BRB No. 98-0996 BLA

HAROLD D. STUMP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order - Awarding Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0139) of Administrative Law Judge Lawrence P. Donnelly 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). This case is on appeal to the Board for a second time. In his initial Decision and Order issued on July 22, 1993, Administrative Law Judge Lawrence E. Gray accepted the stipulation of employer that claimant had nineteen years and eight months of qualifying coal mine employment, and a totally disabling respiratory impairment. The administrative law judge then adjudicated this claim, filed on January 28, 1992, pursuant to the provisions at 20 C.F.R. Part 718, and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but was insufficient to establish that claimant's total disability was due to

pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's finding that claimant failed to establish causation at Section 718.204(b), and thus affirmed the denial of benefits. *Stump v. Peabody Coal Co.*, BRB No. 93-2216 BLA (May 31, 1994)(unpublished). Claimant filed a motion for reconsideration on June 21, 1994, and subsequently filed a request for modification pursuant to 20 C.F.R. §725.310 on May 26, 1995. By Order dated June 28, 1995, the Board dismissed claimant's motion for reconsideration without prejudice, and remanded this case to the district director for modification proceedings. The case was ultimately transferred to the Office of Administrative Law Judges, and assigned to Administrative Law Judge Lawrence P. Donnelly.

In a Decision and Order issued on March 18, 1998, the administrative law judge found that employer was bound by his previous stipulations regarding the length of qualifying coal mine employment and total respiratory disability, but determined that Administrative Law Judge Gray's findings pursuant to Sections 718.202(a)(1), 718.203(b) did not constitute the "law of the case." The administrative law judge then found that the weight of the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4), 718.203(b), and causation pursuant to Section 718.204(b). Consequently, the administrative law judge awarded benefits on modification.

In the present appeal, employer challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1), (4), 718.204(b) and 725.310. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in 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).

Employer initially contends that the administrative law judge erred in failing to determine explicitly whether modification was appropriate based on a mistake in a determination of fact or a change in conditions pursuant to Section 725.310. Employer asserts that if modification was based on a mistake in fact, the administrative law judge should not have performed a *de novo* weighing of the record evidence, but was required to identify a mistake in Judge Gray's finding that claimant's disability was due to smoking and not pneumoconiosis before proceeding to the merits and reopening the record. Employer also argues that modification based on a change in conditions is not appropriate because claimant cannot establish that pneumoconiosis was a necessary cause of disability at Section

718.204(b) if he was already totally disabled due entirely to smoking in 1993. Employer's arguments are without merit. In cases such as this which arise within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, if a claimant avers generally that the ultimate fact was mistakenly decided, the administrative law judge has the authority, without more, to modify the denial of benefits. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In the present case, the administrative law judge properly determined that "[a]ll of the evidence of record is to be reviewed in determining whether a mistake in a determination of fact was made," Decision and Order at 6, noting that he had "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc*, 404 U.S. 254, 256 (1971). The administrative law judge's conclusion that the finding of ultimate fact, *i.e.*, claimant's eligibility for benefits, should be modified is thus subsumed in his findings on the merits. *See Jessee*, *supra*.

Employer next contends that the administrative law judge erred in relying on the opinions of Drs. Doyle, Rasmussen and Koenig to support his finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(b). Employer also maintains that the opinion does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). Specifically, employer argues that the administrative law judge failed to provide a separate causation analysis under the appropriate standard at Section 718.204(b), and provided no reason for discounting the opinions of Drs. Zaldivar, Renn and Tuteur that claimant's disabling chronic obstructive pulmonary disease and emphysema were caused entirely by smoking and were unrelated to dust exposure in coal mine employment.

After consideration of the administrative law judge's Decision and Order, the 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 8-18. The administrative law judge determined that while Drs. Tuteur, Zaldivar and Renn stated that claimant's disabling obstructive impairment was caused by smoking alone, Drs. Doyle, Rasmussen and Koenig opined that coal dust exposure was a substantial contributing factor to claimant's impairment, and that they could not attribute the obstruction to smoking alone or quantify the relative contributions from either cause. Decision and Order at 17. The administrative law judge further determined that the physicians of record disagreed as to the validity and significance of the studies in the medical literature offered in support of the various positions, but that no opinion was shown to be unreasonable. The administrative law judge then acted within his

discretion as trier-of-fact in according determinative weight to the opinion of Dr. Doyle, claimant's treating physician, which was buttressed by the opinion of pulmonary expert Dr. Koenig as well as by the opinion of Dr. Rasmussen. Decision and Order at 18; *see generally Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Contrary to employer's assertions, the administrative law judge did not mechanistically credit Dr. Doyle's opinion, but considered the totality of evidence in this case and was not required to defer to the numerical preponderance of opinions by Board-certified pulmonary experts.[1] *See generally Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). While employer maintains that the opinions of Drs. Zaldivar, Renn and Tuteur 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 35, 14 BLR 2-68 (4th

[1] Although employer correctly notes that only Dr. Koenig possesses qualifications comparable to those of Drs. Zaldivar, Renn and Tuteur, the administrative law judge accurately determined that Dr. Doyle is Board-certified in family medicine and Dr. Rasmussen is Board-certified in internal and forensic medicine. Decision and Order at 11-12. Additionally, the curriculum vitae of each physician reflects extensive pulmonary experience despite the fact that Drs. Doyle and Rasmussen are not Board-certified in pulmonary medicine. *See* Claimant's Exhibits 1-2.

Cir. 1990), and thus are affirmed. Consequently, we affirm the administrative law judge's finding that claimant is entitled to benefits, and need not reach employer's arguments challenging the administrative law judge's findings at Section 718.202(a)(1).[2]

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[2] The administrative law judge found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) because the conflicting x-ray interpretations by the best qualified readers were in equipoise. Decision and Order at 7-8. The administrative law judge's findings at Section 718.202(a)(1) were supported by substantial evidence, in accordance with law, *see Adkins*, *supra*, and did not affect his weighing of the medical opinions at Section 718.202(a)(4), which addressed the existence of pneumoconiosis as defined at 20 C.F.R. §718.201 rather than the existence of clinical pneumoconiosis. Decision and Order at 17-18.

REGINA C. McGRANERY
Administrative Appeals Judge