BRB No. 99-0272 BLA

MICHAEL LESCHICK Claimant-Petitioner v. READING ANTHRACITE COMPANY and LACKAWANNA CASUALTY 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 Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0209) of Administrative Law Judge Ainsworth H. Brown 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). Initially, Administrative Law Judge Jeffrey Tureck credited claimant with thirty-nine years of coal mine employment pursuant to the parties' stipulation, but found that the medical evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 25. Accordingly, he denied benefits. Claimant timely requested modification of the denial pursuant to 20 C.F.R. §725.310 and submitted additional evidence. Director's Exhibit 30-A.

After holding a hearing on claimant's modification request, Administrative Law Judge Ralph A. Romano denied modification because he found that the record failed to establish the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Director's Exhibit 74. Consequently, he denied benefits. Pursuant to claimant's appeal, the Board held that the administrative law judge's finding pursuant to Section 718.204(c) was supported by substantial evidence and, accordingly, affirmed the denial of benefits. *Leschick v. Reading Anthracite Co*., BRB No. 90-1250 BLA (Sep. 24, 1992)(unpub.); Director's Exhibit 87. Thereafter, claimant timely requested modification of the denial of benefits pursuant to Section 725.310 and submitted additional evidence. Director's Exhibit 88.

Considering the claim on the record only,[1] Administrative Law Judge Ainsworth H. Brown found that the record as a whole failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and he therefore denied benefits. Director's Exhibit 116. Claimant again requested modification of the denial of benefits pursuant to Section 725.310 and submitted additional evidence. Director's Exhibit 119. The district director denied modification, and claimant requested a hearing. Director's Exhibits 130, 132.

[1] The parties agreed to a decision on the record. Director's Exhibit 116 at 2.

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. Order to Show Cause, Jan. 14, 1998. Claimant and carrier responded in writing that they waived their right to a hearing and once again requested a decision on the documentary record.[2] Claimant's Letter, Jan. 28, 1998; Carrier's Letter, March 19, 1998; *see* 20 C.F.R. §725.461(a).

Considering the claim on the record only, the administrative law judge found that the medical evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his weighing of the medical evidence pursuant to Section 718.202(a)(1), (4). Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

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. *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)(1), claimant contends generally that the x-ray readings establish the existence of pneumoconiosis. Claimant's Brief at 2. General assertions of entitlement are insufficient to invoke the Board's review. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48

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[2] The Director, Office of Workers' Compensation Programs (the Director), responded that he took no position on whether a hearing was held because he did not plan to participate. Director's Letter, Jan. 21, 1998.

[3] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (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).

(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). Therefore, as claimant raises no specific legal or factual challenge to the administrative law judge's weighing of the x-ray readings, we affirm his finding that the existence of pneumoconiosis was not established by x-ray pursuant to Section 718.202(a)(1).

Pursuant to Section 718.204(a)(4), claimant contends that the administrative law judge failed to accord proper weight to the opinion of Dr. Kraynak, claimant's treating physician. Claimant's Brief at 3. 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). In assessing the medical reports, an administrative law judge is not bound to accept the opinion of any medical expert, but may weigh the medical evidence and draw his or her own inferences. *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

Here, the administrative law judge permissibly accorded greater weight to Dr. Levinson's opinion that claimant does not have pneumoconiosis based upon Dr. Levinson's superior qualifications in Internal Medicine and Pulmonary Disease,[4] *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-154 (1989)(*en banc*) and because the administrative law judge found within his discretion that Dr. Levinson's opinion was better documented and reasoned. Decision and Order at 3; *see Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993)(administrative law judge exercises broad discretion in determining whether a medical opinion is well reasoned). In this regard, claimant asserts that the administrative law judge failed to provide a sufficient rationale for discounting the qualifying[5] pulmonary function studies that Dr. Kraynak relied upon to diagnose a severe respiratory impairment related to claimant's coal mine employment. Claimant's Brief at 3. Contrary to claimant's contention, the administrative law judge explained that he deferred to Dr.

[4] Dr. Kraynak is Board-Eligible in Family Medicine. Claimant's Exhibit 10 at 4.

[5] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Levinson's opinion that the pulmonary function studies administered by Dr. Kraynak were invalid because of sub-optimal effort, cooperation, and comprehension, and because the studies were improperly performed. Director's Exhibits 121, 123; Employer's Exhibit 8. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220 (3d Cir. 1987).

In contrast to the studies administered by Dr. Kraynak, the pulmonary function study administered by Dr. Levinson was non-qualifying and yielded much higher values.[6] Employer's Exhibit 2. Before accepting Dr. Levinson's test results, the administrative law judge considered Dr. Kraynak's deposition testimony in which Dr. Kraynak "questioned the validity of the pulmonary function testing done by Dr. Levinson." Decision and Order at 3; Claimant's Exhibit 10. The administrative law judge permissibly concluded, however, that in light of Dr. Levinson's high qualifications and his experience as the director of a pulmonary laboratory, Dr. Kraynak "provided no convincing rationale as to why the test results that were higher than his own should not be used in the total evaluation of the disease issue." *Id*. In sum, substantial evidence supports the administrative law judge's permissible determination that Dr. Levinson's opinion was "more probative" than Dr. Kraynak's because it was "based on a solid factual foundation." Decision and Order at 3. Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

In light of the foregoing, we also affirm the administrative law judge's overall finding pursuant to Section 718.202(a) that "[c]laimant is not successful in producing a preponderance of evidence to prove the existence of a coal mine related respiratory condition." Decision and Order at 3; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

[6] Based upon his examination and testing, Dr. Levinson reported that he found no evidence of any pulmonary impairment or any industrial pulmonary disease. Employer's Exhibit 1.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge