BRB No. 00-0756 BLA

DONALD WERTZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANBECK DREDGING COMPANY	)	
	)	DATE ISSUED:
Employer-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman and Goggin), Bethlehem, Pennsylvania, for employer.

Edward Waldman (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: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (1999-BLA-00968) of Administrative Law Judge Paul H. Teitler 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] This claim involves a duplicate claim. The administrative law judge found that claimant established thirty-four and three-quarter years of qualifying coal mine employment and that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000), but was sufficient to establish the existence of total respiratory disability pursuant to 20 C.F.R. §718.204(c)(2000) and, consequently, a material change in conditions pursuant to 20 C.F.R. §725.309(2000). The administrative law judge then considered all of the evidence of record and determined that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2000). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1)(2000) and that his total disability was due to

[1]Claimant is Donald Wertz, the miner, whose initial claim for benefits was filed on March 12, 1987 and denied on May 7, 1987 because claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 36. Claimant filed the instant claim for benefits on August 14, 1998. Director's Exhibit 1.

[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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

pneumoconiosis pursuant to Section 718.204(b)(2000). Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs, responds declining to submit a brief on appeal.[3]

[3]We affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2)-(3)(2000) 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 responed 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. 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 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2000); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*. Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

[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.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Initially, claimant contends that the administrative law judge erred in failing to consider the credentials of the physicians submitting positive interpretations. Claimant's Brief at 2. The administrative law judge considered twenty-four interpretations of eight x-rays. Decision and Order at 5-7. Only two of these x-rays, dated October 28, 1997 and August 28, 1998, were interpreted as being positive for the existence of pneumoconiosis. Director's Exhibits 10, 12, 13, 16, 33; Employer's Exhibits 1, 7, 8; Claimant's Exhibits 5-9.

The October 28, 1997 x-ray was interpreted as positive, by one physician who is a Board-certified radiologist, and as negative, by one physician who is a B reader, and four physicians, who are dually qualified as B readers and Board-certified radiologists. Director's Exhibits 12, 16, 33; Employer's Exhibits 1, 7, 8. The administrative law judge acted within his discretion in assigning greater weight to the interpretations of the dually qualified physicians on the basis of their superior credentials and rationally found the October 28, 1997 x-ray to be negative for the existence of pneumoconiosis. Decision and Order at 7; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

The August 28, 1998 x-ray was interpreted as negative, by five dually qualified physicians, as well as by one physician who indicated that he is neither a B reader nor a Board-certified radiologist, and as positive by five physicians who are dually qualified. Director's Exhibits 10, 13, 33; Employer's Exhibit 1; Claimant's Exhibits 5-9. Inasmuch as an equal number of dually qualified physicians read the August 28, 1998 x-ray as positive as did negative, the administrative law judge rationally found that the August 28, 1998 x-ray did not establish the existence of pneumoconiosis. Decision and Order at 7; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1(1998); *Parulis, supra; Lafferty, supra*; *McMath, supra*; *Dillon, supra*; *Martinez, supra*; *Wetzel, supra*. Since the administrative law judge, in weighing the x-ray evidence of record, acted within his discretion in considering the credentials of all of the physicians who submitted interpretations, we reject claimant's contention that the administrative law judge failed to consider the readers qualifications.

Claimant next contends that the administrative law judge erred in considering the January 22, 1999 x-ray, which was interpreted as being negative for the existence of pneumoconiosis, because it was stricken from the record at the hearing. Claimant's Brief at 2; Decision and Order 31; Employer's Exhibit 6. Claimant is correct that the January 22, 1999 x-ray was stricken from the record at the hearing. Hearing Transcript at 5. However, the administrative law judge's reliance on the 1999 x-ray is harmless as his finding was also

based on the preponderance of the x-rays interpreted by the most highly qualified readers as negative for the existence of pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Finally, claimant contends that the administrative law judge erred in according greatest weight to the medical opinions of Drs. Dittman and Rashid, who opined that claimant does not have pneumoconiosis, when they failed to review any of the positive chest x-ray interpretations. Claimant's Brief at 3; Decision and Order 10; Employer's Exhibits 6, 9; Claimant's Exhibits 3, 4. Inasmuch as the administrative law judge rationally found the weight of the x-ray evidence to be negative for the existence of pneumoconiosis, we reject claimant's contention because the weight of the x-ray evidence of record supports the opinions of Drs. Dittman and Rashid that claimant does not have pneumoconiosis. Decision and Order 10; Employer's Exhibits 6, 9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, the administrative law judge acted within his discretion in finding the opinion of Dr. Dittman, who is Board-certified in internal medicine, entitled to greater weight than the opinion of Dr. Kraynak, who stated that he is not Board-certified in any field, on the basis of Dr. Dittman's superior credentials. Decision and Order at 13; Employer's Exhibits 6, 9; Claimant's Exhibits 3, 4; *Parulis, supra; Lafferty, supra; McMath, supra; Dillon, supra; Martinez, supra; Wetzel, supra*. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as well as the denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge