BRB No. 06-0100 BLA

ELMER W. GEORGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 07/27/2006
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5638) of Administrative Law Judge Paul H. Teitler 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] Claimant filed a claim for benefits on December 29, 2000.

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The amendments to the regulations at 20 C.F.R. §725.310 (2002) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

Director's Exhibit 20. In a Decision and Order dated July 17, 2003, Administrative Law Judge Janice K. Bullard denied benefits on the grounds that claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 49. Claimant subsequently filed a petition for modification on June 24, 2004. Director's Exhibit 51. The district director issued a Proposed Decision and Order denying benefits on November 23, 2004. Director's Exhibit 57. Claimant requested a hearing, which was held on December 1, 2004 before Judge Teitler (the administrative law judge). In his Decision and Order dated September 19, 2005, the administrative law judge accepted the parties' stipulation that claimant worked fourteen years in coal mine employment, and that he had established the existence of pneumoconiosis arising out of his coal mine employment. The administrative law judge, however, found that claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in not assigning controlling weight to the opinion of his treating physician, Dr. Kraynak, that he is totally disabled due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the denial of benefits on the grounds that it is supported by substantial evidence.

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 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 under Part 718 in this living miner's claim, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-26.

At the outset, we note that the administrative law judge initially found that the Director had waived the issue of modification based on his concession that claimant had pneumoconiosis. *See* Decision and Order at 2, n. 3. In her brief, counsel for the Director

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 7.

maintains that the administrative law judge's finding of waiver was made in error, but that the error was harmless since the administrative law judge properly denied benefits. Director's Brief at 2, n 1.

In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge must 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 that defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Interpreting Section 725.310, the Board has further held that an administrative law judge is not required to make a preliminary determination regarding whether claimant has established a basis for modification of the district director's denial of benefits prior to reaching the merits of entitlement. Rather, such a determination is subsumed into the administrative law judge's decision on the merits. Thus, the administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director's decision is sought. *See Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

In this case, because claimant's claim was denied based on his failure to establish all of the requisite elements of entitlement, including the existence of pneumoconiosis, the administrative law judge properly recognized that claimant was entitled to modification under Section 725.310 because the newly submitted evidence established that he had pneumoconiosis, as conceded by the Director. The administrative law judge then properly turned his attention to whether claimant established the remaining elements of entitlement, total disability and causation, based on a review of the record as a whole. *See* 20 C.F.R. §718.204(c) (2000).

Turning to the merits of claimant's appeal, we reject claimant's contention that the administrative law judge committed reversible error with respect to Dr. Kraynak's opinion that claimant is totally disabled due to pneumoconiosis.[3] The question of

[3] The administrative law judge found that all five of the pulmonary function studies of record were non-qualifying, and that the one arterial blood gas study was non-qualifying for total disability under the regulatory standards. The administrative law judge also found that the record was devoid of evidence to establish that claimant suffers from cor pulmonale. The administrative law judge thus found that claimant failed to establish his total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 4-6. These findings are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4-6.

whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). While the United States Court of Appeals for the Third Circuit has held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician, the court has also indicated that automatic preferences are disfavored. *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see* 20 C.F.R. §718.104(d). Thus, the opinions of treating and examining physicians should not be presumed to be correct, entitled to the greatest weight or considered to have the most probative value. The administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to the examining physicians' opinions, when warranted. *See* 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d at 579, 21 BLR at 2-114; *Lango*, 104 F.3d at 573, 21 BLR at 2-12.

In weighing the conflicting medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge properly noted that while Dr. Kraynak opined that claimant had a totally disabling respiratory impairment, the doctor based his opinion in part on a pulmonary function study dated May 10, 2005, which was non-conforming and non-qualifying for total disability.[4] Claimant's Exhibit 2; Decision and Order at 8. The administrative law judge had discretion to conclude that Dr. Kraynak's opinion was insufficiently reasoned because Dr. Kraynak failed to explain his diagnosis of total

[4] There has been some confusion in the record as to the correct date of this study. At Claimant's Exhibit 1, the actual study is dated May 10, 2005, but the administrative law judge, Dr. Michos and Dr. Kraynak have referred to this study as being dated May 15, 2005. We reference the study by its actual date.

The administrative law judge noted that in a May 15, 2005 report, Dr. Michos invalidated the May 10, 2005 pulmonary function study, finding that the results of the two best FEV_1 values varied by more than five percent, and that claimant had not put forth optimal effort. In his deposition, Dr. Kraynak maintained that the FEV_1 values of the May 10, 2005 were in compliance with the regulatory requirements, the administrative law judge reviewed the May 10, 2005 pulmonary function study results and found that the two greatest FEV_1 values of 2.04 liters and 1.92 liters differed by 120 milliliters or 5.8 percent, consistent with Dr. Michos's conclusion. The administrative law judge further noted that since claimant demonstrated poor effort on the test, "had [c]laimant's effort been better, the result of the May 15, 2005, could only have been higher." Decision and Order at 8. Thus, the administrative law judge questioned whether Dr. Kraynak's diagnosis of total disability based on the May 15, 2004 pulmonary function study was a reasoned diagnosis. Decision and Order at 5-6.

respiratory disability in light of the objective evidence. Decision and Order at 8. In contrast, the administrative law judge permissibly found that Dr. Kraynak's opinion was outweighed by the contrary opinions of Drs. Rashid and Krol, who diagnosed that claimant had no respiratory impairment because he found the opinions of these physicians to be reasoned, documented, and better supported by the objective evidence. *See Clark*, 12 BLR at 1-149; Director's Exhibits 9, 64; Decision and Order at 7-8.

The administrative law judge, in this instance, rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields*, 10 BLR 1-19; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; *Fuller*, 6 BLR 1-1291. Further, although Dr. Kraynak was the miner's treating physician, the administrative law judge has provided a rational reason for finding his opinion insufficient to meet claimant's burden of proof. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Consequently, we affirm the administrative law judge's finding that the medical evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).[5]

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), and to assess the evidence of record and draw his own conclusions and inferences there from, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis, and the denial of benefits.

[5] The administrative law judge properly found that since claimant is not totally disabled, he is unable to establish causation at 20 C.F.R. §718.204(c). Decision and Order at 8.

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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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge