BRB No. 04-0896 BLA

DOWELL BAILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/17/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Request for Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Howard M. Radzely, 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Request for Modification (2003-BLA-0257) of Administrative Law Judge Michael P. Lesniak 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.*[1] This case is before the Board for the third

[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 codified at 20 C.F.R. Parts 718, 722, 725, and 726.

time.[2] Claimant's entitlement to benefits was conceded by the Director, Office of Workers' Compensation Programs (the Director), in 1996. Director's Exhibit 54. The issue that remained for determination was the date from which claimant's benefits should be payable.

In a Decision and Order issued on November 5, 2001, the Board held that the administrative law judge permissibly found that the opinion dated July 21, 1995 by Dr. Walker, that claimant was totally disabled, was the best reasoned opinion and that the administrative law judge also permissibly credited Dr. Zaldivar's opinion dated April 17, 1991, that claimant had no impairment and was not totally disabled, thus precluding an onset date of total disability due to pneumoconiosis prior to that date. *Bailey v. Director, OWCP*, BRB No. 01-0110 BLA, slip op. at 4 (Nov. 5, 2001)(unpub.). The Board noted that the Director conceded that claimant's onset of total disability due to pneumoconiosis commenced in the month following Dr. Zaldivar's opinion, *i.e.*, as of May 1991. *Id.* Accordingly, to be consistent with the Director's position and the evidence of record, the Board modified the administrative law judge's finding of onset of total disability due to pneumoconiosis from July 1, 1995 to May 1, 1991. *Id.*

Thereafter, claimant timely requested modification of the onset date determination pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 97. No new evidence was presented and the parties waived their right to a hearing. The administrative law judge denied claimant's request for modification. The administrative law judge credited as well-reasoned and supported Dr. Zaldivar's 1991 opinion diagnosing no respiratory impairment over Dr Rasmussen's 1971 contrary opinion, and he declined to credit Dr. Pelaez's 1981 qualifying pulmonary function study. The administrative law judge further found that based on Dr. Zaldivar's opinion, claimant could not have been totally disabled due to pneumoconiosis as of April, 1991, and that based on Dr. Walker's July 21, 1995 report, claimant was totally disabled due to pneumoconiosis by July, 1995. Accordingly, the administrative law judge found that since the Director conceded that claimant was totally disabled due to pneumoconiosis as of the month following Dr. Zaldivar's April, 1991 report, claimant was entitled to benefits as of May 1, 1991. The administrative law judge therefore concluded that there was no mistake in a determination of fact in the prior onset date determination.

The new regulations are not applicable to this case because claimant filed his claim prior to March 31, 1980. Director's Exhibits 1, 28.

[2] The full procedural history of this case is set forth in the Board's Decision and Order of November 5, 2001. *Bailey v. Director, OWCP*, BRB No. 01-0110 BLA (Nov. 5, 2001)(unpub.); Director's Exhibit 96.

On appeal, claimant contends that the record does not establish when he became totally disabled due to pneumoconiosis and he requests that the Board reverse the administrative law judge's decision and find claimant entitled to benefits as of February 1, 1975, the month in which he filed his application for benefits. The Director responds, urging affirmance of the administrative law judge's decision to deny claimant's modification request.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

If a miner is found entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989). Consequently, should an administrative law judge find a miner entitled to benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled due to pneumoconiosis, then the miner is entitled to benefits as of his filing date, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at some point subsequent to the filing date. *Lykins*, 12 BLR at 1-183. In the case at bar, the administrative law judge found that the evidence affirmatively established that claimant was totally disabled due to pneumoconiosis by July 1, 1995, and he accepted the Director's continued concession that claimant was totally disabled as of the month following Dr. Zaldivar's April, 1991 report.

Claimant contends that the administrative law judge erred in relying on Dr. Zaldivar's 1991 diagnosis of "no impairment" in determining the onset date of claimant's total disability due to pneumoconiosis, because Dr. Zaldivar "was unable to diagnose the presence of pneumoconiosis and erroneously concluded that the claimant had no pulmonary impairment." Claimant's Brief at 3. We disagree.

In the prior proceedings concerning the merits of claimant's entitlement to benefits under 20 C.F.R. Part 727, the United States Court of Appeals for the Fourth Circuit rejected claimant's argument that Dr. Zaldivar's "no impairment" opinion had to be discredited because Dr. Zaldivar did not diagnose pneumoconiosis, contrary to the administrative law judge's finding that claimant had invoked the interim presumption of total disability due to pneumoconiosis by positive x-rays:

> Pneumoconiosis is established on the basis of different data than the other critical elements of a black lung claim, and it is not necessarily inconsistent to credit a physician's opinion regarding one element while rejecting his view concerning another element. . . . Moreover, contrary to Bailey's contention, Dr. Zaldivar's finding of no pulmonary impairment was reached independently of his finding of no pneumoconiosis, and the former finding is supported by the results of Dr. Zaldivar's pulmonary function tests, blood gas tests, and physical examination.

Bailey v. Director, OWCP, No. 93-1157, slip op. at 3 (4th Cir., Nov. 7, 1994).[3] We therefore reject claimant's contention that the administrative law judge erred in relying on Dr. Zaldivar's finding of no pulmonary impairment.

Additionally, there is no merit in claimant's general assertion that Dr. Zaldivar "erroneously concluded that the claimant had no pulmonary impairment." Claimant's Brief at 3. The administrative law judge found that Dr. Zaldivar's assessment was supported by the objective testing and physical examination that he conducted, and reasonably concluded that Dr. Zaldivar's opinion merited "great weight" in view of Dr. Zaldivar's high qualifications in pulmonary medicine. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 546, 21 BLR 2-323, 2-335, 2-341 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Claimant alleges no specific error in the administrative law judge's discretionary determination, which is supported by substantial evidence. Accordingly, we reject claimant's general allegation of error in the administrative law judge's decision to rely on Dr. Zaldivar's opinion.

Claimant additionally contends that the administrative law judge erred in finding that positive x-ray readings did not establish that claimant was totally disabled due to pneumoconiosis as of the date of the x-ray readings. Claimant's Brief at 3. Contrary to claimant's contention, the administrative law judge correctly found that two positive readings of a chest x-ray taken on January 7, 1991 documented the presence of pneumoconiosis, but did not prove that claimant was totally disabled due to pneumoconiosis as of that point in time for purposes of determining the onset date of his

[3] The Fourth Circuit court's decision in this case was rendered after the court's decision in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), addressing the probative value of a physician's "no impairment" opinion that is premised on a finding that the miner does not have pneumoconiosis. The court cited *Grigg* in its decision in this case. *Bailey v. Director, OWCP*, No. 93-1157, slip op. at 2 (4th Cir., Nov. 7, 1994).

entitlement to benefits. *See Lykins*, 12 BLR at 1-182-83; *Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129 n.4 (1987). Consequently, we reject claimant's contention.[4]

In addition, claimant contends that Dr. Rasmussen, in his 1971 report, submitted pulmonary function and blood gas studies that were "within limits" but that Dr. Rasmussen noted that claimant showed impairment in oxygen transfer as well as an abnormal ventilatory response to exercise. Claimant's Brief at 4. The administrative law judge considered that Dr. Rasmussen examined and tested claimant in 1971 and concluded that claimant "would appear to be incapable of performing steady work beyond light work levels." Decision and Order at 6; Director's Exhibit 28, exhibit 22 at 2. The administrative law judge found, however, that the pulmonary function studies and resting arterial blood gas levels obtained by Dr. Rasmussen were normal. *Id.* Substantial evidence supports this finding. The pulmonary function and blood gas studies conducted by Dr. Rasmussen were non-qualifying for total disability and Dr. Rasmussen rated the pulmonary function study and resting blood gas study "normal." Director's Exhibit 28, exhibit 22 at 1. The administrative law judge rationally found the opinion of Dr. Rasmussen not well-reasoned because he "offer[ed] no reasonable explanation for his conclusion," despite claimant's normal objective tests. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Moreover, on this record as weighed by the administrative law judge, claimant presents no reason for the Board to remand this case for the administrative law judge to consider Dr. Rasmussen's additional observation that claimant's 1971 exercise test reflected "minimal impairment" in oxygen transfer. Director's Exhibit 28, exhibit 22 at 2. Review of Dr. Rasmussen's opinion reveals no explanation for his disability diagnosis in light of exercise results showing minimal impairment, yet the administrative law judge has already permissibly sought "reasonable explanation" for Dr. Rasmussen's conclusions. Decision and Order at 6; *see Clark*, 12 BLR at 1-155. Additionally, the administrative law judge reasonably chose to give "greater weight" to Dr. Zaldivar's April, 1991 diagnosis of no pulmonary impairment in part because Dr. Zaldivar was "highly qualified" by his certification in both internal medicine and pulmonary disease. Decision and Order at 6; *see Hicks*, 138 F.3d at 546, 21 BLR at 2-341. A review of the record reflects that, by contrast, Dr. Rasmussen is not certified in pulmonary disease. Director's Exhibit 28, exhibit 23. We therefore agree with the Director that on this

[4] Because we reject claimant's contention on these grounds, we need not address the Director's argument that whether the x-ray evidence is positive for pneumoconiosis has never been properly resolved because a previous administrative law judge relied on the true-doubt rule to find that claimant established invocation of the interim presumption by x-ray evidence pursuant to 20 C.F.R. §727.203(a)(1). Director's Brief at 3.

record as weighed by the administrative law judge, it would be futile to remand this case for the administrative law judge to consider further Dr. Rasmussen's 1971 report.

Accordingly, the administrative law judge's Decision and Order-Denying Request for Modification is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge