BRB No. 00-0577 BLA

DANNY TOOTHMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED:
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGranery, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0719) of Administrative Law Judge Daniel L. Leland 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).[1] The instant case involves a 1997 duplicate claim.[2] The administrative law

[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

judge initially found the evidence sufficient to establish a material change in conditions. The administrative law judge therefore considered claimant's 1997 claim on the merits. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)(2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on July 13, 1978. Director's Exhibit 28. In a Decision and Order dated March 9, 1983, Administrative Law Judge Victor J. Chao denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1978 claim.

Claimant filed a second claim on April 2, 1997. Director's Exhibit 1.

[3]Inasmuch as no party challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3)(2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which all the parties have responded.[4] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that although 20 C.F.R. §718.202(a) (2000) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). However, inasmuch as the administrative law judge in the instant case found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000),

[4]Employer and the Director, Office of Workers' Compensation Programs, assert that the amended regulations would not affect the outcome of this case. Claimant contends that he would benefit by the "new" definition of pneumoconiosis in the amended regulations. Claimant also contends that his treating physician should be accorded greater weight pursuant to 20 C.F.R. §718.104(d). Because the administrative law judge properly discredited the opinions of the only physicians who diagnosed pneumoconiosis (Drs. Cox and Devabhaktuni), *see* discussion, *infra*, the new definition of pneumoconiosis would not assist claimant in establishing the existence of pneumoconiosis. *See* 20 C.F.R. §718.201. Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. However, this regulation only applies to evidence developed after January 19, 2001. *See* 20 C.F.R. §718.104(d).

his findings, if affirmable, would conform to the newly adopted Fourth Circuit holding in *Compton*.

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis. In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 7. Of the eleven x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists, only one is positive for pneumoconiosis.[5] Director's Exhibits 13, 28; Claimant's

[5]Dr. Francke, a B reader and Board-certified radiologist, interpreted claimant's January 8, 1979 and June 20, 1979 x-rays as negative for pneumoconiosis. Director's Exhibit 28. There are no positive interpretations of these x-rays rendered by physicians dually qualified as B readers and Board-certified radiologists.

Drs. Wiot, Wheeler and Scott, each qualified as a B reader and Board-certified radiologist, interpreted claimant's April 25, 1997 x-ray as negative for pneumoconiosis. Director's Exhibit 13; Employer's Exhibits 10, 11. Drs. Wiot, Shipley and Spitz, each qualified as a B reader and Board-certified radiologist, interpreted claimant's November 11, 1997 x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 2, 6. There are no positive interpretations of these x-rays rendered by physicians dually qualified as B readers and Board-certified radiologists.

Dr. Brandon, a B reader and Board-certified radiologist, interpreted claimant's September 10, 1999 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. However, an equally qualified physician, Dr. Wiot, interpreted this x-ray as negative for pneumoconiosis. Employer's Exhibit 16.

Claimant argues that the administrative law judge erred in not considering the qualifications of Drs. Harron and Brodie. Claimant's Brief at 7. Although Drs. Harron and Brodie rendered positive x-ray interpretations of claimant's January 8, 1979 x-ray, the record does not reveal that these physicians possess any special radiological qualifications. *See* Director's Exhibit 28. Moreover, Dr. Francke, a B reader and Board-certified radiologist,

Exhibit 1; Employer's Exhibits 1, 2, 6, 10, 11, 16. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis.

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and two B readers, Drs. Zaldivar and Morgan, interpreted claimant's January 8, 1979 x-ray as negative for pneumoconiosis. *Id.*

Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis. While Drs. Cox and Devabhaktuni opined that claimant suffered from pneumoconiosis, Director's Exhibits 8, 18, 28; Claimant's Exhibit 2, Drs. Jones, Hayes, Sachs, Kress, Morgan, Renn and Abrahams opined that claimant did not suffer from pneumoconiosis. Director's Exhibits 18, 19, 28; Employer's Exhibits 8, 13, 14, 15, 17. In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion in according less weight to Dr. Cox's opinion because he failed to explain the basis for his finding that claimant suffered from pneumoconiosis.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 7; Director's Exhibit 28. The administrative law judge also acted within his discretion in finding that Dr. Devabhaktuni's opinion was too equivocal to support a finding of pneumoconiosis.[7] S*ee Justice v. Island Creek Coal*

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[6]In a report dated July 24, 1979, Dr. Cox diagnosed emphysema and pneumoconiosis. Director's Exhibit 28. Dr. Cox indicated that these diagnoses were related to dust exposure in claimant's coal mine employment. *Id.* Dr. Cox provided no explanations or bases for his opinions.

[7]During a deposition of October, 28, 1999, the following exchange took place:

> Q. And then Dr. Renn's final statement, "It is within a reasonable degree of medical certainty [claimant's] pulmonary emphysema resulted from years of tobacco smoking rather than coal dust exposure." Do you agree with that or disagree with that?
>
> A. I disagree with that.
>
> Q. You disagree with that because you believe that some minor part of it is due to coal dust exposure?
>
> A. Some part of it is due to coal dust exposure.
>
> Q. Some minor part?
>
> A. Possible.
>
> Q. Can you put a percentage on the part of the impairment that's due to coal dust exposure?

Co., 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 7; Director's Exhibits 8, 18, 28; Claimant's Exhibit 2. The administrative law judge also properly discredited Dr. Devabhaktuni's opinion because the doctor did not adequately explain how he was able to make a nexus between claimant's lung disease and his coal dust exposure. *See Clark*, *supra*; *Lucostic*, *supra*; Decision and Order at 7; Director's Exhibits 8, 18, 28; Claimant's Exhibit 2. The administrative law judge properly accorded greater weight to Dr. Renn's opinion that claimant's emphysema was due to his cigarette smoking history rather than his coal dust exposure because he found that it was "well reasoned." Decision and Order at 7-8; Director's Exhibit 18; Employer's Exhibit 14. The administrative law judge also noted that Dr. Renn's opinion was supported by the opinions of Drs. Morgan and Abrahams. Decision and Order at 8; Director's Exhibits 19, 28, Employer's Exhibits 8, 13, 17. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

A. The major part of the impairment is from cigarette smoking, but some part [is] due to occupational dust exposure.

Q. "The major part," meaning, what, 80 percent or more?

A. I'm not sure.

Claimant's Exhibit 2 at 42.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge