BRB No. 00-0663 BLA

DAVID C. DINGUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLEETWOOD ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	DATE ISSUED:
Employer/Carrier-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 F. Sutton, Administrative Law Judge, United States Department of Labor.

David C. Dingus, Pound, Virginia, *pro se.*

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Michelle S. Cox (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (98-BLA-0569) of Administrative Law Judge Daniel F. Sutton 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).[2] Claimant filed an application for benefits on February 11, 1997. Director's Exhibit 1. In a Decision and Order issued on March 3, 2000, the administrative law judge credited claimant with twenty-four years of coal mine employment, and found that the evidence of record was insufficient to establish the presence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. Part 718 (2000). Accordingly, benefits were denied.

In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not participate in the merits of this appeal.

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[1]Claimant is David C. Dingus, the miner. Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2]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 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). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the regulations.

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 Association 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 March 2, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[3] Claimant has not responded to the Board's order.[4] Based on the briefs submitted by employer and the Director, 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial

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[3]In a brief dated March 19, 2001, employer asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer also stated that if the Board believes that the new regulations somehow affect the disposition of this appeal, the case must be stayed for the duration of the briefing, hearing and decision schedule in accordance with the preliminary injunction of the United States District Court for the District of Columbia. In a brief dated March 21, 2001, the Director asserted that the regulations at issue in the lawsuit do not affect the outcome of the case.

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

evidence. *McFall v. Jewell Ridge Coal Corp.,* 12 BLR 1-176 (1989); *Stark v. Director, OWCP,* 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) (2000). At Section 718.202(a)(1) (2000), the administrative law judge weighed the conflicting interpretations of the x-rays of record , and accorded determinative weight to the greater number of negative readings performed by physicians who are both B readers and board-certified radiologists.[5] Thus, the administrative law judge properly found that claimant did not satisfy his burden of proof at Section 718.202(a)(1). Director's Exhibits 26, 27, 51, 54; Employer's Exhibits 1, 3, 7, 9; Claimant's Exhibits 1, 2; Decision and Order at 5-6. As the administrative law judge's findings pursuant to this subsection are rational and supported by substantial evidence, they are affirmed. *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992);[6] *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988).

[5]A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R.§37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985).

[6]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

We also affirm the administrative law judge's finding that the requirements of Section. 718.202(a)(3) (2000) were not met since the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 (2000), are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis.[7] *See* Director's Exhibit 1; Decision and Order at 10; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

[7]We also note that the Decision and Order lacks a specific finding pursuant to Section 718.202(a)(2) (2000). This omission is harmless however, since the record contains no biopsy or autopsy evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Pursuant to Section 718.202(a)(4) (2000) , the administrative law judge rationally determined that Dr. Smiddy's diagnosis of pneumoconiosis was entitled to little weight since this physician relied on a positive x-ray reading which was re-read as negative by better qualified readers, and which was contrary to the administrative law judge's finding that the x-ray evidence as a whole was negative for the presence of pneumoconiosis, did not cite any objective tests, and failed to address the cause of claimant's respiratory symptoms. Decision and Order at 8-11; Claimant's Exhibit 2; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, supra; Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). The administrative law judge also rationally accorded little weight to Dr. Cortellesi's diagnosis of pneumoconiosis since the administrative law judge found that this opinion failed to include a rationale for its conclusion, and was based on the unpersuasive opinions of Dr. Smiddy, and Dr. Sy, who did not affirmatively diagnose the presence of pneumoconiosis. Decision and Order at 8-11; Claimant's Exhibits 2, 3; Director's Exhibit 51; *Trumbo, supra; Clark, supra; Tackett, supra*. Moreover, it was within the administrative law judge's discretion to credit the reports of Drs. Hippensteel and Fino, both of whom found no evidence of pneumoconiosis, as better supported by the objective evidence of record, over the opinion of Dr. Paranthaman who diagnosed the presence of the disease. Decision and Order at 8-11; Employer's Exhibits 1, 2, 5, 11; Director's Exhibits 21, 22, 24; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Trumbo, supra; Clark supra*. Accordingly, we hold that substantial evidence supports the administrative law judge's findings, and we affirm the administrative law judge's determination that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4).[8] Moreover, as claimant has failed to establish the existence of pneumoconiosis, a required element of proof pursuant to Part 718 (2000), we also affirm the administrative law judge's finding that claimant has

[8]Inasmuch as the administrative law judge rationally determined that claimant did not establish the existence of pneumoconiosis by any of the methods set forth in Section 718.202(a), we need not remand this case for reconsideration pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). In *Compton*, the Fourth Circuit held that in determining whether the existence of pneumoconiosis has been demonstrated under Section 718.202(a)(1)-(4), the administrative law judge must weigh all relevant evidence together.

not established entitlement to benefits, and we need not address the remaining elements of entitlement.

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge