BRB No. 00-0790 BLA

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| RONALD LAMAR KEHLER, SR. | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: |
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| ANDREW WORATYLA COAL COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| CONSTITUTION STATE SERVICES COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order - Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

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

Michelle S. Gerdano (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 McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-00813) 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 credited claimant with nineteen years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 (2000).[2] The administrative law judge considered all of the evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). The administrative law judge thus found that the newly submitted evidence was insufficient to establish a material change in

[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 first claim for black lung benefits in 1977, which was finally denied in 1980. Decision and Order at 2; Director's Exhibit 28. Claimant filed his second claim for benefits in 1984, which was finally denied in 1984. Decision and Order at 2; Director's Exhibit 29. Claimant filed the instant claim on October 19, 1998. Decision and Order at 2; Director's Exhibit 1.

conditions pursuant to 20 C.F.R. §725.309(d) (1999)[3] in accordance with *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Accordingly, benefits were denied.

[3] The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

On appeal, claimant contends that the administrative law judge erred in finding that the recent evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) (2000) and total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), and thus erred in failing to find a material change in conditions established pursuant to Section 725.309(d) (1999). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[4]

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 9, 2001, to which claimant, employer 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 briefs submitted by the parties, 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 the 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 to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718 (2000), claimant must establish 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 (2000). Failure of claimant 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).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order

[4] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) (2000) and 718.204(c)(1)-(3) (2000) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.

Claimant contends that the administrative law judge erred in finding that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(1) (2000). Claimant specifically contends that the administrative law judge improperly accorded greater weight to the numerical superiority of the August 3, 1999, x-ray readings that were negative. We disagree. In his consideration of the x-ray evidence, the administrative law judge noted that there were seven negative readings and four positive readings of the August 3, 1999, x-ray submitted with the most recent claim and that all of the readings were by B readers, ten of whom were also Board-certified radiologists. Decision and Order at 4; Claimant's Exhibits 2, 4-7; Employer's Exhibit 3. The administrative law judge thus reasonably found that as equally qualified physicians reached equally probative, but conflicting, conclusions, the negative and positive evidence was equally balanced. The administrative law judge therefore permissibly concluded that the x-ray evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(1) (2000). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 4-5.

In addition, we reject claimant's contention that the administrative law judge erred in failing to consider the "professional relationship of the Employer's consultative radiologists" since their degree of independence within their group practice is questionable. The identity of a party who hires a medical expert does not, by itself, demonstrate partiality or partisanship on the part of the physician. *Urgolites v. Bethenergy Mines, Inc* ., 17 BLR 1-20 (1992). Moreover, we have reviewed the record and we conclude that the administrative law judge was not required to determine the degree of independence of employer's radiologist's inasmuch as the record contains no evidence to support claimant's allegations. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Inasmuch as the administrative law judge weighed all of the recently submitted x-ray evidence and reasonably concluded that it was insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1) (2000).

We further reject claimant's contention that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to Section 718.202(a)(4). The administrative law judge acted within his discretion as trier-of-fact in determining that the opinion of Dr. McGlaughlin, claimant's treating physician, diagnosing coal workers' pneumoconiosis in various office notes, was insufficient to establish the existence of

pneumoconiosis, since the physician did not explain the basis for his conclusion or identify the particular medical studies he relied on in reaching his conclusion. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 5-6. Moreover, the administrative law judge reasonably found Dr. McGlaughlin's opinion outweighed by the contrary opinions of Drs. Rashid and Dittman as he found their opinions were better reasoned and supported by their findings on physical examination and objective studies. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 6. Inasmuch as the administrative law judge rationally concluded that the recently submitted medical opinion evidence did not establish the existence of pneumoconiosis and his conclusion is supported by substantial evidence, we affirm his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000).

In considering whether total disability was established by the recently submitted medical opinions of record pursuant to Section 718.204(c)(4) (2000), the administrative law judge permissibly accorded diminished weight to the opinion of Dr. McGlaughlin, that claimant was unable to perform activities due to shortness of breath, as he found the physician did not explain the basis for his conclusion. *Clark*, *supra*; *Lucostic*, *supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 8. Moreover, the administrative law judge permissibly gave greater weight to the opinions of Drs. Rashid and Dittman, that claimant was not disabled from a pulmonary or respiratory standpoint, as he found that the physicians' opinions were supported by the objective evidence. *Clark*, *supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel*, *supra*; Decision and Order at 8.

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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge's finding that the weight of the newly submitted medical opinions of record was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4) (2000) is supported by substantial evidence and thus is affirmed. Furthermore, since the administrative law judge found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c) (2000), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2) (2000); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). As claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) or total respiratory

disability pursuant to Section 718.204(c) (2000), essential elements of entitlement, the administrative law judge correctly found that claimant failed to establish a material change in conditions since the prior denial pursuant to Section 725.309(d) (1999). *Swarrow*; *supra*.

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