BRB No. 03-0856 BLA

HARRY J. GILPIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INC.	)	
	)	DATE ISSUED: 07/21/2004
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 – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Carl J. Smith, Jr. (Richman & Smith LLP) Washington, Pennsylvania, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2002-BLA-5136) of Administrative Law Judge Michael P. Lesniak rendered 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 credited claimant with twenty years and three months of coal mine employment[2] and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and further established the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c). Accordingly, the administrative law judge awarded benefits.

The relevant procedural history of this case is as follows: Claimant filed a claim for benefits on May 12, 1998, which was denied by a claims examiner on July 28, 1998. Director's Exhibits 1, 18. Following a hearing, Administrative Law Judge Richard A. Morgan issued a Decision and Order dated February 29, 2000. The administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4)(2000) and failed to establish total respiratory disability at Section 718.204(c)(1)-(4)(2000). Accordingly, he denied the claim. Director's Exhibit 45. Claimant filed an appeal with the Board, together with new evidence, which the Board construed as a request for modification. Therefore, the Board remanded the case to the district director. Director's Exhibits 46, 52. Following the district director's denial of modification, the case was assigned to Administrative Law Judge Michael P. Lesniak. Judge Lesniak issued a Decision and Order dated August 29, 2003, wherein he found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and further established the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(i)-(iv), 718.204(c). Thus, Judge Lesniak found the evidence sufficient to establish a change in conditions pursuant to Section 725.310, and, therefore, awarded benefits. Employer then filed the instant appeal with the Board.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the issues of the existence of pneumoconiosis, the existence of total disability, and total disability causation. Claimant

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[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] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

responds, urging affirmance of the administrative law judge's 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. 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. 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, *see* 20 C.F.R. §725.2(c), a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. If a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "There is no need for a smoking gun factual error, changed conditions or startling new evidence."), *see Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62 (3d Cir. 1995), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). Moreover, the Third Circuit has held that pursuant to a petition for modification, the administrative law judge must review all evidence of record, both newly submitted evidence and evidence previously in the record, and determine whether there was any mistake of fact made in the prior adjudication, including the ultimate fact, *see Keating*, 71 F.3d at 1123, 20 BLR at 2-63.

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[3] The administrative law judge's findings that claimant has twenty years and three months of coal mine employment, that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(3), that he is entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), that this presumption has not been rebutted, and that he failed to establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to Section 718.202(a)(4), in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to the opinion of Dr. Cohen, as supported by the opinions of Drs. Garson and Hahn, than to the opinions of Drs. Kinsella, Spagnolo, Laman and Cho. Decision and Order at 17-19. Employer initially contends that the administrative law judge erred in discrediting the opinions of Drs. Kinsella and Spagnolo, whom employer asserts are highly qualified and provided well documented and reasoned opinions. Employer's Brief at 11-12. Contrary to employer's arguments, the administrative law judge properly accorded less weight to Dr. Kinsella's opinion on the ground that his statement, that claimant "may" have significant airways obstruction which was "most likely" due to cigarette smoking and not coal dust exposure was equivocal. The administrative law judge also properly discredited the opinions of both Dr. Kinsella and Dr. Spagnolo, who opined that there was no objective, reliable, reproducible evidence that claimant had any lung disease arising out of coal dust exposure, because both physicians failed to explain how they were able to eliminate coal dust as a contributing factor to claimant's lung disease. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Gilliam v. G & O Coal Co.*, 7 BLR 1-59 (1984). Similarly, the administrative law judge also acted within his discretion in according little weight to the opinion of Dr. Cho, as he stated no rationale for his opinion that claimant does not have pneumoconiosis. Decision and Order at 19; *Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19; *Clark*, 12 BLR at 1-155; *Gilliam*, 7 BLR at 1-61.

Employer further asserts that in discrediting the opinion of Dr. Laman, the administrative law judge impermissibly substituted his own opinion for that of the physician. Employer's Brief at 14. We disagree. In his December 15, 2002 deposition, Dr. Laman testified that claimant suffered from obstructive lung disease which was due to cigarette smoking and not due to coal dust exposure. Employer's Exhibit 5 at 25. Dr. Laman explained that he could make this distinction because of the presence of small airways disease, which, he stated, is not caused by coal dust exposure. Employer's Exhibit 5 at 26. In evaluating Dr. Laman's opinion, the administrative law judge noted that Dr. Laman's conclusions regarding the significance of the presence of small airways disease were at odds with the comments to the regulations which contain language supporting the proposition that small airways disease can be associated with coal dust exposure. Decision and Order at 19. Employer asserts that in discrediting Dr. Laman's opinion on these grounds, the administrative law judge impermissibly substituted his own opinion for that of the physician. Employer's Brief at 14. Contrary to employer's arguments, while the administrative law judge did note the comments to the regulations, the administrative law judge specifically found, as was within his discretion, that Dr. Laman's opinion was unreasoned and entitled to less weight because he provided no authority for his conclusion that the presence of small airways disease rules out coal dust

as a contributory factor to claimant's lung disease. Decision and Order at 19; *Clark*, 12 BLR at 1-155.

In addition, employer asserts that the opinions of Drs. Cohen, Hahn and Garson are unreasoned and unsupported by the objective evidence of record, and that, therefore, the administrative law judge erred in according these opinions determinative weight. Employer's Brief at 7-10. With respect to Dr. Cohen's opinion, employer specifically asserts that his opinion is entitled to little weight for several reasons: it is based in part on a negative x-ray; his interpretation of the pulmonary function study evidence is in conflict with the interpretation provided by Dr. Laman; and his report contains a reference to an exercise blood gas study which is not contained in the record. Employer's Brief at 7-8. Contrary to employer's arguments, the administrative law judge acted within his discretion in according greatest weight to the opinion of Dr. Cohen, who he noted is a Board-certified pulmonologist and whose report he found well-documented and well-reasoned, because he took into account both claimant's significant coal mine employment history and significant smoking history, and clearly and persuasively explained, point by point, his opinion that coal mine dust exposure was a significant contributing cause of claimant's lung disease. Decision and Order at 11; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*), *rev'd on other grounds* 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *see Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Jewell Smokeless Coal Corp. v. Street*, 42 F.2d 241, 19 BLR 2-1 (4th Cir. 1994).

Similarly, the administrative law judge also permissibly credited the supporting opinions of Drs. Hahn and Garson, that claimant's diagnosed chronic obstructive pulmonary disease and chronic bronchitis are due to a combination of smoking and coal dust exposure, because he found their opinions to be well-reasoned and based on the relevant objective testing, physical examinations, medical history, smoking history and occupational history. Decision and Order at 18; Director's Exhibits 48, 53, Claimant's Exhibits 1, 2. Whether a medical report is sufficiently reasoned is for the administrative law judge as the trier of fact to decide. *See Clark*, 12 BLR at 1-155. In addition, contrary to employer's arguments, the more recent opinions of Drs. Garson and Hahn are not inconsistent with their prior reports of record, as neither physician had previously expressed an opinion as to whether claimant suffered from pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 7. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Moreover, after weighing together all the relevant evidence pursuant to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997),[4] the administrative law judge found that the medical evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 19. Because this finding is supported by substantial evidence, it is affirmed.

Pursuant to Section 718.204(b)(2)(iv), in finding the medical opinion evidence sufficient to establish the existence of a totally disabling respiratory impairment, the administrative law judge again accorded greater weight to the opinion of Dr. Cohen, as supported by the opinions of Drs. Garson and Hahn, than he accorded to the opinions of Drs. Kinsella, Spagnolo, Cho and Laman. Decision and Order at 17-19. Employer initially contends that the administrative law judge erred in discrediting the opinions of Drs. Kinsella and Spagnolo, who, employer asserts, are highly qualified and who provided well-documented and reasoned opinions. Employer's Brief at 11-12. Contrary to employer's arguments, the administrative law judge properly accorded less weight to Dr. Kinsella's opinion regarding the issue of total disability on the ground that the physician admitted that he did not know the severity of claimant's respiratory impairment. Decision and Order at 21-22; Employer's Exhibit 4. Similarly, the administrative law judge permissibly accorded less weight to the opinion of Dr. Spagnolo, that claimant's "physical limitation is secondary to his severe ischemic cardiovascular disease" on the ground that the opinion did not address whether claimant retained the respiratory capacity to perform his usual coal mine employment, therefore it is not a clear opinion on the issue of disability. Decision and Order at 21-22; Director's Exhibit 55; *Clark*, 12 BLR at 1-155. The administrative law judge also acted within his discretion in according little weight to Dr. Cho's opinion, because he failed to explain the basis for his conclusion that claimant was totally disabled. Decision and Order at 21-22; *Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19; *Clark*, 12 BLR at 1-155; *Gilliam*, 7 BLR at 1-61.

Employer further asserts that the administrative law judge erred in crediting the opinion of Dr. Cohen, that claimant suffers from a totally disabling respiratory impairment, over that of Dr. Laman, that claimant retained the respiratory capacity to perform his usual coal mine work, although perhaps at a slower pace. Employer's Brief at 8-9. Contrary to employer's arguments, the administrative law judge acted within his

[4] In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

discretion in according less weight to Dr. Laman's opinion because the physician stated that claimant could perform light to moderate work, while the administrative law judge had specifically found that claimant's usual coal mine work required heavy manual labor. Decision and Order at 21-22. The reasonableness of this analysis has been confirmed by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, which has held that an administrative law judge may accord little weight to a physician's opinion where the physician does not have an accurate picture of the exertional requirements of claimant's usual coal mine work.[5] *Gonzales v. Director, OWCP*, 869 F.2d 776, 779, 12 BLR 2-192, 2-197 (3d Cir. 1989).

Finally, contrary to employer's arguments, the administrative law judge permissibly credited the opinions of Drs. Cohen, Hahn and Garson, that claimant is totally disabled, because he found their opinions to be well-reasoned and documented, supported by the evidence of record including: diagnostic tests which show the presence of both restrictive and obstructive defects; claimant's occupational history; the physical exertion required by his last coal mine employment; his smoking history; his subjective symptoms and use of supplemental oxygen. Decision and Order at 21-22; s*ee Clark*, 12 BLR at 1-155. Therefore, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Regarding the cause of claimant's totally disabling respiratory impairment pursuant to Section 718.204(c), the administrative law judge analyzed the medical opinion evidence and found it sufficient to establish that claimant's disability is due to pneumoconiosis. The administrative law judge again accorded the greatest weight to the opinion of Dr. Cohen, which he found to be well-reasoned, well-documented, credible and highly persuasive, as well as supported by the opinions of Drs. Garson and Hahn. Decision and Order at 22. The administrative law judge accorded less weight to the opinions of Drs. Kinsella, Spagnolo, Laman and Cho because they opined, contrary to his findings, that claimant does not suffer from pneumoconiosis. Decision and Order at 22. Employer again contends that the administrative law judge erred in discrediting the opinions of Drs. Kinsella, Spagnolo, Laman and Cho, who, employer asserts, are highly qualified and provided well documented and reasoned opinions. Employer's Brief at 11-15. Contrary to employer's arguments, the Board has held that where the administrative

[5] As the administrative law judge properly accorded less weight to the opinion of Dr. Laman on the ground that his opinion is based on an inaccurate assessment of the exertional requirements of claimant's usual coal mine work, a finding which is unchallenged by employer on appeal, we need not address employer's assertion that the administrative law judge failed to resolve the differences between Drs. Laman and Cohen regarding the interpretation of the blood gas study evidence.

law judge has properly credited the medical opinion evidence supporting a diagnosis of pneumoconiosis, the administrative law judge may permissibly reject another physician's opinion on causation because its underlying premise, that the miner does not have pneumoconiosis, is inaccurate. *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986); *Soubik v. Director, OWCP*, 366 F.3d 226, 234, --- BLR --- (3d Cir. 2004). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Because the administrative law judge has discretion to resolve conflicts in the medical evidence, his findings will not be disturbed if supported by substantial evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). The administrative law judge considered "the qualifications of the competing physicians and the quality of their respective reasoning," *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002), and provided valid reasons for assigning greater weight to claimant's evidence and less weight to employer's competing evidence. We affirm the administrative law judge's finding that claimant met his burden of proof to establish the existence of totally disabling pneumoconiosis because the medical opinions of Drs. Laman, Spagnolo, Kinsella and Cho were properly found to be outweighed by the contrary opinions of Drs. Cohen, Garson and Hahn. We therefore affirm as supported by substantial evidence the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2)(i)-(iv), and 718.204(c) and his determination that claimant established a change in conditions sufficient to warrant modification of the prior decision and to establish entitlement to benefits. *See* 20 C.F.R. §725.310; *Keating*, 71 F.3d at 1123, 20 BLR at 2-63.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is hereby 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 J. HALL
Administrative Appeals Judge