BRB No. 98-1170 BLA

CONLEY L. DANIELS Claimant-Petitioner v. LEECO, INCORPORATED and TRANSCO ENERGY COMPANY Employer/Carrier-Respondents 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 of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Timothy J. Walker, London, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0665) of Administrative Law Judge Rudolf L. Jansen 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). Claimant's application for benefits filed on April 16, 1993 was denied by Judge Jansen because he found that the medical

evidence of record failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Director's Exhibit 29. Claimant appealed, by counsel, but failed to allege any specific errors in the administrative law judge's evaluation of the evidence or his application of the law. Consequently, the Board affirmed on the grounds that claimant provided the Board with no basis to review the administrative law judge's findings, while also noting that substantial evidence supported the administrative law judge's finding that pneumoconiosis was not established pursuant to Section 718.202(a). *Daniels v. Leeco, Inc*., BRB No. 95-1220 BLA (Jul. 28, 1995)(unpub.); Director's Exhibit 35.

Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 36. After the district director denied modification, claimant requested a hearing. Director's Exhibits 52, 53. Prior to the scheduling of a hearing, the administrative law judge issued an order directing the parties to show cause as to why a hearing should be held on modification. Order to Show Cause, May 5, 1997. Both claimant and employer responded, in writing, that they waived their right to a hearing and requested a decision on the documentary record. Response to Order to Show Cause, May 8, 1997; Response to Order to Show Cause, May 14, 1997; *see* 20 C.F.R. §725.461(a); *Robbins v. Cyprus Cumberland Coal Co*., 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir., 1998).

Considering the claim on the record only, the administrative law judge found that the new medical evidence, considered in conjunction with the previously submitted evidence, failed to establish the existence of pneumoconiosis or total respiratory disability pursuant to Sections 718.202(a) and 718.204(c). Therefore, he concluded that no change in conditions or mistake in a determination of fact was demonstrated pursuant to Section 725.310 and, accordingly, denied claimant's request for modification.

On appeal, claimant contends that the administrative law judge failed to consider relevant medical evidence under Section 718.202(a)(1), (4). Claimant further alleges that the administrative law judge erred in his weighing of the medical opinions under Sections 718.202(a)(4) and 718.204(c)(4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the

Director), has declined to participate in this appeal.[1]

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).

To be entitled to benefits under the Act, 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. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416, 21 BLR 2-192, 2-197 (6th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

In addition, Section 725.310 provides that a party may request modification of the terms of an award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority to reconsider all the evidence to determine whether the record demonstrates a change in conditions since the previous denial of benefits or a mistake in a determination of fact in the prior decision. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the new x-ray readings submitted on modification in conjunction with the original x-ray readings in the record and found the weight of the expert readings to be negative for pneumoconiosis. Decision and Order at 7; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59-60, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director,*

[1] We affirm as unchallenged on appeal the administrative law judge's findings that pneumoconiosis and total respiratory disability were not established pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(c)(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).

OWCP, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Claimant contends that the administrative law judge erred by failing to consider a positive x-ray reading by Dr. Bushey. Claimant's Brief at 5. Review of the record, however, discloses no x-ray reading or medical report by Dr. Bushey. Furthermore, we see no indication that claimant ever submitted such evidence to the district director.

After the Department of Labor provides a claimant with an initial pulmonary examination, it is up to the claimant to submit to the district director any additional medical reports or tests that he wishes to have considered in his claim. 20 C.F.R. §725.407(b); *White v. Director, OWCP*, 6 BLR 1-368, 1-370 (1983). Claimant does not state that he submitted Dr. Bushey's report and x-ray reading to the district director, but rather, states only that he sent copies of Dr. Bushey's report and x-ray reading to employer's counsel, with "the Department of Labor on the copy list" of the cover letter. Claimant's Brief at 8. Apparently, however, claimant's counsel failed to send copies to the district director,[2] or if he did, they were not placed into the record. Whatever occurred, claimant's counsel made no attempt to submit these items to either the district director or the administrative law judge once it should have become

[2] Claimant attaches to his brief a September 30, 1996 letter to employer's counsel indicating that Dr. Bushey's report was enclosed and requesting that employer's counsel "include this information as an exhibit in Mr. Daniel's file . . . ." Claimant's Exhibit A. By letter dated October 2, 1996, employer's counsel responded, requesting the original x-ray film read by Dr. Bushey, and indicated that he was returning extra copies of Dr. Bushey's report which appeared to "have been intended for other parties." Director's Exhibit 50.

apparent that they were not in the record.[3] In sum, the administrative law judge considered the claim on the record before him, and our review is confined to the record as it was developed below. 20 C.F.R. §802.301. Because Dr. Bushey's x-ray reading and report were not in the record, the administrative law judge committed no error in not mentioning them. Therefore, we reject claimant's contention.

Claimant next alleges that in weighing the x-ray readings pursuant to Section 718.202(a)(1), the administrative law judge placed undue emphasis on the qualifications of the readers and the numerical superiority of the negative readings. Claimant's Brief at 5. Contrary to claimant's contention, the administrative law judge simply performed a qualitative and quantitative evaluation of the x-rays, as he is required to do. *See* 20 C.F.R. §718.202(a)(1); *Staton, supra*; *Woodward, supra*. Therefore, we reject claimant's allegation of error. As claimant alleges no other specific error with respect to the administrative law judge's finding, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge evaluated the medical opinions based on relative medical qualifications and the documentation and reasoning provided by the physicians. Decision and Order at 6-9; *see Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 536, 21 BLR 2-323, 2-335, 2-341 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997) Ultimately, he accorded greatest weight to the examination report of a Board-certified Internist and Pulmonologist who concluded that claimant

[3] The district director's Proposed Decision and Order issued on October 29, 1996 discussed the medical evidence quite thoroughly yet made no mention of Dr. Bushey's opinion. Director's Exhibit 52. The February 3, 1997 List of Director's Exhibits accompanying the case referral package sent to the Office of Administrative Law Judges did not include Dr. Bushey's report or x-ray reading. After the administrative law judge made no reference in his decision to Dr. Bushey, claimant did not move for reconsideration in an attempt to bring Dr. Bushey's report to the administrative law judge's attention.

does not have pneumoconiosis. Director's Exhibit 51. Claimant contends that in so doing, the administrative law judge failed to accord proper weight to the opinion of Dr. Chaney, claimant's treating physician. Claimant's Brief at 9.

In weighing the medical opinion evidence, an administrative law judge must consider a physician's status as a treating physician, *see Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993), but there is no *per se* rule that a treating physician's opinion must be accorded the greatest weight. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir.1995); *Berta v. Peabody Coal Co*., 16 BLR 1-69, 1-70 (1992). Here, the administrative law judge considered Dr. Chaney's treating status, Decision and Order at 8, but permissibly discounted his "skeletal" opinion letter and brief treatment notes as insufficiently documented and reasoned to constitute evidence of pneumoconiosis. Decision and Order at 8; *see* 20 C.F.R. §718.202(a)(4); *Fife, supra*; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983). Furthermore, contrary to claimant's additional contention, the administrative law judge did not mischaracterize Dr. Chaney's opinion. Claimant's Brief at 9. The administrative law judge noted accurately that Dr. Chaney did not definitively diagnose pneumoconiosis until his 1997 opinion letter. Prior to that, Dr. Chaney simply recorded "previous history of C.W.P.," or noted that claimant was in his office for a "follow-up visit for C.O.P.D./C.W.P.," in the treatment notes. Claimant's Exhibit 3. Because the administrative law judge adequately considered Dr. Chaney's opinion and provided valid reasons for declining to credit it, we reject claimant's contention, and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(c)(4), the administrative law judge again evaluated the medical opinions based upon qualitative factors, and deferred to a Board-certified pulmonary expert's opinion that claimant retains the respiratory capacity to perform arduous manual labor. Decision and Order at 9-10; Director's Exhibit 51. Claimant alleges that the administrative law judge erred by failing to compare the opinions of Drs. Sundaram and Chaney, who stated that claimant is totally disabled, with claimant's coal mine employment duties as a beltman. Claimant's Brief at 12-13.

A physician's opinion regarding total disability must be a reasoned medical judgment. 20 C.F.R. §718.204(c)(4). In view of this requirement, the administrative law judge rationally discounted Dr. Sundaram's opinion because his conclusion was not supported by the pulmonary function and blood gas study results that he obtained, Director's Exhibit 36, and the administrative law judge permissibly declined to credit Dr. Chaney's opinion because it was not based upon any objective medical data. Director's Exhibit 36; Claimant's Exhibit 1; *see Fife, supra*; *Rowe, supra*.

Since the administrative law judge found, within his discretion, that these reports did not contain reasoned medical judgments of disability, *see* 20 C.F.R. §718.204(c)(4), there was no need for him to compare them with claimant's job duties. Therefore, we reject claimant's contention, and we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).

As claimant alleges no other error with respect to the administrative law judge's analysis pursuant to Section 725.310, we affirm his finding that neither a change in conditions nor a mistake in a determination of fact was established on the record before him. *See Worrell, supra*; *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge