BRB No. 00-0754 BLA

WILLIAM C. HERRING, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Upon Remand From The Benefits Review Board Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Dorothy L. Page (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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Upon Remand From The Benefits Review Board Denying Benefits (96-BLA-0796) of Administrative Law Judge Ainsworth H. Brown 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

[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.

Board for the third time. Initially, the administrative law judge credited claimant with four years of coal mine employment and accepted the parties' stipulation to the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(2000). The administrative law judge found, however, that the medical evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2000) and denied benefits. Claimant appealed, and in *Herring v. Director, OWCP*, BRB No. 97-1051 BLA (Apr. 9, 1998) (unpub.), the Board vacated the administrative law judge's Decision and Order and remanded the case for him to consider the evidence at Section 718.202(a)(1), (3) and (4)(2000). On remand, the administrative law judge found that the medical evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), (3) and (4)(2000) and therefore denied benefits. Claimant appealed, and in *Herring v. Director, OWCP*, BRB No. 99-0247 BLA (Nov. 17, 1999)(unpub.), the Board vacated the administrative law judge's Decision and Order at Section 718.202(a)(1) and (a)(4)(2000) and remanded the case for the administrative law judge to consider the evidence pursuant to Section 718.202(a)(1) and (4)(2000) and then weigh the evidence together to determine whether the existence of pneumoconiosis is established in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). On remand, considering both x-ray and medical opinion evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis as defined by the Act, and therefore failed to establish causation, and again denied benefits. Claimant appeals, contending that the administrative law judge erred in his weighing of the x-ray evidence and the medical opinion evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.

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. Based on the responses submitted 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 findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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).

Claimant contends that the administrative law judge erred in his consideration of the x-ray evidence. Specifically, claimant contends that the July 26, 1995 x-ray is sufficient to establish the presence of pneumoconiosis because it was interpreted as positive by both Drs. Mathur and Smith, dually qualified Board-certified, B-readers, Claimant's Exhibit 2; Director's Exhibit 19, and the only other interpretation was by the Director.[2] Claimant also contends that the other x-ray evidence establishes the existence of pneumoconiosis because the preponderance of the readings by dually qualified Board-certified, B-readers was positive, *i.e.*, there were eleven positive x-ray interpretations by Board-certified, B- readers as opposed to seven negative interpretations by Board-certified, B-readers.

Contrary to claimant's inference, however, the fact that the x-ray reading submitted by the Director was negative does not *per se* render it less reliable. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991)(*en banc*). Moreover, contrary to claimant's argument, the numerical weight of the positive x-ray evidence does not in and of itself establish the existence of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Accordingly, because claimant has not raised any other arguments regarding the administrative law judge's evaluation of the x-ray evidence, it is affirmed.

Claimant next contends that the administrative law judge erred in failing to credit the medical opinions which found the existence of pneumoconiosis. Specifically, claimant contends that the administrative law judge erred in rejecting the opinions of Drs. Kraynak and Kruk simply because they relied on a coal mine employment history greater than that found by the administrative law judge. Claimant also contends that the administrative law judge erred in relying on the failure of Drs. Bemiller and Cable to address the cause of claimant's pulmonary impairment as sufficient to support a finding of no pneumoconiosis.

The evidence of record contains the medical opinions of four physicians. Drs. Kraynak and Kruk found the presence of coal workers' pneumoconiosis, Director's Exhibits 10, 19; Claimant's Exhibit 18, while Drs. Bemiller and Ahluwalia made no mention of the disease or of any respiratory impairment arising out of coal mine employment. Director's Exhibits 11, 19, 35. Likewise, Dr. Cable who administered a pulmonary function study of claimant did not address the cause of the pulmonary impairment observed. In weighing the

[2] The Director had the July 26, 1995 x-ray reread by Dr. Francke, who was also a Board-certified, B-reader. Dr. Francke read the x-ray as negative. Director's Exhibit 20.

opinions, the administrative law judge accorded less weight to the opinions of Drs. Kraynak and Kruk because they relied on a coal mine employment history at least twice as long as the four years which were found to have been established. Decision and Order on Remand at 2. This was proper. *Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988)(medical opinion based on inaccurate work history properly rejected as unreasoned); *West v. Director, OWCP*, 896 F.2d 308, 312, 13 BLR 2-323, 2-331 (8th Cir. 1990); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Moreover, contrary to claimant's argument, because the administrative law judge properly found the opinions of Drs. Kruk and Kraynak to be unreliable and because the other opinions of record did not address the cause of claimant's respiratory impairment, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis as defined by the Act. *See* 20 C.F.R. §718.201, 718.202(a)(4). Decision and Order on Remand at 2-3; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We therefore affirm the administrative law judge's weighing of the medical opinions. Moreover, as the administrative law judge properly weighed the x-ray and medical opinion evidence together in determining that claimant failed to establish the existence of pneumoconiosis, this finding is affirmed. *Williams, supra*. Further, as the administrative law judge found that the prerequisite finding of disease had not been established, he properly found that causation likewise could not be established. *See* 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Upon Remand From the Benefits Review Board Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge