BRB No. 86-2697 BLA

JOHN SPENSKO Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

P. J. Creasey, Roswell, Georgia, Lay Representative for claimant.

Karen Lynne Baker (Marshall J. Breger, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and DOLDER, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (85-BLA-5435) of Administrative Law Judge Alexander Karst denying 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

et seq. (the Act). After determining that claimant's original claim, filed on March 1, 1973, and his second claim, filed on June 15, 1977, had been finally denied, the administrative law judge adjudicated the merits of claimant's third claim, filed on May 23, 1983, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge credited claimant with fifteen years of qualifying coal mine employment as stipulated by the parties and supported by the record, but found that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in applying the regulations at 20 C.F.R. Part 718 rather than those at 20 C.F.R. Part 727, and further challenges the administrative law judge's evaluation of the x-ray, blood gas study and medical opinion evidence of record. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits.

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 pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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).

Turning first to the procedural issue, claimant contends that the administrative law judge erred in adjudicating this claim pursuant to the regulations at Part 718 rather than those at Part 727. In support of his contention, claimant notes that on August 21, 1984, Administrative Law Judge Alfred Lindeman issued an Order Granting Motion to Dismiss Price River Coal Company, in which he found that claimant had filed a timely request for modification of his June 15, 1977 claim.[1] See

[1] Judge Lindeman determined that claimant's June 15, 1977 claim was denied on April 1, 1982, and that claimant's request for modification on May 4, 1983, was timely filed. See Director's Exhibits 1, 27, 55. Judge Lindeman calculated that claimant had a year and 39 days within which to request modification, as the deputy commissioner's denial became final after 30 days pursuant to 20 C.F.R. §725.419(d); further, claimant was entitled to a seven-day allowance for mail service pursuant to 20 C.F.R. §725.311(c), and an additional two days pursuant to 20 C.F.R. §725.311(d) since May 1, 1982 was a Saturday. Director's Exhibit 55. Contrary to Judge Lindeman's analysis, however, inasmuch as claimant failed to act within 30 days of the denial, the date finality began to run was the last day upon which the deputy commissioner took action, i.e., April 1, 1982, and not 30 days hence. See 20

Director's Exhibit 55. Claimant therefore asserts that Judge Karst was bound by Judge Lindeman's earlier findings, and that Judge Karst arbitrarily applied the regulations at Part 718 without notice or justification. We disagree. Judge Lindeman's Order adjudicated the issue of whether transfer of liability to the Black Lung Disability Trust Fund was appropriate; however, inasmuch as claimant's entitlement to benefits and evidence in support thereof were not at issue, Judge Karst was not bound by Judge Lindeman's findings concerning whether claimant filed a timely request for modification. A review of the record reveals that the deputy commissioner denied claimant's 1977 claim on April 1, 1982, and thus the one-year period within which to request modification pursuant to 20 C.F.R. §725.310 expired on March 31, 1983. See Director's Exhibits 27, 31; Stanley v. Betty B Coal Co., 13 BLR 1-72 (1990). As claimant did not request modification until May 4, 1983, Judge Karst properly adjudicated the merits of claimant's duplicate claim filed on May 23, 1983, pursuant to the regulations at Part 718.[2] See Muncy v. Wolfe Creek Collieries

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C.F.R. §725.310; see generally Garcia v. Director, OWCP, 12 BLR 1-24 (1988).

[2] Claimant also complains that the Department of Labor (DOL) telephoned but failed to notify him in writing of the postponement of a scheduled hearing, and that the Director failed to timely submit a pre-hearing report. Claimant therefore asserts that he has been unfairly held to time limitations and set schedules, while DOL has not. We reject claimant's arguments, however, as the administrative law judge acted within his discretion in finding extraordinary, compelling reasons for the Director's inaction; and the administrative law judge further determined that claimant had not been unduly prejudiced, but offered claimant a continuance of the hearing, which claimant did not elect. See Hearing Transcript at 3-6; see generally Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989).

Coal Co., 3 BLR 1-627 (1981); see also Lukman v. Director, OWCP, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990).

Turning to the merits of this claim, claimant asserts that the x-ray, blood gas study and medical opinion evidence of record is sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to Section 727.203(a)(1), (a)(3) and (a)(4), and that the administrative law judge erred in evaluating this evidence pursuant to Part 718. As discussed supra, however, the regulations at Part 727 are inapplicable. The administrative law judge properly reviewed the evidence of record pursuant to Part 718, and determined that it was insufficient to sustain claimant's burden of establishing total disability due to pneumoconiosis pursuant to Section 718.204. As this claim arises within the appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit, claimant must establish that his pneumoconiosis was at least a contributing cause of his total disability. Mangus v. Director, OWCP, 882 F.2d 152, 13 BLR 2-9 (10th Cir. 1989). The administrative law judge acted within his discretion in according determinative weight to the opinions of Dr. Farney,[3] a pulmonary specialist, see

[3] Dr. Farney concluded that claimant suffered from chronic bronchitis and emphysema secondary to smoking, but not coal workers' pneumoconiosis or any respiratory impairment which would prevent him from returning to his usual coal mine employment. See Employer's Exhibit 1.

Dillon v. Peabody Coal Co., BLR 1-113 (1988), and Dr. Rawson,[4] claimant's treating physician, see Onderko v. Director, OWCP, 14 BLR 1-2 (1989), and Revnack v. Director, OWCP, 7 BLR 1-771 (1985), both of which satisfy the Mangus standard, based on the physicians' credentials and because he found that the opinions were well-reasoned and documented, and supported by the objective evidence of record. Decision and Order at 5; see King v. Consolidation Coal Co., 8 BLR 1-262 (1985); Wetzel v. Director, OWCP, 8 BLR 1-139 (1985); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985). The administrative law judge permissibly gave little weight to the opinion of Dr. Calhoun, who diagnosed total disability due to pneumoconiosis, as the physician was a non-examining general practitioner. Decision and Order at 4, 5; Claimant's Exhibit 1; see Onderko, supra. The administrative law judge also reasonably found that the opinions of Drs. Demman and Bekemeyer were equivocal at best.[5] See generally Campbell v. Dirctor, OWCP,

[4] Dr. Rawson diagnosed chronic bronchitis and moderate obstructive airway disease, and checked the "no" box on Department of Labor Form CM-988, indicating that the diagnosed condition was not related to occupational dust exposure. See Director's Exhibit 12; Perry v. Director, OWCP, 9 BLR 1-1 (1986).

[5] The administrative law judge found that the evidence concerning claimant's smoking history was inconsistent and contradictory, and that the lay testimony was not credible. Consequently, the administrative law judge credited the smoking histories listed on those medical reports which showed a significant history of smoking. The administrative law judge then determined that Dr. Demman never recorded a smoking history, and diagnosed possible pneumoconiosis in his 1973 report, but pneumoconiosis related to coal mine employment in his 1977 report, see Director's Exhibits 11, 50; and Dr. Bekemeyer diagnosed chronic bronchitis related to coal mine employment but opined "may be related to minimal smoking history or industrial bronchitis." Decision and Order at 3, 4; Director's Exhibit 39. An

11 BLR 1-16 (1987). Contrary to claimant's arguments, Drs. Baumeister, Payne and Sargent merely submitted x-ray interpretations, and Dr. Etzel did not render any disability findings, thus their reports are not relevant to the inquiry at Section 718.204(b). See Director's Exhibits 13, 27, 40, 41, 61, 62; Claimant's Exhibit 2; Pettry v. Director, OWCP, 14 BLR 1-98 (1990); Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989). The administrative law judge's findings pursuant to Section 718.204(b) are supported by substantial evidence and are hereby affirmed. Inasmuch as claimant has failed to establish that he is totally disabled due to pneumoconiosis, claimant is precluded from entitlement to benefits under Part 718, and thus we need not address claimant's arguments regarding the remaining issues of whether claimant established the existence of pneumoconiosis or total disability. See Trent, supra. Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

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administrative law judge may properly discount a medical opinion listing an inaccurate smoking history as unreliable on the issues of etiology and causation. See Stark v. Director, OWCP, 9 BLR 1-36 (1986), Maypray v. Island Creek Coal Co., 7 BLR 1-683 (1985).

NANCY S. DOLDER
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge