BRB No. 00-0806 BLA

LONZO GUERRA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG ELK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	DATE ISSUED:_______________
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Richard A. Dean and Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (99-BLA-0950) of Administrative Law Judge Joseph E. Kane denying benefits on a miner's 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] The administrative law judge credited the miner with twenty-nine years of coal mine employment. Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Decision and Order at 11-14. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) (2000) and Section 718.202(a)(4) (2000). Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability based on the medical opinion evidence. Claimant's Brief at 5-7. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

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[1]Claimant is Lonzo Guerra, the miner, who filed his claim for benefits on June 11, 1998. Director's Exhibit 1.

[2]The Department of Labor 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.

[3]We affirm the administrative law judge's findings regarding the length of coal mine employment and pursuant to Section 718.202(a)(2)-(a)(3) (2000) as they are unchallenged on

appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *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 Ass'n 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 employer and the Director have responded.[4] Claimant has not filed a response.[5] 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 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).

Pursuant to Section 718.202(a)(1) (2000), the administrative law judge noted that the record contains fourteen interpretations of six x-rays. Decision and Order at 11. The administrative law judge found that the x-ray evidence failed to establish the existence of pneumoconiosis "[b]ecause the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians." Decision and Order at 11.

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[4]Employer and the Director, Office of Workers' Compensation Programs, assert that the regulations at issue in the lawsuit do not affect the outcome of this case.

[5]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 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

The record contains a positive reading of the April 4, 1990 x-ray by Dr. Anderson, whose radiological qualifications are not in the record, and a positive reading of the October 27, 1990 x-ray by Dr. Wright, whose radiological qualifications are also not in the record. Director's Exhibits 19, 20. Dr. Myers, whose radiological qualifications are not in the record, interpreted the February 22, 1991 x-ray as positive, and four physicians, who are B-readers[6] and Board-certified radiologists, interpreted this x-ray as negative. Director's Exhibits 21-23; Employer's Exhibits 1, 2. Dr. Baker, a B-reader, interpreted the July 21, 1998 x-ray as positive and four dually-qualified physicians interpreted this x-ray as negative. Director's Exhibit 13; Employer's Exhibits 1, 2. Additionally, Dr. Broudy, a B-reader, interpreted the August 25, 1998 x-ray as negative and Dr. Dahhan, also a B-reader, interpreted the October 1, 1998 x-ray as negative. Director's Exhibits 15, 46.

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3-4. Contrary to claimant's assertion, it was permissible for the administrative law judge to consider the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge also considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit inasmuch as he considered all the x-ray evidence in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). *see generally Cox v. Director,*

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[6]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

OWCP, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Inasmuch as the administrative law judge properly concluded that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence, *see* 20 C.F.R. §718.202(a)(1), we affirm the administrative law judge's finding. *See Staton, supra*; *Johnson, supra*; *Creech, supra.*

Pursuant to Section 718.202(a)(4) (2000), the administrative law judge found that claimant failed to establish the existence of pneumoconiosis. Decision and Order at 12. In so finding, the administrative law judge gave "great weight to the opinions of Drs. Broudy and Fino, two highly-qualified physicians." *Id.* Moreover, the administrative law judge found that Dr. Broudy's opinion is entitled to "great weight" because he examined the miner, "considered extensive medical evidence of record," and "defended his opinion that the miner does not suffer from coal workers' pneumoconiosis" at his deposition. *Id.* The administrative law judge stated that Dr. Branscomb's opinions are also not supportive of claimant's position in establishing the existence of pneumoconiosis.[7] *Id.*

Additionally, the administrative law judge noted that Drs. Anderson, Wright, Myers, Baker, and a physician from Lexington Surgeons found that the miner has pneumoconiosis. Decision and Order at 12. The administrative law judge permissibly accorded "little weight" to the finding of pneumoconiosis by the Lexington Surgeons' physician because this physician "did not state the medical findings upon which he relied in diagnosing pneumoconiosis and did not explain how those findings support a diagnosis of pneumoconiosis." *Id*; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983). The administrative law judge noted that "Dr. Anderson is a highly-qualified physician," but the administrative law judge found "no reason to credit his opinion over the opinions of Drs. Broudy and Fino." *Id.* Furthermore, the administrative law judge stated that the qualifications of Drs. Wright, Myers, and Baker are not in the record and, therefore, he accorded greater weight to the opinions of Drs. Broudy and Fino over the former physicians' opinions based on the latter physicians' superior qualifications.[8] *Id*; *see*

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[7]As the administrative law judge noted, while Dr. Branscomb, in his August 13, 1998 opinion, was unable to determine whether or not the miner has pneumoconiosis, this physician concluded, in his January 5, 1999 opinion, that the miner does not have pneumoconiosis, after reviewing additional evidence. Director's Exhibits 14, 42.

[8]The administrative law judge noted that Dr. Anderson is Board-certified in internal medicine and pulmonary disease. Decision and Order at 12. On an x-ray report, Dr. Baker is identified as a B-reader. Director's Exhibit 13. Drs. Broudy and Fino are Board-certified in internal medicine and pulmonary disease and are B-readers. Director's Exhibits 15, 16.

Dillon v. Peabody Coal Co., 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant contends that the administrative law judge erred in "granting controlling weight" to Dr. Fino's opinion. Claimant's Brief at 4. The administrative law judge, however, did not give Dr. Fino's opinion "controlling weight," but found that claimant failed to establish the existence of pneumoconiosis based on the opinions of Dr. Fino and Dr. Broudy, who examined the miner. Decision and Order at 12. Contrary to claimant's assertion, it was within the administrative law judge's discretion to find that claimant failed to establish the existence of pneumoconiosis by relying on the opinion of Dr. Fino, a non-examining physician, as supported by the opinion of Dr. Broudy, an examining phyisician.[9] *See Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989), *aff'd on reh'g*, 877 F.2d 495, 12 BLR 2-303 (6th Cir. 1989); *Collins v. Sec'y of HHS*, 734 F.2d 1177, 6 BLR 2-54 (6th Cir. 1984); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1993).

Inasmuch as an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met its burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we hold that the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis based on his decision to credit the opinions of Drs. Broudy and Fino. *See* 20 C.F.R. §718.202(a)(4); *Dillon*, *supra*; *Wetzel*, *supra*; *see also Clark*, *supra*; *Fields*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we also affirm his denial of benefits on the miner's claim.

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[9]Claimant notes that it is within the administrative law judge's discretion to determine the weight to be accorded the opinion of a non-examining physician. Claimant's Brief at 4.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge