions of Drs. Rothfleisch[9] and Kraynak,[10] because "there is no other opinion evidence in this modification case in

[7] Although not discussed by the administrative law judge, we note that Dr. Stempel's x-ray reading of "[p]leural abnormalities consistent with pneumoconiosis" would not be sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, because it was not properly classified for pneumoconiosis. 20 C.F.R. §§718.102, 718.202.

[8] The administrative law judge's finding that the medical opinion evidence is insufficient to support a finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) is affirmed, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[9] Dr. Rothfleisch diagnosed coal workers' pneumoconiosis based on Dr. Stempel's interpretation of the March 25, 2009 x-ray, as well as coronary artery disease, asthma, and hypertension. Decision and Order at 8; Director's Exhibit 133.

[10] Dr. Kraynak, who treated claimant for a number of years, reviewed Dr. Smith's positive interpretations of the x-rays of January 31, 2007 and October 25, 2007, and concluded that claimant has coal workers' pneumoconiosis contracted from his coal mine employment. Decision and Order at 9; Director's Exhibit 124; Claimant's Exhibits 1, 2.

contradiction to these two opinions." Claimant's Brief at 9. Contrary to claimant's assertion, however, the administrative law judge provided permissible reasons for finding these medical opinions unpersuasive. First, he found that Dr. Rothfleisch "base[d] his opinion on an x-ray interpretation by a doctor who is less qualified, and an x-ray I find to be in equipoise." Decision and Order at 9. Additionally, the administrative law judge found that Dr. Rothfleisch failed to provide a rationale for his opinion, "but rather just [wrote] down coal workers' pneumoconiosis." *Id*. Next, the administrative law judge found that Dr. Kraynak, claimant's treating physician, similarly based his diagnosis of pneumoconiosis on an x-ray that was found to be in equipoise. Finally, the administrative law judge found that Dr. Kraynak "simply opine[d]" that claimant has coal workers' pneumoconiosis in a "blanket statement" based on claimant's shortness of breath, cough and dyspnea. *Id*. at 9-10.

Contrary to claimant's assertions, the administrative law judge rationally determined that the opinions of Drs. Kraynak and Rothfleisch are unexplained, and are not sufficiently well-reasoned. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986), *citing Phillips v. Director, Office of Workers' Compensation Programs*, 768 F.2d 982, 984-85 (8th Cir. 1985); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, the administrative law judge permissibly discounted the opinions of Drs. Rothfleisch and Kraynak because he found that they were based on x-rays that were in equipoise. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126, 1-128 (1985). Additionally, contrary to claimant's contention, the administrative law judge was not obligated to assign additional weight to Dr. Kraynak's opinion, based solely on his status as claimant's treating physician. While a treating physician's opinion is assumed to be more valuable than that of a non-treating physician, *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004), automatic preferences are disfavored, *Mancia v. Director, OWCP*, 130 F.3d at 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). In this case, although the administrative law judge acknowledged Dr. Kraynak's years as claimant's treating physician, Decision and Order at 9, he did not specifically consider the doctor's opinion in light of the criteria provided in 20 C.F.R. §718.104(d)(1)-(4). Nonetheless, since the administrative law judge permissibly discredited the doctor's opinion because he found it unexplained and not well-reasoned, *see* 20 C.F.R. §718.104(d)(5); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Clark*, 12 BLR at 1-155; *see also Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000, 1-1001 (1984), any error by the administrative law judge in this regard is harmless. *Larioni*, 6 BLR at 1-1278. Because the administrative law judge has broad discretion to assess the credibility of the medical experts, we affirm his determination that the opinions of Drs. Rothfleisch and Kraynak failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Clark*, 12 BLR at 1-155.

Based on the foregoing, we affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement.[11] *See Ondecko*, 512 U.S. at 267, 18 BLR at 2A-1; *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Trent*, 11 BLR at 1-27.

Accordingly, the Decision and Order Granting Request for Modification and Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[11] Claimant also contends generally that the opinions of Drs. Rothfleisch and Kraynak established total respiratory disability at 20 C.F.R. §718.04(b)(2)(iv). However, the administrative law judge, finding that pneumoconiosis, an essential element of entitlement, was not established, did not make a total disability finding. Administrative Law Judge's February 25, 2010 Decision and Order.