BRB No. 01-0652 BLA

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

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

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

Mary Forrest-Doyle (Eugene Scalia, 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, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (2000-BLA-0683) of Administrative Law Judge Ralph A. Romano rendered 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] Claimant filed his application for

[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.

benefits on September 27, 1999. Director's Exhibit 1. The District Director of the Office of Workers' Compensation denied benefits and claimant requested a hearing, which was held on August 28, 2000.

In the ensuing Decision and Order, the administrative law judge found that the documentary evidence of record and claimant's testimony established "less than five years" of coal mine employment. Decision and Order at 4. The administrative law judge additionally found that although the x-ray evidence and medical opinions established the existence of pneumoconiosis, claimant did not establish that the pneumoconiosis arose out of coal mine employment. Finally, the administrative law judge found that even assuming that claimant's pneumoconiosis arose out of coal mine employment, claimant did not prove that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by denying him the opportunity to respond to evidence which claimant contends was not sent to him by the Director, Office of Workers' Compensation Programs (the Director), at least twenty days before the hearing as required by 20 C.F.R. §725.456(b)(1)(2000). Claimant alleges that the administrative law judge erred further in excluding evidence submitted by claimant. Additionally, claimant argues that the administrative law judge erred in finding that claimant established fewer than five years of coal mine employment, erred in finding that claimant did not establish that his pneumoconiosis arose out of coal mine employment, and erred in finding that claimant did not prove that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. The Director responds, urging affirmance.[2]

The Board's scope of review is defined by statute. The administrative law

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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 for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, 145 F.Supp.2d 1 (D.D.C. 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. No party responded. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

[2] We affirm as unchallenged on appeal the administrative law judge's findings that both the existence of pneumoconiosis and the presence of a totally disabling respiratory or pulmonary impairment were established. *See* 20 C.F.R. §§718.202(a), 718.204(b)(2); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Initially, claimant contends that the administrative law judge erred by admitting into the record Dr. Abdul Rashid's July 25, 2000 report in which Dr. Rashid reviewed the medical evidence at the behest of the Director. Claimant alleges that the administrative law judge erred in finding that the Director timely sent Dr. Rashid's report to claimant.

Any evidence not submitted to the district director "may be received into evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(1)(2000). We review the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989)(*en banc*).

The hearing in this case was scheduled for August 28, 2000. Thus, any evidence to be submitted had to be sent to all other parties by August 8th. Review of the record reveals that the Director sent Dr. Rashid's July 25, 2000 report and the doctor's *curriculum vitae* to the administrative law judge on July 27, 2000. Director's Exhibit 34. The cover letter attached to this exhibit indicated that service was "VIA FACSIMILE & FIRST-CLASS", and certified that "[c]opies are being forwarded to counsel for claimant." *Id*. Below the signature block, the Director's counsel typed "cc: Helen M. Koschoff, Esquire." *Id*. Further review of the record indicates that, for each exhibit that was submitted to the administrative law judge, both claimant's and Director's counsel attached a dated cover letter indicating that each had provided copies to the other.

Review of the hearing transcript indicates that when claimant's counsel objected to Dr. Rashid's July 25, 2000 report on the ground that it was not sent to claimant's counsel, the administrative law judge asked the Director's counsel for proof of service on claimant. The Director's counsel produced the July 27 cover letter and averred that, as stated in the letter, he had sent the report to claimant's counsel on July 27th by both fax and regular mail. Tr. at 10. Claimant's counsel responded that she had no record of receiving the report. *Id*.

On these facts, we detect no abuse of discretion in the administrative law judge's conclusion that the Director produced sufficient evidence of having sent the report to claimant's counsel on July 27th. *See Clark, supra*. The July 27 cover letter along with the Director's counsel's statements at the hearing support a finding of service on July 27. In form, the July 27 cover letter matches those used by both claimant and the Director in exchanging the rest of their evidence. Faced with

claimant's counsel's allegation of non-receipt, the administrative law judge permissibly exercised his discretion in finding that Dr. Rashid's July 25th report was sent to claimant on July 27th. Claimant directs us to no authority requiring more formalized proof that an item of evidence was sent to a party, and review of the Act and regulations reveals no such requirement.[3] Consequently, we affirm the administrative law judge's ruling admitting Dr. Rashid's July 25, 2000 report into the record.

Claimant further asserts that, even assuming Dr. Rashid's July 25, 2000 report was sent on July 27th, the administrative law judge erred in not permitting claimant to submit rebuttal evidence when Dr. Rashid's report was sent only twelve days before the twenty-day deadline. Review of the hearing transcript indicates that claimant never asked the administrative law judge to consider whether submission of Dr. Rashid's report twelve days before the deadline constituted surprise evidence. Instead, after the administrative law judge admitted Dr. Rashid's report, claimant's counsel asked, "Would the Claimant be given an opportunity to respond to that, Your Honor?" Tr. at 11. The administrative law judge, interpreting this request as reflecting a misunderstanding of his ruling, replied, "Well, we've got an Affidavit of Service. You've received it presumptedly [sic] and I'm going to accept it as served." *Id*. Claimant made no further objection or argument on this point. Because claimant did not ask the administrative law judge to rule on whether timely submission of Dr. Rashid's report twelve days before the twenty-day deadline nevertheless constituted surprise evidence, claimant waived the argument.[4] *See Dankle v. DuQuesne Light Co*., 20 BLR 1-1, 1-6 (1995).

Claimant next contends that the administrative law judge erred by excluding a

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[3] The administrative law judge's ruling comports with 29 C.F.R. §18.3 (Service and filing of documents), which provides, in pertinent part, that a party serving a document on another party need only "certify to the manner and date of service." 29 C.F.R. §18.3(b).

[4] Even if claimant's general request to respond were interpreted as an argument that submission twelve days before the twenty-day deadline constitutes unfair surprise, none of the cases cited by claimant support his claim that service of a medical record review report almost two weeks before the deadline amounts to service on the eve of the twenty-day deadline. *See North American Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-49 (1990); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(*en banc*). Those cases involved submissions exactly upon or just prior to the deadline. Additionally, Dr. Rashid's July 25, 2000 medical record review report can hardly be labeled a surprise, when it essentially repeated the conclusions Dr. Rashid reached in his December 9, 1999, February 9, 2000, and March 3, 2000 reports. Director's Exhibits 17-19. Finally, Dr. Rashid's July 25, 2000 report is contemporaneous with and effectively rebutted by claimant's July 14, 2000 deposition of Dr. Raymond Kraynak, in which Dr. Kraynak reviewed claimant's medical records and Dr. Rashid's prior reports, and expressed his disagreement with Dr. Rashid's conclusions. Claimant's Exhibit 5.

copy of a mining lease sent by claimant on August 25, 2000 and stamped as received by the Office of Administrative Law Judges on August 28, 2000, the date of the hearing. Review of the hearing transcript reveals that claimant did not proffer this document at the hearing, nor was the record left open for the submission of post-hearing evidence. Therefore, the administrative law judge did not abuse his discretion in excluding this document from the record as untimely filed. Decision and Order at 4 n.2; *see* 20 C.F.R. §725.456(b)(1)(2000); *Clark supra*. Accordingly, we now turn to the administrative law judge's consideration of the evidence.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant asserts that the administrative law judge failed to provide a rationale for his finding that the evidence did not establish that claimant's total disability is due to pneumoconiosis. Claimant's contention lacks merit.

A miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *see Bonessa v. United States Steel Corp*., 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989)(pneumoconiosis must be a substantial contributor). The administrative law judge considered the conflicting opinions of Drs. Rashid and Kraynak. Dr. Rashid, who is Board-certified in Internal Medicine, examined and tested claimant on December 9, 1999 and reviewed his medical records. Director's Exhibits 17-19, 34. Dr. Rashid concluded that although claimant's chest x-ray revealed "category I silicosis," Director's Exhibit 34 at 1, claimant's respiratory impairment was the result of smoking and "morbid obesity."[5] Director's Exhibit 19 at 2. Dr. Kraynak, who is Board-eligible in Family Medicine and is claimant's treating physician, examined and tested claimant on May 17, 2000 and reviewed the medical evidence of record. Claimant's Exhibits 3, 5. Dr. Kraynak concluded that claimant's total disability is due to coal workers' pneumoconiosis because, in Dr. Kraynak's view, claimant's twenty-two years of smoking and his obesity were less significant than his coal mine employment. *Id*. In rendering his opinion, Dr. Kraynak first relied on a coal mine employment history of eighteen years, Claimant's Exhibit 3, but was later asked to assume that claimant had less than ten years of coal mine employment. Claimant's Exhibit 5 at 16.

[5] Dr. Rashid recorded a smoking history of one pack per day for twenty-two years, and reported that claimant "is at least 100 lbs. over his acceptable weight." Director's Exhibits 17-19; Director's Exhibit 34 at 1.

Contrary to claimant's contention, the administrative law judge explained that he accorded greater weight to Dr. Rashid's opinion because Dr. Rashid possesses superior medical credentials. Decision and Order at 11. The administrative law judge permissibly looked to qualifications to resolve the dispute over the causative roles of smoking, obesity, and coal mine dust exposure in the impairment of a man considered by both physicians to have worked in mining for at most ten years. Director's Exhibits 18-19, 34; Claimant's Exhibit 5 at 16; *see Dillon v. Peabody Coal Co*., 11 BLR 1-113, 1-114 (1988). The administrative law judge further found, within his discretion, that Dr. Rashid's opinion was better reasoned and supported, *see Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993), and that Dr. Kraynak's short period of time as claimant's treating physician did not entitle his opinion to greater weight.[6] *See Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Berta v. Peabody Coal Co*., 16 BLR 1-69, 1-70 (1992). Substantial evidence supports the administrative law judge's findings, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Mays v. Piney Mountain Coal Co*., 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting). Therefore, we affirm the administrative law judge's finding "that the Claimant has failed to establish total disability due to pneumoconiosis." Decision and Order at 11; *see* 20 C.F.R. §718.204(c)(1); *Bonessa, supra*.

Because claimant has failed to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). Because we affirm the denial of benefits on this ground, we need not address claimant's remaining allegations of error.

[6] Review of the record indicates that Dr. Kraynak had been treating claimant for one month at the time of Dr. Kraynak's examination report, Claimant's Exhibit 3, and for two months at the time of his deposition. Claimant's Exhibit 5.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge