

BRB No. 01-0450 BLA

DENVER T. SIZEMORE)
)
 Claimant-Petitioner)
)
 v.)
)
 LEECO, INCORPORATED)
)
 and)
 TRANSCO ENERGY, INCORPORATED)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order On Remand - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (96-BLA-0194) of Administrative Law Judge Gerald M. Tierney rendered 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).¹ This case is on appeal to 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 found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20

time. The prior history of this claim is set forth in the Board's most recent decision in *Sizemore v. Leeco, Inc.*, BRB No. 99-1180 (Aug. 16, 2000). In that decision, the Board affirmed the administrative law judge finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)(2000), but held that the administrative law judge failed to determine whether the newly submitted medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000), and failed to consider whether a mistake in a determination of fact had been made pursuant to 20 C.F.R. §725.310 (2000). The case was accordingly remanded for reconsideration. *Sizemore, supra*. On remand, the administrative law judge considered the newly submitted medical opinion evidence which consisted of the report of Dr. Bushey. Considering Dr. Bushey's opinion, in conjunction with the evidence previously submitted, the administrative law judge found that it failed to establish the existence of pneumoconiosis, and therefore failed to establish a basis for modification. *See* 20 C.F.R. §§718.202(a)(1)-(4); 725.310 (2000). In addition, based upon his review of the entire record, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the newly submitted medical opinion evidence, *i.e.*, the opinion of Dr. Bushey, did not establish the existence of pneumoconiosis and therefore a basis for modification. Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs (the Director), is not participating 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to Section 725.310, claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Further, even if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits. *See Worrell, supra; Jessee v. Director, OWCP*, 5 F.3d 723, BLR 2-26 (4th Cir. 1993).

In determining whether claimant has established modification pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence considered in conjunction with the previously submitted evidence to determine if the weight of the new evidence is sufficient to establish an element of entitlement which was adjudicated against claimant in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992); *Wojtowicz v. Dusquesne Light Co.*, 12 BLR 1-162 (1989); *see O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

Claimant first contends that the administrative law judge erred in rejecting Dr. Bushey's opinion because it was based on a positive x-ray interpretation which was contrary to the administrative law judge's finding that the x-ray evidence was negative for pneumoconiosis, including subsequent x-rays.² Contrary to claimant's argument, however, the administrative law judge accorded little weight to Dr. Bushey's opinion, that claimant suffers from pneumoconiosis, because he found that Dr. Bushey did not provide a basis for his diagnosis, apart from an x-ray. Specifically, the administrative law judge stated that although Dr. Bushey's diagnosis of pneumoconiosis was purportedly based on examination, symptoms, work history, pulmonary function study and x-ray, because Dr. Bushey did not tie any of those factors other than the x-ray into his diagnosis, the report was based solely on the x-ray. This was permissible. Decision and Order at 2; Director's Exhibit 53 at 3. Further the administrative law judge reasonably found Dr. Bushey's statement: "compatible" with coal workers' pneumoconiosis to be unconvincing. Decision and Order at 2; Director's Exhibit

² After noting claimant's history of coal mine employment, his history of smoking, symptoms, findings on physical examination, results of a pulmonary function study, and x-ray reading, Dr. Bushey concluded his report by stating, "Diagnosis: Chronic lung disease with pulmonary emphysema and fibrosis, compatible with coal workers' pneumoconiosis 2/2, q/p, em." Director's Exhibit 53 at 3.

53; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Additionally, the administrative law judge acted within his discretion in according little weight to Dr. Bushey's opinion because the doctor failed to discuss whether claimant's smoking history played any role in claimant's diagnosed chronic lung disease or whether claimant's chronic lung disease was "compatible" with smoking. Decision and Order at 2; Director's Exhibit 53. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Next, claimant contends that the administrative law judge erred in finding Dr. Bushey's opinion unreasoned and undocumented. Claimant contends that because Dr. Bushey's opinion is based on claimant's history, examination findings and symptoms it is adequately documented. While a doctor's report is adequately documented if it contains the above factors, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984); *Buffalo v. Director, OWCP*, 6 BLR 1-1166 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984), in order to be reasoned its conclusions must be supported by its underlying documentation. *Worhach, supra*; *Fields, supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Hess, supra*; *Fuller, supra*. This is a determination the administrative law judge must make. In the instant case, the administrative law judge found that because Dr. Bushey did not discuss how his findings on examination, claimant's symptoms, work history, and the results of a pulmonary function study related to his diagnosis of pneumoconiosis and because he did not discuss whether claimant's smoking history played any role in his diagnosis of chronic lung disease, the report was unreasoned. This was rational. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 155 (1989)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860, 865 (1985).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray, supra*, and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge's finding that Dr. Bushey's opinion failed to establish the existence of pneumoconiosis and, therefore, a basis for modification. *Worrell, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge