BRB No. 97-1562 BLA

GEORGE W. McGINNIS)
)
Claimant)
)
v.)
)
CONSOLIDATION COAL COMPANY)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
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.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-187) of Administrative Law Judge Michael P. Lesniak awarding 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 at least thirty-five years of qualifying coal mine employment, and adjudicated the claim, filed on December 8, 1994, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence 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 total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1), (4). The administrative law judge further found that it was unclear whether an earlier claim, filed on January

19, 1984, should be considered finally denied or still pending, but that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(b). Claimant and the Director, Office of Workers' Compensation Programs (the Director), have not participated in this appeal.[1]

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).

Employer contends that the administrative law judge erred in evaluating the evidence pursuant to Sections 718.202(a)(4) and 718.204(b). Specifically, employer argues that the administrative law judge substituted his own conclusions for those of qualified physicians, mischaracterized the opinions of Drs. Jaworski and Lenkey, and failed to provide valid reasons for crediting the opinions of Drs. Jaworski, Lenkey and Frome, that the miner had pneumoconiosis which contributed in part to his totally disabling respiratory impairment, over the contrary opinions of Drs. Altmeyer and Fino that claimant does not have pneumoconiosis and that his disability is due entirely to smoking.

After consideration of the administrative law judge's Decision and Order, the

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[1]The administrative law judge's finding that claimant was entitled to the presumption at 20 C.F.R. §718.203(b) which was not rebutted, his finding that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1), (4), and his finding that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309, are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In evaluating the medical opinions at Sections 718.202(a)(4) and 718.204(b), the administrative law judge accurately reviewed the physicians' qualifications, conclusions and underlying documentation. Decision and Order at 5-7. Initially, we reject employer's argument that because Drs. Jaworski and Lenkey interpreted x-rays as positive for pneumoconiosis, the credibility of their diagnosis of pneumoconiosis is questionable in light of the administrative law judge's finding that the weight of the x-ray evidence was negative. A review of the record reveals that both physicians diagnosed "legal" pneumoconiosis as defined in 20 C.F.R. §718.201, and not merely "clinical" pneumoconiosis based solely on positive x-ray interpretations. Decision and Order at 6, 7; Director's Exhibit 14; Employer's Exhibits 6, 14.

Employer also asserts that the opinions of Drs. Jaworski and Lenkey do not support a finding of causation because these physicans agreed with Drs. Fino and Altmeyer that the normal pulmonary function study results obtained three years after claimant left coal mine employment indicated that claimant's continued smoking was the cause of his deteriorating ventilatory function. We disagree. The administrative law judge reasonably determined that despite some internal inconsistencies, Drs. Jaworski and Lenkey essentially opined that smoking was the primary cause of claimant's respiratory disability, but that dust exposure in coal mine employment was a contributing factor, and the physicians could not quantify the relative contribution from either cause. Decision and Order at 6-8; Employer's Exhibit 6 at 15-20; Employer's Exhibit 14 at 9, 13, 14, 19, 22-25. The administrative law judge then acted within his discretion as trier-of-fact in finding that, notwithstanding the preponderance of negative x-ray evidence, the normal pulmonary function study results three years after claimant left mining, and claimant's continued smoking, the opinions of Drs. Altmeyer and Fino were not persuasive, and that the opinions of Drs. Frome, Jaworski and Lenkey were entitled to greater weight as they were more consistent with claimant's lengthy history of coal mine employment,[2] his symptoms,

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[2]Employer additionally argues that the administrative law judge failed to specifically explain how he credited claimant with at least thirty-five years of coal mine employment, and asserts that the record only substantiates twenty-five years of coal mine employment. While we agree that the administrative law judge should have explicitly identified the evidence he relied on, the record contains evidence which supports the administrative law judge's finding, and the error is harmless inasmuch as it does not affect the outcome of this case. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). The application of regulatory presumptions is not affected, and even twenty-five years of coal mine employment constitutes a

recent abnormal blood gas and pulmonary function study results, and the progressive nature of pneumoconiosis. Decision and Order at 8, 10; *see generally Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). While employer asserts that the opinions of Drs. Altmeyer and Fino are better reasoned, an administrative law judge does not have to accept the opinion or theory of any given medical witness, but may weigh the evidence and draw his own conclusions, and the Board is not empowered to reweigh the evidence. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). The administrative law judge's findings and inferences pursuant to Sections 718.202(a)(4) and 718.204(b) are supported by substantial evidence, consistent with applicable law, *see Robinson v. Pickands Mather & Co.*, 914 F.2d 790, 14 BLR 2-68 (4th Cir. 1990), and thus are affirmed. Consequently, we affirm his award of benefits.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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significant exposure, as recognized by the statute and regulations.