BRB No. 09-0506 BLA

WILLIAM BARNHART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
D & F COAL COMPANY	)	
	)	DATE ISSUED: 12/16/2009
and	)	
	)	
STATE WORKERS' INSURANCE FUND	)	
	)	
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 Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Barbara L. Feudale (Law Office of Barbara L. Feudale), Gordon, Pennsylvania, for claimant.

Edward K. Dixon and Ryan M. Krescanko (Zimmer Kunz, P.L.L.C.), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-05273) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) 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). Claimant filed an initial claim for benefits on March 15, 2004. Director's Exhibit 2. In a Decision and

Order dated June 21, 2006, Administrative Law Judge Ralph A. Romano found that the evidence established that claimant worked in qualifying coal mine employment for eight and one-half years, but that the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 46. Accordingly, benefits were denied. *Id*.

On June 19, 2007, claimant filed a petition for modification and submitted additional evidence. Director's Exhibit 47. The district director denied modification on October 11, 2007 and claimant requested a formal hearing. Director's Exhibit 53. The case was then assigned to the administrative law judge, who issued his Decision and Order on October 27, 2008, which is the subject of this appeal.

The administrative law judge initially determined that Judge Romano's finding that claimant worked in qualifying coal mine employment for eight and one-half years was correct. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge initially found, pursuant to 20 C.F.R. §725.310, that there was no mistake in a determination of fact with regard to Judge Romano's denial of benefits. Reviewing the newly submitted x-ray evidence, the administrative law judge found that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, therefore, he concluded that claimant had demonstrated a change in conditions pursuant to 20 C.F.R §725.310. In considering the claim on the merits, the administrative law judge noted that since claimant had less than ten years of coal mine employment, he was not entitled to the rebuttable presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence was insufficient to establish that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c) or the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further determined that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

Claimant appeals, challenging the administrative law judge's findings of eight and one-half years of coal mine employment, that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(4), 718.203, and that claimant is not totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has responded that he will not file a brief unless requested to do so by the Board.[1]

[1] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant may establish a basis for modification of the denial of his claim by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. In considering whether a change in conditions has been established pursuant to Section 725.310, an 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 at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-83 (1993). If a change is established, the administrative law judge must then consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *Nataloni*, 17 BLR at 1-83. In addition, the administrative law judge has the authority to consider all the evidence for any mistake of fact, including the ultimate fact of entitlement. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

A. Length of Coal Mine Employment

Claimant argues that the administrative law judge erred in finding that there was no mistake in fact with regard to Judge Romano's calculation of the length of his coal

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to 20 C.F.R. §718.202(a)(2)-(3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *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).

[2] Because claimant's last coal mine employment occurred in Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

mine employment. Claimant contends that the administrative law judge erred in not accepting his testimony that he has over ten years of coal mine employment and, therefore, is entitled to the rebuttable presumption that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. Claimant's Brief at 2-3. Specifically, claimant maintains that Judge Romano and the administrative law judge erred in failing to count as qualifying coal mine employment the time he spent in high school working for "boot-leg" coal mines. *Id*. at 2. We disagree.

In determining the length of coal mine employment, the administrative law judge considered claimant's signed employment history forms, oral testimony, Social Security Administration (SSA) records, and the June 21, 2006 findings of Judge Romano. On the Department of Labor (DOL) Form CM-911, claimant stated that he worked for "Independent Mining" from 1969 to November of 1970, Wavo Coal Company from November 1970 to August 1972, John Galt Energy Corporation from November 1975 to December 1975, F & O Coal Company from January 1977 to August 1977, Mele Construction from August 1977 to December 1977, Shepco Coal Company from December 1977 to May 1978, Bob McCaul from November 1979 to April 1980, Beltrami Enterprises from June 1980 to May 1981, A & T Associates from May 1981 to February 1982, and D & F Coal Company from November 1981 to October 1985. Director's Exhibit 3.

At the hearing, claimant testified that he worked for a total of one and one-half years undertaking "boot-leg" coal mining around 1969 or 1970. Hearing Transcript at 15-16. He also testified that he worked for John Galt Energy Corporation and an individual named Frank Plevin in the "early seventies" for approximately six to eight months, for Beltrami Enterprises for approximately sixteen months, for Donaldson Coal Company for approximately one year, for various other small coal companies for approximately six months, and for the employer for four and one-half years. Hearing Transcript at 15-18. The employer has also stipulated that claimant was employed with it from 1982-1985, for a total of four and one-half years. Employer's Brief at 2.

The SSA records reflect that claimant worked for John Galt Energy Corporation for one quarter in 1975, Mele Construction for two quarters in 1977, F & O Coal Company for one quarter in 1977, Shepco Coal Company for the entire year of 1978, Beltrani Enterprises for the entire years of 1980 and 1981, and employer from 1982 to 1985. Claimant's Exhibit 4. In addition, claimant was employed with A & T Associates for the years 1981 and 1982. *Id*.

In his June 21, 2006 Decision and Order – Denying Benefits, Judge Romano found that the SSA earnings report established coal mine employment in 1977, 1978 and 1980-1984, for a total of six years. He noted that while claimant testified to having worked for various "coal digging projects" while in high school in 1968 and 1969, as

well as working drag lines in 1970, there are "no earnings reported for the coal mine companies [that] [c]laimant listed on his written statement from 1969 through 1975." 2006 Decision and Order at 3. Judge Romano noted that claimant's "own listing of coal mine employment," at Director's Exhibit 3, showed that claimant worked about two and one-half years from 1969-1975 and, thus, Judge Romano credited claimant with this time, for a total of eight and one-half years of coal mine employment. *Id*. at 3. With respect to the "coal digging projects" alleged by claimant, Judge Romano noted that "[c]laimant did not testify to specific dates this work began or ended, nor did he indicate the hours spent each week on this . . . coal digging work." *Id*. Thus, Judge Romano concluded, "while I find [c]laimant was a credible witness, I find the lack of specificity for the times worked on the coal digging project while in high school provide no basis for finding additional coal mine employment for 1968 and 1969." *Id*. at 3-4.

Upon reviewing Judge Romano's finding concerning the length of coal mine employment, the administrative law judge concluded that "[Judge] Romano's analysis of the evidence regarding [c]laimant's coal mine employment is correct." Decision and Order at 4. There is no dispute that claimant established at least eight and one-half years of coal mine employment based on the documentary evidence of record. The question, therefore, is whether claimant established at least ten years of coal mine employment, taking into account his testimony. Contrary to claimant's contention, we see no error in the administrative law judge's conclusion that Judge Romano correctly calculated claimant's length of coal mine employment, based on his review of the SSA earnings report and claimant's written statement of employment. *Garrett v. Cowin & Co.*, 16 BLR 1-77, 1-81 (1990); Decision and Order at 3-4. Because the credibility of the witnesses, and the weight to accord the evidence, is a matter within the sound discretion of the trier-of-fact, we reject claimant's allegation of error and affirm the administrative law judge's finding of eight and one-half years of coal mine employment. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

B. Existence of Legal Pneumoconiosis

The administrative law judge found that claimant established the existence of clinical pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.202(a)(1), but that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis. Claimant contends that the administrative law judge erred in failing to credit Dr. Simelaro's opinion that claimant has a mild obstructive lung disease caused by coal dust exposure (legal pneumoconiosis).[3] We disagree.

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the conflicting opinions of Drs. Simelaro and Levinson. Dr. Simelaro diagnosed clinical and legal pneumoconiosis[4] while Dr. Levinson opined that claimant does not have pneumoconiosis. The administrative law judge assigned less weight to Dr. Simelaro's diagnosis of pneumoconiosis because he found that Dr. Simelaro "relied on a greatly inflated coal mine employment history of [seventeen] years, which is exactly double the [eight and one-half years] of coal mine employment" established by the record. Decision and Order at 11. The administrative law judge further found that Dr. Simelaro failed to discuss how his clinical findings supported his opinion. *Id.* The administrative law judge also considered the opinion of Dr. Levinson to be "problematic" as the doctor primarily based his diagnosis of no pneumoconiosis on the negative x-ray evidence and did not specifically address the existence of clinical pneumoconiosis. *Id.* Thus, the administrative law judge concluded that the medical opinion evidence was insufficient to satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.202(a)(4).

Contrary to claimant's contention, the administrative law judge was not required to credit Dr. Simelaro's opinion based solely on his status as claimant's treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Insofar as the administrative law judge found, in a reasonable exercise of his discretion, that Dr. Simelaro's opinion was not reasoned as to the existence of legal pneumoconiosis, we affirm his finding pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.104(d); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989).

C. Disease Causation

Claimant also argues that even if he has established less than ten years of coal mine employment, the administrative law judge "erred in not finding that his pneumoconiosis arose at least in part out of coal mine employment." Claimant's Brief at

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definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

[4] In a March 6, 2008 deposition, Dr. Simelaro testified that claimant had worked in the mines for almost seventeen years and that he had been "involved in the coal industry all his life." Claimant's Exhibit 1 at 11. He concluded that, taking into account claimant's work history, claimant "had a marked exposure to coal dust and the only thing you can conclude is that he has some form of obstructive lung disease as a result of coal dust inhalation or pneumoconiosis." *Id.* at 40.

3. Claimant's argument is without merit. Because the administrative law judge permissibly determined that Dr. Simelaro's opinion was not reasoned on the issue of the etiology of claimant's respiratory condition, we affirm his finding that claimant failed to satisfy his burden to establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c).[5] *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Because claimant has failed to establish either that his clinical pneumoconiosis arose out of coal mine employment or the existence of legal pneumoconiosis, we affirm the administrative law judge's denial of benefits.[6]

[5] Dr. Levinson opined that claimant did not have pneumoconiosis and, therefore, did not address the issue of disease causation pursuant to 20 C.F.R. §718.203. Employer's Exhibit 7.

[6] In light of our affirmance of the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203, it is unnecessary to address claimant's assertions of error with respect to the administrative law judge's findings at 20 C.F.R. §718.204(b), (c).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge