BRB No. 00-0719 BLA

CARLOS MOLLETTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SMC COAL & TERMINAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
SMC MINING COMPANY	)	
	)	
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 on Remand - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant, *pro se*.

Laura Klaus (Arter & Hadden, LLP) Washington D.C., 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 on Remand - Denial of Benefits (96-BLA-1804) of Administrative Law Judge Daniel J. Roketenetz 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] This case is before the Board for a

[1] The Department of Labor has amended the regulations implementing the Federal

second time.[2] In his first Decision and Order, the administrative law judge made several determinations: he excluded Director's Exhibits 1-33 from evidence; found that claimant was a miner under the Act; credited claimant with twenty-two years and ten months of coal mine employment; determined that claimant had one dependent; and concluded that employer was the responsible operator. Pursuant to claimant's request for modification of the district director's denial, the administrative law judge found the newly submitted evidence sufficient to establish the presence of a totally disabling respiratory impairment, and thus, a change in conditions. The administrative law judge, therefore, adjudicated the claim on the merits, and found the evidence of record insufficient to establish the existence of pneumoconiosis. Accordingly, benefits were denied. On appeal, the Board vacated the findings of the administrative law judge at 20 C.F.R. §718.202(a)(1) and (a)(4)(2000) and remanded the case for further consideration. *See Mollette v. SMC Coal & Terminal Co.*, BRB No. 98-1208 BLA (Jun. 10, 1999). On reconsideration, the Board affirmed its Decision and Order by Order dated September 29, 1999. *Id.*

On remand, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment. The administrative law judge, however, found the

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Coal Mine 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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his initial application for benefits on July 7, 1994, which the district director denied on December 7, 1994. *See* Director's Exhibits 1, 15. By letter dated April 29, 1995, claimant indicated his decision to appeal the denial of benefits. See Director's Exhibit 18. The district director treated this letter as a request for modification and issued a Proposed Decision and Order Granting Modification on July 25, 1996. *See* Director's Exhibits 19, 17. Employer contested this finding. *See* Director's Exhibit 37.

evidence of record insufficient to establish that claimant's total disability was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge regarding causation. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. Employer also argues that the findings of the administrative law judge regarding the x-ray cannot be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not participate in this appeal.[3]

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 law suit 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 only the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[4] Based on the brief submitted by the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[3] We affirm the findings of the administrative law judge on claimant's status as a miner under the Act, on the length of coal mine employment, on dependency, on the designation of employer as the responsible operator, and at 20 C.F.R. §725.310 (2000), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm the administrative law judge's exclusion of Director's Exhibits 1-33 from the record as unchallenged on appeal. *Id*.

[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, is construed as a position that the challenged regulations will not affect the outcome of this case.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erroneously relied upon the medical opinions of Drs. Dahhan, Renn and Castle to find that claimant failed to establish that his total disability was due to pneumoconiosis as defined by the Act as these physicians' findings, that claimant did not have coal workers' pneumoconiosis, directly conflicted with the administrative law judge's finding that the existence of pneumoconiosis was established. Claimant also contends that the opinions of Drs. Renn and Castle, that COPD cannot be equated with coal workers' pneumoconiosis, are contrary and hostile to the Act as they are not in keeping with the presumption that chronic bronchitis and COPD are substantially related to or aggravated by pneumoconiosis provided to claimant in *Doris Coal Company v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991) and *Allen v. Island Creek Coal Co.*, 21 BLR 1-1 (1996), *affirming on recon.*, 15 BLR 1-32 (1991). Likewise, claimant contends that the testimony of Dr. Renn, that his opinion on the presence of pneumoconiosis was given from a medical, not a legal standpoint, is also contrary and hostile to the Act as it violates the definition of pneumoconiosis under the Act, which encompasses obstructive disorders.

Claimant's contention that he is entitled to the presumption that his chronic bronchitis and COPD are substantially related to or aggravated by pneumoconiosis is rejected. Contrary to claimant's contention, the presumption provided in *Stiltner*, which provides that after a miner has established that he is being treated for a pulmonary disorder, that disorder will be presumed to have been caused by or at least aggravated by the miner's pneumoconiosis, making employer liable for the medical costs of that treatment, applies to medical benefits only claims. *Stiltner*, *supra*; *Allen*, *supra*. Claimant's contention is, therefore, rejected.

In the instant case, the administrative law judge correctly found that Drs. Dahhan, Renn, Tuteur, and Castle attributed claimant's disabling respiratory impairment to smoking and/or asthmatic bronchitis,[5] while Dr. Baker alone attributed claimant's severe respiratory

[5] Following his examination of claimant, Dr. Dahhan diagnosed a totally disabling respiratory impairment as a result of claimant's chronic obstructive lung disease (emphysema) and chronic bronchitis, which he related to claimant's smoking and not to his coal mine employment. *See* Employer's Exhibits 40, 70. Dr. Renn reviewed claimant's medical records and diagnosed a severe obstructive respiratory impairment which the physician described as asthma and said was not related to claimant's coal mine employment.

impairment to coal workers' pneumoconiosis and COPD. In finding the weight of the medical opinion evidence insufficient to meet claimant's burden of proof on causation, the administrative law judge, noting that the physicians' qualifications were comparable, permissibly found the opinions of Drs. Baker, Dahhan, Renn, Tuteur, and Castle more persuasive than the opinion of Dr. Baker on the issue of causation.[6] *See Cross Mountain Coal Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Contrary to claimant's argument, the administrative law judge did not err when he credited the medical opinions of Drs. Dahhan, Renn and Castle concerning the cause of claimant's respiratory impairment as each physician acknowledged that claimant had a severe obstructive respiratory impairment which would prevent him from performing his usual coal mine employment. Employer's Exhibits 40, 51, 55, 70-72. *See Milburn Colliery Co. v. Hicks*, 21 BLR 2-324 (4th Cir. 1998); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195-96, 19 BLR 2-304, 2-320 (4th Cir. 1995); *Cf. Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *see also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Moreover, we reject claimant's argument that the opinions of Drs. Renn and Castle are contrary and hostile to the Act because the physicians declined to equate COPD with coal workers' pneumoconiosis. COPD can meet the definition of pneumoconiosis under the Act if it is determined that it arose out of, is substantially related to or is aggravated by coal dust exposure. 20 C.F.R. §718.201. In the instant case, Drs. Renn and Castle specifically found that it was unrelated to coal mine employment.[7] *Id*. Accordingly, as the administrative law

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Employer's Exhibits 51, 71. Dr. Castle also reviewed claimant's medical records and diagnosed a moderately severe obstructive airways disease which he related to bronchial asthma and tobacco induced chronic bronchitis and not to claimant's coal mine employment. Employer's Exhibits 55, 72. Finally, Dr. Tuteur diagnosed a moderate obstructive defect which he related to claimant's smoking and not to his coal mine employment. Employer's Exhibit 52.

[6] Claimant does not challenge the findings of the administrative law judge regarding the medical opinions of Drs. Tuteur and Younes. Thus, we affirm these findings as unchallenged on appeal. *Skrack, supra*.

[7] Drs. Renn, Dahhan, and Castle explained that claimant's impairment showed significant reversibility during testing and that because of this reversibility, claimant's obstructive impairment was not related to coal workers' pneumoconiosis as coal workers' pneumoconiosis is not reversible. None of the physicians, however, ruled out the possibility that coal workers' pneumoconiosis could result in an obstructive impairment. Employer's Exhibits 51, 52, 55, 71, 72, and, in fact, Drs. Renn and Castle testified that coal workers' pneumoconiosis results in both restrictive and obstructive impairments, Employer's Exhibit 71 at 18-22, 72 at 10, 12-14, 16.

judge acted rationally in weighing the medical opinion evidence concerning the cause of claimant's respiratory impairment, we affirm his finding that claimant failed to establish that his total disability was due to pneumoconiosis as defined by the Act[8]

[8] As we affirm the denial of benefits, we need not address employer's arguments regarding the administrative law judge's weighing of the x-ray evidence at 20 C.F.R. §718.202(a)(1)(2000). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge