

BRB No. 98-0168 BLA

PHIL E. COMBS)
)
 Claimant-Respondent)
)
 v.)
)
 LECKIE SMOKELESS COAL COMPANY) DATE ISSUED:
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Brian C. Murchison (Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Stephen E. Crist (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1407) of Administrative Law Judge Daniel L. Stewart awarding 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). The present claim is claimant's¹ third application for benefits. Initially, claimant filed a claim for benefits on February 6, 1981 which was denied on July 2, 1981 because claimant failed to establish total respiratory disability. Director's Exhibit 21. In a letter dated August 3, 1981, claimant submitted additional evidence, stated that he would like to appeal the denial and requested that the Department of Labor (DOL) review his file and "hold it" as he was in the process of getting additional evidence. Director's Exhibit 21. No further action was taken on this claim.

On March 13, 1987, claimant filed a second claim for benefits which was denied on September 8, 1987 because claimant failed to establish total respiratory disability. Director's Exhibit 21. On September 24, 1987, claimant requested a formal hearing. Director's Exhibit 21. On January 8, 1988 DOL requested that claimant furnish further information concerning his coal mine employment. Director's Exhibit 21. Claimant supplied information concerning his coal mine employment on August 23, 1995 and again requested a hearing before an administrative law judge. Director's Exhibit 21. Claimant then filed the instant claim for benefits on November 13, 1995. Director's Exhibit 1. The administrative law judge found that claimant established the existence of forty-three years and eleven months of qualifying coal mine employment, that employer is the properly designated responsible operator, that claimant's 1995 claim merged with his 1981 and 1987 claims and that the claim was to be considered pursuant to the interim regulations at 20 C.F.R. §§718.302 and 718.305 because claimant's original application was filed on February 6, 1981. The administrative law judge then found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(b), (c)(4), and 718.305. Accordingly, benefits were awarded. In the instant appeal, employer generally contends that the 1981 and 1987 claims should be considered abandoned or withdrawn pursuant Section 725.309(d), that claimant has failed to establish total disability due to pneumoconiosis and that employer has produced enough evidence to rebut the Part 718 interim presumptions. Claimant responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must

¹ Claimant is Phil E. Combs, the miner.

establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson, supra; Baumgartner, supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Further, in the case of a claimant who has filed more than one claim, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the administrative law judge determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of 20 C.F.R. §725.310 are met. 20 C.F.R. §725.309(d).

Employer initially contends that the administrative law judge erred in finding that the instant claim is entitled to Part 718 interim review because claimant's 1981 and 1987 claims are not pending within the meaning of the Act. Employer's Brief at 3-5. Specifically, employer contends that the 1981 claim should be considered abandoned because claimant did not actively pursue the claim and that the 1987 claim should not be considered to be pending because claimant expressed a clear intent to withdraw his 1987 claim. Employer's Brief at 3-5. Upon considering the status of claimant's 1981 claim, the administrative law judge found that claimant's statement that he would like to appeal the denial constituted a request for a formal hearing before an administrative law judge which required the district director to refer all contested issues to an administrative law judge for resolution. The administrative law judge then found that the district director failed to refer the claim to the Office of the Administrative Law Judges (OALJ) and that the claim was still pending at the time he filed his 1987 claim. Decision and Order at 20. The administrative law judge also found that claimant requested a formal hearing after the initial denial of his 1987 claim and that this claim was not transferred to the OALJ for a formal hearing.

Because the record supports the administrative law judge's findings that claimant requested an appeal of the initial denial of his 1981 claim and a formal hearing after the initial denial of his 1987 claim and that the district director failed to transfer either of these cases to the OALJ for a hearing, the administrative law judge acted within his discretion in finding that claimant's 1981 and 1987 claims were not abandoned. Decision and Order at 20; Director's Exhibit 21; *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988); *Streets v. North American Coal Corp.*, 7 BLR 1-814 (1985). Further, the administrative law judge properly found that claimant did not withdraw his 1987 claim because claimant's lay representative's statement that claimant "decided to refile instead of pursuing the appeal of his initial claim"

does not qualify as a proper withdrawal pursuant to 20 C.F.R. §725.306(a). Thus, we affirm the administrative law judge's finding that the 1981 and 1987 claims were pending when claimant filed the present claim and that the claims merged with the present claim pursuant to 20 C.F.R. §725.309. *Tackett v. Howell and Bailey Coal Co.*, 9 BLR 1-181 (1986).

Employer next generally contends that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis. Employer's Brief at 6-10. Pursuant to Section 718.202(a)(1), the administrative law judge considered the x-ray evidence of record which consists of twenty-five interpretations of eight x-rays, seventeen of which are positive for the existence of pneumoconiosis. Director's Exhibits 3, 14, 15, 20, 21; Claimant's Exhibits 3, 7; Employer's Exhibits 2-5. Of the seventeen positive interpretations, eleven were by physicians who are B-readers and board-certified radiologists, while only five of the negative interpretations are by physicians who are similarly qualified. Director's Exhibits 13, 20, 21; Claimant's Exhibits 3, 7; Employer's Exhibits 2-4. The administrative law judge acted within his discretion in finding that the preponderance of the interpretations by the physicians with the highest qualifications is positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 33-35; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Perry, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also properly found that claimant established that his pneumoconiosis arose from his coal mine employment pursuant to Section 718.203(b) as he established over forty-three years of qualifying coal mine employment and employer has not rebutted the presumption. Decision and Order at 35-36.

Pursuant to Section 718.204(b), (c)(4), the administrative law judge considered the medical opinion evidence of four physicians. Dr. Fino, in a record review, opined that claimant has pneumoconiosis and that he is not totally disabled from a respiratory impairment. Employer's Exhibit 1. Dr. Daniel examined claimant and opined that claimant has pneumoconiosis and would have difficulty in performing sustained heavy manual labor. Director's Exhibit 21. Dr. Vasudevan examined claimant and opined that he had no pneumoconiosis and moderate respiratory impairment due to air flow limitation. Employer's Exhibit 5. Dr. Rasmussen examined claimant and opined that he is totally disabled due to his pneumoconiosis. Director's Exhibits 11, 21.

The administrative law judge rationally found that the opinions of Drs. Daniel, Vasudevan and Rasmussen are entitled to greater weight than Dr. Fino's opinion because they examined claimant while Dr. Fino merely performed a record review. Decision and Order at 30; *Grigg v. Director, OWCP*, 28 F. 3d 416, 18 BLR 2-301 (4th Cir. 1994). The administrative law judge then acted within his discretion in finding that Dr. Rasmussen's

opinion is entitled to more weight than the opinions of Drs. Daniel and Vasudevan because Dr. Rasmussen was more aware of the physical requirements of claimant's job as a mine foreman. Decision and Order at 30; *Lafferty, supra*; *Debusk v. Pittsburg & Midway Coal Co.*, 12 BLR 1-15 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson, supra*. Thus, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Sections 718.202(a)(1), 718.203(b), 718.204(b), (c)(4), and the award of benefits, as they are supported by substantial evidence and in accordance with law.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge