BRB No. 99-0751 BLA

GEORGE HAVANIS	)	
Claimant-Petitioner	)	DATE ISSUED:
v.	)	
CONSOLIDATION COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order--Denying Benefits on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Debra L. Henry (United Mine Workers of America, Compensation Department), Belle Vernon, Pennsylvania, for claimant.

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

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order--Denying Benefits on Remand (93-BLA-1777) of Administrative Law Judge Thomas M. Burke 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). This case is before the Board for the fifth time. In its first two decisions, the Board remanded the case to the administrative law judge for him to properly weigh the medical evidence pursuant to 20 C.F.R. §727.203. *Havanis v. Consolidation Coal Co*., BRB No. 83-1918 BLA (Apr. 14, 1986)(unpub.); *Havanis v. Consolidation Coal Co.*, BRB No. 88-2130 BLA

(Dec. 5, 1990)(unpub.); Director's Exhibits 42, 66. After the Board's second remand of the case, the administrative law judge found that the weight of the medical opinion evidence established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(4), and found that employer did not establish rebuttal thereof by either of the methods set forth at 20 C.F.R. §727.203(b)(3) or (b)(4). Director's Exhibit 69. Accordingly, he awarded benefits.

Employer appealed, but at the same time, also submitted new medical evidence and filed a request for modification with the district director alleging that a mistake in a determination of fact was made in awarding benefits. Director's Exhibit 72; *see* 20 C.F.R. §725.310. Consequently, the Board dismissed employer's appeal and remanded the case to the district director for modification proceedings. Director's Exhibit 77.

The district director denied modification and employer requested a hearing before the administrative law judge. Prior to the scheduled hearing, the administrative law judge issued a Decision and Order denying employer's request for modification, but without considering the request on its merits. Therefore, on appeal, the Board remanded the case for the administrative law judge to consider whether employer carried its burden to demonstrate a mistake in a determination of fact, or a change in conditions other than recovery from pneumoconiosis. *Havanis v. Consolidation Coal Co*., BRB No. 94-2223 BLA (Sep. 25, 1996)(unpub.).

On remand, the administrative law judge found that the evidence of record established invocation of the interim presumption pursuant to Section 727.203(a)(4) and found that employer did not establish rebuttal pursuant to Section 727.203(b)(3), (4). Accordingly, he awarded benefits. Pursuant to employer's appeal, the Board vacated the administrative law judge's finding pursuant to Section 727.203(a)(4) and remanded the case for him to determine whether the treating physician's report he credited constituted a reasoned medical judgment diagnosing a totally disabling respiratory or pulmonary impairment. *Havanis v. Consolidation Coal Co*., BRB No. 98-0219 BLA (Oct. 30, 1998)(unpub.). Additionally, the Board vacated the administrative law judge's finding that the medical evidence submitted by employer was insufficient to establish rebuttal pursuant to Section 727.203(b)(3), (4) and instructed the administrative law judge to reconsider rebuttal on remand. Finally, the Board instructed the administrative law judge to consider entitlement pursuant to 20 C.F.R. Part 718, if entitlement under 20 C.F.R. Part 727 was not established.

On remand, the administrative law judge again deferred to the medical opinion of claimant's treating physician to find that invocation of the interim presumption was established pursuant to Section 727.203(a)(4). The administrative law judge found, however, that the medical opinion of Dr. Fino submitted by employer established rebuttal pursuant to Section 727.203(b)(3), (4). The administrative law judge additionally found that the medical evidence considered under 20 C.F.R. Part 718 did not establish the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge therefore concluded that employer demonstrated a mistake in a determination of fact pursuant to Section 725.310. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Consequently, he denied benefits.

On appeal, claimant contends that the administrative law judge erred by finding rebuttal established pursuant to Section 727.203(b)(3), (4). Claimant alleges further that the administrative law judge erred in his weighing of the medical opinion evidence when he found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4). Employer responds, urging affirmance, and 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. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Claimant has been presumed totally disabled due to pneumoconiosis pursuant to Section 727.203(a)(4). To rebut this presumption under Section 727.203(b)(3), employer must rule out any causal connection between claimant's total disability and his coal mine employment. *Plesh v. Director, OWCP*, 71 F.3d 103, 113, 20 BLR 2-30, 2-49 (3d Cir. 1995); *Kline v. Director, OWCP*, 877 F.2d 1175, 1179, 12 BLR 2-346, 2-354 (3d Cir. 1989).

Pursuant to Section 727.203(b)(3), the administrative law judge based his finding that employer established rebuttal on the examination report and testimony of Dr. Fino, who opined that cigarette smoking, and not coal dust inhalation, was the cause of claimant's chronic obstructive lung disease. Director's Exhibit 72; Employer's Exhibit 2. Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, concluded that claimant's pulmonary condition is unrelated to his coal mine employment and that claimant is not disabled in whole or in part by the inhalation of coal dust. *Id*. The administrative law judge found that although Dr. Bhatt, claimant's treating physician, diagnosed "total and permanent disability from Coal Workers' Pneumoconiosis," Director's Exhibit 25, his report was not as well-reasoned or supported as that of Dr. Fino. The administrative law judge explained that he found Dr. Fino's opinion "more creditable than the report of Dr. Bhatt on the question of the cause of the [c]laimant's pulmonary condition," because Dr. Fino explained why the medical evidence was consistent with a smoking-related condition and inconsistent with a coal mine dust-related condition. Decision and Order at 6.

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[1] We affirm as unchallenged on appeal the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant contends that the administrative law judge did not accord proper weight to Dr. Bhatt's opinion as the treating physician at subsection (b)(3), when the administrative law judge deferred to Dr. Bhatt's opinion to find invocation established at subsection (a)(4). Claimant's Brief at 2. An administrative law judge may accord additional weight to a treating physician's opinion, but there is no *per se* rule that a treating physician's opinion must be accorded the greatest weight. *See Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Berta v. Peabody Coal Co.*, 16 BLR 1-69, 1-70 (1992).

Here, the administrative law judge permissibly accorded greater weight to Dr. Fino's opinion that claimant's pulmonary condition is unrelated to coal mine employment because the administrative law judge found within his discretion that Dr. Fino's opinion was better documented and reasoned. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). In this regard, claimant asserts that Dr. Fino based his opinion on the "bald assumption" that claimant's smoking history was greater than he admitted to Dr. Fino, and that Dr. Fino failed to explain why the opacities on claimant's x-ray were unrelated to coal mine employment. Claimant's Brief at 2-3. Review of the record discloses, however, that Dr. Fino did not base his opinion on such an assumption, and that Dr. Fino, a B-reader, stated that there were no opacities on claimant's chest x-ray, one factor in his opinion that claimant's respiratory condition is unrelated to coal mine employment. Director's Exhibit 72 at 3; Employer's Exhibit 2 at 16, 32. Therefore, we reject claimant's allegations of error.

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[2] Claimant assumes that the administrative law judge properly accorded greatest weight to Dr. Bhatt's opinion to find invocation established at Section 727.203(a)(4). Review of the administrative law judge's Decision and Order indicates that he cited Dr. Bhatt's treating status as the reason for crediting Dr. Bhatt's diagnosis of total disability, but without first addressing, as instructed by the Board, whether Dr. Bhatt's diagnosis was reasoned. Employer contends that the administrative law judge erred in this regard, but argues that the error is harmless in light of the administrative law judge's rebuttal finding. Employer's Brief at 9-22. Because we affirm the administrative law judge's finding pursuant to Section 727.203(b)(3), we need not address this issue. Therefore, we do not decide whether the administrative law judge properly deferred to Dr. Bhatt's opinion at Section 727.203(a)(4).

[3] Based on claimant's elevated carboxyhemoglobin level and Dr. Fino's observation that claimant's fingers were nicotine-stained, Dr. Fino expressed a suspicion that claimant was smoking more than the three cigarettes a day he told Dr. Fino that he was smoking. Director's Exhibit 72 at 6; Employer's Exhibit 2 at 11, 15. Nevertheless, Dr. Fino stated that the smoking history as reported to him by claimant, totaling at least twenty pack-years, was significant. *Id*. Ultimately, the administrative law judge did not rely upon Dr. Fino's suspicion of a more extensive smoking history in making his finding at Section 727.203(b)(3).

Substantial evidence supports the administrative law judge's finding. Consequently, we affirm the administrative law judge's finding pursuant to Section 727.203(b)(3). *See Plesh, supra*.

Because the administrative law judge found that entitlement was not established pursuant to 20 C.F.R. Part 727, he was required to consider whether entitlement was established under 20 C.F.R. Part 718. *See Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987). To be entitled to benefits under Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(4), the administrative law judge accorded greater weight to the report and testimony of Dr. Fino to find that the existence of pneumoconiosis was not established. The administrative law judge found that Dr. Fino's opinion that there was no lung disease arising out of coal mine employment outweighed Dr. Bhatt's contrary opinion because Dr. Fino reviewed more extensive medical documentation and explained how the clinical and objective data supported his conclusion. *See Kertesz, supra*; *Trumbo, supra*. Additionally, the administrative law judge took into account Dr. Fino's superior qualifications in Internal Medicine and Pulmonary Disease, *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-154 (1989)(*en banc*), and found that Dr. Fino's opinion was supported by that of Dr. Strimlan, who diagnosed a mild impairment most likely due to smoking.

Claimant contends that the administrative law judge should have discounted Dr. Fino's opinion because Dr. Fino was retained by employer. Claimant's Brief at 5. The Board has held that, without specific evidence indicating that a report prepared for one party is unreliable, an administrative law judge should consider that report as equally reliable as the other reports of record. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-36 (1991)(*en banc*). As claimant points to no specific record evidence of bias, the administrative law judge did not err in considering Dr. Fino's opinion to be reliable. *See Melnick, supra*. Additionally, contrary to claimant's contention, the administrative law judge was not required to accord determinative weight to Dr. Bhatt's opinion because he was claimant's treating physician. *See Lango, supra*; *Berta, supra*.

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[4] The record does not contain Dr. Bhatt's qualifications.

Finally, claimant asserts that the administrative law judge's acceptance of Dr. Fino's 1991 opinion that claimant does not have pneumoconiosis, rendered eleven years after Dr. Bhatt diagnosed pneumoconiosis, is inconsistent with the progressive nature of pneumoconiosis. Claimant's Brief at 5-6. Claimant, however, overlooks the administrative law judge's finding that he made a mistake in a determination of fact previously when he credited Dr. Bhatt's 1980 diagnosis of pneumoconiosis. *See Keating, supra*. Therefore, the administrative law judge's finding pursuant to Section 718.202(a)(4) is not inconsistent with the progressive nature of pneumoconiosis. As substantial evidence supports the administrative law judge's finding, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

In sum, we affirm the administrative law judge's finding that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3). *See Plesh, supra*. We also affirm the administrative law judge's finding that the evidence of record did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement under Part 718. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). Therefore, we affirm the administrative law judge's finding that employer carried its burden to demonstrate a mistake in a determination of fact pursuant to Section 725.310. *See Keating, supra*; *Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-81-82 (1998)(McGranery, J., dissenting); *Branham v. BethEnergy Mines, Inc*., 20 BLR 1-27, 1-34 (1996).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge