BRB No. 00-0723 BLA

ROY HABEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JOSEPH ZAKREWSKY HAULING, INC.	)	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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Christopher L. Wildfire (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Rita Roppolo (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, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-00815) of Administrative Law Judge Ralph A. Romano 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 administrative law judge determined that claimant established ten and one-quarter years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 2-3. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or total disability pursuant to 20 C.F.R. §718.204(2000). Decision and Order at 4-8. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the x-ray and medical opinion evidence and further erred in failing to find total disability established based upon the pulmonary function study and medical opinion evidence of record. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that she will not participate in this appeal.[3]

[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 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]Claimant filed his claim for benefits on November 12, 1997. Director's Exhibit 1.

[3]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(2), (3) (2000) are affirmed as unchallenged on appeal. *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 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 claimant and the Director have responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer has not responded to the Board's order.[4] Based on the briefs submitted by claimant 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.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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 to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of 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 that there is no reversible error contained therein. Initially, claimant's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), is without merit.[5] The administrative law judge fully

[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.

[5]The Administrative Procedure Act requires each adjudicatory decision to include a

discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

With respect to the merits, claimant initially contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the preponderance of the x-ray evidence. Claimant's Brief at 4-6. We disagree. Claimant's contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). Contrary to claimant's assertion, the administrative law judge is not required to defer to the numerical superiority of x-ray readings. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). The administrative law judge, in the instant case, permissibly concluded that based on the qualifications of the readers, the x-ray evidence was evenly balanced and thus properly concluded that claimant did not meet his burden of persuasion. Decision and Order at 4; Director's Exhibits 22, 23, 41, 46; Claimant's Exhibits 2, 5, 11, 12; Employer's Exhibit 2; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Wilt, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

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statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Claimant further asserts, in the alternative, that the administrative law judge erred in limiting claimant to two rereadings of the May 6, 1999 x-ray interpretation. Claimant's Brief at 6-10. We find no merit in claimant's argument. The record indicates that the parties and the administrative law judge fully discussed what evidence would be submitted post hearing. *See* Hearing Transcript at 19-26. The administrative law judge considered claimant's objections to his decision to leave the record open for two rereadings of Dr. Galgon's May 6, 1999 x-ray. *See* Hearing Transcript at 26. An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). Claimant, in the instant case, has failed to establish that the administrative law judge's decision was arbitrary or an abuse of discretion.[6] *Piccin v. Director*, OWCP, 6 BLR 1-616 (1983). Consequently, we affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000).

[6]While the administrative law judge is required to admit evidence required for a full and true disclosure of the facts, he is free to exclude irrelevant, immaterial or unduly repetitious evidence. *See* 5 U.S.C. §556(d); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989).

Claimant also contends that the administrative law judge erred in failing to accord proper weight to the opinion of Dr. Kraynak, the miner's treating physician. Claimant's Brief at 12-16. We disagree. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Moreover, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician.[7] *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Clark, supra*; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, a physician's opinion, based upon his own tests and observations or the review of other objective test results, may be substantial evidence in support of an administrative law judge's findings. *Evosevich v. Consolidation Coal* Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel, supra*. The administrative law judge, in the instant case, properly considered the entirety of the medical opinion evidence of record and permissibly accorded greater weight to the opinion of Dr. Galgon, stating that claimant did not suffer from coal workers' pneumoconiosis, in light of Dr. Galgon's superior qualifications as a pulmonary specialist.[8] Decision and Order at 5-6; Director's Exhibits 19,

[7]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[8]Dr. Galgon, who is Board-certified in internal medicine and pulmonary disease and a B-reader, examined the miner on May 6, 1999, and opined that the

20; Claimant's Exhibits 4, 6; Employer's Exhibits 1, 2; *Clark, supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel, supra*.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally determined that the x-ray evidence was evenly balanced and permissibly accorded greater weight to the opinion of Dr. Galgon based upon his superior credentials, claimant has not met his burden of proof on all the elements of entitlement. *Clark, supra*; *Trent, supra*; *Perry, supra*. The administrative law judge is empowered to weigh the medical 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, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) as it is supported by substantial evidence and is in accordance with law. Decision and Order at 4-6; *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Trent, supra*; *Perry, supra*.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a living miner's claim pursuant to 20 C.F.R. Part 718,

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miner does not have pneumoconiosis or any impairment or disability due to pneumoconiosis. Employer's Exhibits 1, 2. Dr. Matthew J. Kraynak, an examining physician who is Board-certified in family medicine, opined that the miner was totally disabled due to coal workers' pneumoconiosis due to coal mine employment. Claimant's Exhibit 4. Dr. Raymond J. Kraynak, who is the miner's treating physician and is Board-eligible in family medicine, opined that claimant has possible pneumoconiosis and industrial bronchitis and is totally and permanently disabled due to coal workers' pneumoconiosis. Director's Exhibits 19, 20; Claimant's Exhibit 6.

entitlement thereunder is precluded and we need not address claimant's remaining contentions on appeal. *See Williams, supra*; *Trent, supra; Perry, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge