BRB No. 96-0979 BLA

EDWARD KUBILUS )
)
Claimant-Petitioner )
)
v. )
)
KOCHER COAL COMPANY )
)
and )
)
LACKAWANNA CASUALTY COMPANY )
) DATE ISSUED:
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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Lynne G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:
Claimant[1] appeals the Decision and Order (95-BLA-0713) of Administrative

Law Judge Paul H. Teitler 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). The administrative law judge credited claimant with twenty-four years of qualifying coal mine employment and found

that he established the existence of pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1), (4). Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.[2]

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).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Claimant first contends that the administrative law judge erred in crediting Dr. Levinson's invalidation of the qualifying pulmonary function studies of October 12, 1994 and April 3, 1995. Claimant's Brief at 4; Claimant's Exhibits 3, 8. Dr. Levinson, in reports dated January 23, 1995, found the October 1994 pulmonary function study to be invalid because the "effort expended by the patient is judged unacceptable" and because he did not "feel that the entire forced vital capacity curves" had been displayed. Employer's Exhibit 6. Dr. Levinson, in a report dated April 28, 1995, invalidated the April 1995 pulmonary function study because claimant expended unacceptable effort. Employer's Exhibit 9. The administrative law judge permissibly credited these invalidations because he found them to be the most well-reasoned and explained. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent v. Director, OWCP 11 BLR 1-26 (1987); Siegel v. Director, OWCP*, 8 BLR 1-156 (1985).

Claimant next contends that the administrative law judge's reasons for not considering the most recent pulmonary function study evidence of record were cursory and lacked "appropriate rationale." Claimant's Brief at 5. The most recent pulmonary function study, dated October 9, 1995, produced qualifying results. Claimant's Exhibit 18. The record also contains pulmonary function studies dated August 3, 1995, September 13, 1994, and May 11, 1994 which produced non-qualifying results. Director's Exhibit 9, 10; Employer's Exhibit 11. The August 3, 1995 pulmonary function study was invalidated by Dr. Simelaro who stated that there "are three spirometric loops that are not legally acceptable, although clinically acceptable." Director's Exhibit 18. The administrative law judge permissibly found this pulmonary function study to be in substantial compliance and found it and the May 11, 1994 study to be the most probative. Decision and Order at 8; *see Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987).

The administrative law judge then permissibly found the October 9, 1995 qualifying pulmonary function study to be unpersuasive on the basis of the non-qualifying results of the August 3, 1995 pulmonary function study. Decision and Order at 8; Claimant's Exhibit 18; Employer's Exhibit 11; *see Lafferty*, *supra*. The administrative law judge then rationally concluded that, based upon the non-qualifying results of the September 13, 1994 study as supported by the non-qualifying results of the August 3, 1995 study, that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1). Decision and Order at 8; Director's Exhibit 10; Employer's Exhibit 11; *see Lafferty*, *supra.* Thus, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1).

Claimant next contends that the administrative law judge erred in crediting the opinions of Drs. Cable and Levinson, who opined that claimant was not totally disabled, over the opinions of Drs. Kruk, Simelaro, and Kraynak, who opined that claimant does have total respiratory disability. Director's Exhibit 11; Claimant's Exhibits 1, 2, 4, 17, 18; Employer's Exhibit 10. The administrative law judge found the opinions of Drs. Cable and Levinson to be entitled to the greatest weight because their opinions were well-reasoned and well-documented, due to the fact that they performed blood gas and pulmonary function testing which supported their opinions. Decision and Order at 11; Director's Exhibit 11; Employer's Exhibit 10.

The administrative law judge then found that Dr. Simelaro's opinion was not well-reasoned or well-documented. The administrative law judge concluded that Dr. Simelaro did not explain the discrepancies between his statement, in his deposition

of May 18, 1995, that pneumoconiosis "gives you really restrictive lung disease, while smoking gives you an obstructive pattern" and his statement, in his report of October 12, 1995, that claimant has "obstructive pulmonary disease, not only as a result of smoking, but also because of his marked coal worker's exposure." Decision and Order at 11; Claimant's Exhibit 17, 18. However, contrary to the administrative law judge's statement, Dr. Simelaro did not state that pneumoconiosis only causes a restrictive lung disease because he states, in his deposition, that pneumoconiosis "can give you obstructive disease." Claimant's Exhibit 17 at 17. Dr. Simelaro also noted, in his report of October 12, 1995, that "[o]riginally, he had a mild obstruction and now there is a moderate obstruction noted" due in part to his "coal worker's exposure." Director's Exhibit 18. This error is harmless, however, because the administrative law judge also permissibly found Dr. Simelaro's opinion to be not well-reasoned or well-documented because Dr. Simelaro failed to explain his finding of total respiratory disability in light of the non-qualifying results of a pulmonary function study performed by Dr. Levinson, which he reviewed on October 12, 1995, and because his opinion that claimant suffers from total respiratory disability is based upon a pulmonary function study, performed by Dr. Kraynak, which he found to be normal in his report of December 23, 1994. Decision and Order at 11-12; Claimant's Exhibit 4, 18; *see Clark*, *supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, the administrative law judge permissibly found Dr. Kraynak's opinion entitled to less weight than Dr. Levinson's opinion on the basis of Dr. Levinson's superior qualifications. Decision and Order at 12; Claimant's Exhibit 18; Employer's Exhibit 10; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, the administrative law judge properly assigned less weight to Dr. Kruk's opinion because he relied upon a pulmonary function study that was invalidated by Dr. Levinson. Decision and Order at 12; Claimant's Exhibit 2; Employer's Exhibit 6; *see Clark, supra*; *Lucostic, supra*; *Peskie, supra*.

Inasmuch as the administrative law judge must weigh all of the evidence of record and draw his own conclusions and inferences, *see Lafferty*, *supra*, and has broad discretion to assess the record and determine whether a party has met its burden of proof, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge