

BRB No. 07-0212 BLA

E.J.)
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 Claimant-Petitioner)
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 v.)
)
 MIDWEST COAL COMPANY) DATE ISSUED: 10/18/2007
)
 Employer-Respondent)
)
 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 Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2004-BLA-05493) of Administrative Law Judge Jeffrey Tureck on a subsequent 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). The administrative law judge credited claimant with fifteen years of qualifying coal mine employment, and adjudicated this claim, filed on February 17, 2002, pursuant to the regulatory provisions at 20 C.F.R. Part 718. Without deciding the issue, the administrative law judge assumed that one of the applicable conditions of entitlement had changed since the prior denial pursuant to 20 C.F.R. §725.309(d), but found, after considering all of the evidence of record, that claimant had failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's finding that entitlement was not established, and specifically maintains that the administrative law judge's failure to consider all evidence relevant to the issue of claimant's smoking history erroneously affected his weighing of Dr. Cohen's opinion, that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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. 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).

Claimant contends that the administrative law judge erred in failing to address the hearing testimony of Jack Hill and Mosis Moultrie, that they had never seen claimant smoke. As Mr. Hill worked in the mines with claimant between 1976 and 1986 and has known him for approximately thirty years, and as Mr. Moultrie has known claimant for approximately twenty years, claimant maintains that their testimony was highly relevant to the administrative law judge's determination of claimant's true smoking history. Claimant argues that the administrative law judge was obligated to discuss all evidence of record relevant to the issue of claimant's smoking history, and should at least have offered some explanation as to why the testimony of these witnesses was not reliable, particularly since it buttressed claimant's testimony at his deposition and at the hearing in the present claim, that claimant smoked no more than two or three cigarettes in his life, as well as the medical records indicating that claimant is a non-smoker. Claimant further asserts that, contrary to the administrative law judge's finding that Dr. Cohen's opinion was based on an incorrect smoking history, the physician accurately reported that claimant was a non-smoker. Claimant thus contends that either a reversal of the denial of benefits or a remand to the administrative law judge for further findings would be appropriate. We disagree.

After considering the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge acknowledged claimant's testimony at the 2006 hearing and at his 2005 deposition, that claimant smoked no more than two or three cigarettes in his life, *see* Hearing Transcript at 55, Claimant's Exhibit 5 at 47-48, and noted that in connection with the present claim, claimant told Drs. Reddy, Repsher and Cohen that he had never smoked. Decision and Order at 3; Director's Exhibit 10; Claimant's Exhibit 1 at 2; Employer's Exhibit 1 at 2. The administrative law judge permissibly found, however, that such history was incorrect, as it was contradicted

by claimant's 1990 hearing testimony in a previous claim, that the most he ever smoked was one-half pack per day, stopping twenty-five or thirty years prior to the hearing after smoking for less than ten years, *see* 1990 Hearing Transcript at 50-51, and by the earlier medical reports and records in claimant's prior claims that consistently reported a history of smoking that ranged from one-half pack to two packs per day for up to twenty years, ending in approximately 1969. Decision and Order at 3; Director's Exhibits 1, 2; *see generally Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Even if fully credited, the testimony of Messrs. Hill and Moultrie would not establish that claimant had never smoked, but merely that these witnesses had never seen him smoke.¹ Consequently, any error in the administrative law judge's failure to discuss their testimony is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge further determined that claimant was hospitalized for treatment of bullous emphysema, a condition that Dr. Repsher attributed to heavy smoking, in May 1974, only two years after claimant had started working as a coal miner but after many years of smoking as reported by multiple physicians. Decision and Order at 4, 8; Employer's Exhibit 1 at 3; Employer's Exhibit 14 at 2, 45-46. Thus, the administrative law judge rationally concluded that the weight of the evidence established that claimant had been a cigarette smoker, the recent histories notwithstanding, and that the only uncertainty was how much he had smoked. Decision and Order at 3; *Trumbo*, 17 BLR at 89.

In evaluating Dr. Cohen's opinion, the administrative law judge determined that the physician's mistaken belief, that claimant had never smoked, greatly influenced his diagnosis of legal pneumoconiosis, as Dr. Cohen stated that claimant "has no other significant exposure which could cause chronic obstructive lung disease." Decision and Order at 8; Claimant's Exhibit 1 at 4. Because Dr. Cohen also relied on a positive x-ray, contrary to the administrative law judge's finding that a better-qualified reader interpreted the film as negative, and the physician's report and deposition testimony reflected no knowledge of claimant's hospitalization for treatment of bullous emphysema after only two years of coal mine employment, the administrative law judge acted within his discretion in discounting Dr. Cohen's opinion. Decision and Order at 8; *see generally*

¹ Mosis Moultrie testified that he first met claimant in approximately 1973, and saw him about four times per week since the mid-1980s. Hearing Transcript at 44-47. Jack Hill testified that he was working in a bank when he first met claimant in approximately 1965, and that he made several loans to claimant. Hearing Transcript at 31-32, 43. Mr. Hill then began working in the mines with claimant in 1976, and saw him at work approximately 15 times per day. Hearing Transcript at 30, 32-37. As the earlier medical records document that claimant stopped smoking in approximately 1969, it appears that claimant was a non-smoker during all or most of the time that these witnesses interacted with claimant.

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

As claimant did not identify any substantive error of law or fact in the administrative law judge's weighing of the remaining medical opinions of record at Section 718.202(a)(4), and as claimant has not challenged the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3), we affirm the administrative law judge's findings thereunder. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge