BRB No. 00-0684 BLA

JAMES ROBERTSON)
)
Claimant-Petitioner)
)
v.)
)
ACTION MINING COMPANY) DATE ISSUED:

)
and)
)
ROCKWOOD CASUALTY)
)
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 On Remand - Denying Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor

James M. Jacobs, Jr. (Yelovich & Flower), Somerset, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order On Remand - Denying Modification (97-BLA-858) of Administrative Law Judge Michael P. Lesniak 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 *et seq*. (the Act).[1] This case is on appeal to the Board for a second time.[2] In the initial Decision and Order on modification, the administrative law judge credited claimant with twenty-three years of coal mine employment and found employer to be the responsible operator. The administrative law judge found the medical

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his initial application for benefits on May 21, 1996 which the district director denied on August 16, 1996 on the grounds that claimant did not establish the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment due to pneumoconiosis. *See* Director's Exhibits 1, 16. Claimant timely requested modification on November 5, 1996 and submitted new evidence. *See* Director's Exhibits 24, 25. On February 7, 1997, the district director issued a Proposed Decision and Order Granting Request for Modification and awarded benefits after finding that claimant established a change in conditions as claimant had established the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment due to pneumoconiosis. *See* Director's Exhibit 33. In response, employer requested a hearing on modification which was held on March 26, 1998. *See* Director's Exhibit 34; Hearing Transcript.

opinion evidence of record sufficient to establish the existence of pneumoconiosis and that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment. The administrative law judge also found that claimant established a totally disabling respiratory impairment based on qualifying pulmonary function and blood gas studies and that claimant's pneumoconiosis was a contributing cause of his totally disabling respiratory impairment. Accordingly, benefits were awarded.

On appeal, the Board affirmed the findings of the administrative law judge on the length of coal mine employment, on cause of pneumoconiosis, on total disability, and on onset, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The Board, however, vacated the administrative law judge's findings on the existence of pneumoconiosis and remanded the case for further consideration pursuant to *Penn Allegheny v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[3] The Board also vacated the findings of the administrative law judge on cause of disability and remanded the case for consideration of that issue, if reached. *See Robertson v. Action Mining Co.*, BRB No. 98-1289 BLA (Nov. 8, 1999).

In weighing all of the record evidence together, pursuant to *Williams*, *supra*, including the x-rays and medical opinions, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis. The administrative law judge further concluded that because claimant had not established the existence of pneumoconiosis, he was not entitled to the benefit of the presumption that his pneumoconiosis arose out of coal mine employment, or that pneumoconiosis, even as defined under the broad definition of the term, *see* 20 C.F.R. §718.201, was a "substantial contributor" to his totally disabling respiratory impairment. Thus, having found that claimant failed to establish any element of entitlement previously adjudicated against him, the administrative law judge denied claimant's request for modification, and benefits were, accordingly, denied.[4]

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[3] Since the miner's last coal mine employment took place in Pennsylvania, the Board applied the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] The administrative law judge erred in referring to the standards enunciated in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995) and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) as governing his determination on modification inasmuch as these cases deal with the standard in duplicate claims. This error is harmless, however, as the administrative law judge correctly considered all the evidence of record to determine whether there was a basis for modification. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

On appeal, claimant challenges the findings of the administrative law judge on the existence of pneumoconiosis. Employer responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which only the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[5] Based on the brief submitted by the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

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 in a living miner's claim pursuant to 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. 20 C.F.R. §§718.202, 718.203, 718.204. 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*).

First, claimant argues that the administrative law judge erred in his weighing of the x-ray evidence as he failed to consider whether the readers who submitted interpretations on behalf of employer were biased. Specifically, claimant contends that the x-ray interpretations

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[5] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

of Drs. Soble, Duncan and Laucks should be rejected on the basis of bias because these physicians were all employed by the same company and employer provided no evidence of the independence of these x-ray readers, even though it appears that the readings were performed on separate dates. Claimant thus asserts that because employer failed to produce relevant evidence on the issue of the physicians' independence of each other, evidence which is within employer's control, the Board should draw a negative inference that the physicians' readings were not rendered independently of each other, and that the physicians were, therefore, biased. We disagree.

The party alleging bias must prove its allegations based on affirmative evidence in the record. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). In the instant case, claimant merely conjectures that the evidence submitted by employer may be biased because the x-ray readers were all employed by the same company. He has offered no proof of this bias, if any; however, even conceding that the readings were performed on different dates. Claimant's Brief at 7. Instead, claimant would have the Board hold that the administrative law judge must assume the x-ray readers in this case were biased unless employer can prove that their readings were conducted independently of each other. This is a misstatement of the law. *See Melnick*, *supra*. Accordingly, claimant's argument is rejected.[6]

Next, claimant argues that the administrative law judge erred in relying on the opinion and testimony of Dr. Strother to deny benefits. Claimant asserts that Dr. Strother's opinion should be discredited because Dr. Strother does not recognize that chronic bronchitis and emphysema can arise from coal mine employment, a premise which is fundamentally at odds with the Act. Claimant also contends that Dr. Strother's opinion that claimant's chronic bronchitis is due to cigarette smoking rather than coal dust exposure in insufficiently specific and does not sufficiently focus on claimant. Claimant's Brief at 6.

In finding that the medical opinion evidence did not establish the existence of pneumoconiosis, the administrative law judge accorded little weight to the opinions of Drs. Raver, Schmitt and Levine who attributed some part of claimant's respiratory disability to coal worker's pneumoconiosis because their opinions were not supported by the evidence of record and were based on incomplete information.[7] The administrative law judge credited

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[6] Moreover, because the record does not show that claimant raised this issue before the administrative law judge, claimant is precluded from raising it for the first time on appeal. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

[7] Claimant does not challenge the administrative law judge's reasons for finding unpersuasive, the medical opinions of Drs. Levine and Schmitt, which he found entitled to less weight, and the medical opinion of Dr. Raver, which he found entitled to little weight,

the opinions of Drs. Hanzel and Strother because they had examined claimant, and because their opinions were in accord with each other and the objective evidence of record. Further, the administrative law judge noted that Dr. Strother was a highly qualified pulmonary specialist, who presented a thorough, well-reasoned, and well-documented opinion which supported his conclusion that "[c]laimant [did] not present sufficient evidence of pneumoconiosis, even under the broad definition contemplated by the Act, and that his respiratory problems [were] caused by asthma or asthmatic bronchitis resulting from his not insignificant smoking habit." Decision and Order at 10.

Pneumoconiosis is defined, for the purpose of the Act, as a "chronic dust disease of the lung and its sequelae, including respiratory or pulmonary impairments, arising out of coal mine employment." 20 C.F.R. §718.201 (emphasis added). Legal pneumoconiosis is further defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment[,]" including, "but...not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2)(emphasis added). Further, arising out of coal mine employment is defined as including "any chronic pulmonary disease or respiratory impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b)(emphasis added).

Contrary to claimant's argument, in the instant case, Dr. Strother recognized that chronic bronchitis and emphysema could be related to coal mine employment, Employer's Exhibit 2 at 29-30, but opined that, claimant's severe obstructive lung disease was consistent with asthmatic bronchitis related to cigarette smoking and attributed claimant's obstructive lung disease to his cigarette smoking, not coal workers' pneumoconiosis. Employer's Exhibit 2 at 22-23.

Because Dr. Strother does not in any way indicate that claimant's obstructive lung disease is related to coal mine employment, we cannot say that the administrative law judge acted irrationally or contrary to the law in finding that Dr. Strother's opinion did not establish the existence of pneumoconiosis as defined by the Act. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Further, contrary to claimant's argument that Dr. Strother's opinion is not sufficiently specific or focused on claimant to be reliable, Dr. Strother's opinion is based on examination, work, smoking, family and medical histories, symptoms and objective medical data. *See Church v. Eastern Associated Coal Corp.*, 20

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and for crediting the medical opinion of Dr. Hanzel. These findings are, therefore, affirmed *See Skrack*, *supra*.

BLR 1-8 (1996); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We, therefore, affirm the administrative law judge's crediting of Dr. Strother's opinion. *See Williams*, *supra*; *see also Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Further, inasmuch as claimant has raised no other arguments regarding the administrative law judge's analysis of the evidence, we must affirm his findings on pneumoconiosis and disability causation.

Accordingly, the Decision and Order On Remand - Denying Modification of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge