BRB No. 02-0715 BLA

JAMES R. STILTNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WELLMORE COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge.

Claimant appeals the Decision and Order (97-BLA-0640) of Administrative Law Judge Michael P. Lesniak 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] This case is before the Board for the fourth time. In its last Decision

[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 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

and Order, the Board vacated the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202 (a) and remanded the case to the administrative law judge to weigh the evidence relevant to the existence of pneumoconiosis together in light of *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The Board also vacated the administrative law judge's finding on causation and remanded for the administrative law judge to consider Dr. Tuteur's opinion pursuant to the standard set forth in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193, 19 BLR 2-304, 2-315-316 (4th Cir. 1995), citing *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995) and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). *Stiltner v. Wellmore Coal Corporation*, BRB No. 00-0987 (July 31, 2001)(unpub.). On remand, the administrative law judge, considering both x-ray and medical opinion evidence together, found that the existence of pneumoconiosis was not established at 20 C.F.R. §§718.202(a)(1), (4). The administrative law judge also found, on reconsidering all the relevant evidence, that claimant failed to establish causation at Section 718.204(c). Specifically, the administrative law judge accorded the opinion of Dr. Tuteur greater weight than the opinions of Drs. Sutherland and Robinette as he found it better reasoned. Accordingly, benefits were denied.

On appeal, claimant contends that the evidence establishes the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that pneumoconiosis is totally disabling. Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs, is not participating in 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 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, claimant must prove 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. Failure 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)(*en banc*).

Claimant argues that the administrative law judge erred in using the overwhelming weight of employer's negative x-ray evidence to find that claimant did not establish the existence of pneumoconiosis. Specifically, while acknowledging that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Compton*,

supra that all relevant evidence on the existence of pneumoconiosis must be weighed together at Section 718.202(a)(1)-(4), claimant nonetheless contends that the administrative law judge acted in contravention of the Act when he relied on negative x-ray evidence to deny benefits. Additionally, claimant contends that the medical opinion evidence is not in equipoise, *i.e.*, four opinions finding the existence of pneumoconiosis and four opinions finding no pneumoconiosis, because one of the physicians, finding that claimant did not have pneumoconiosis was hostile to the Act, *i.e.*, that of Dr. Tuteur.

In finding that the evidence did not establish the existence of pneumoconiosis, the administrative law judge first noted that Administrative Law Judge Clement J. Kichuk had previously found that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1) because the majority of the more qualified physicians interpreted the x-rays as negative for the existence of pneumoconiosis. Turning to the medical opinion evidence, the administrative law judge noted that he had agreed with Judge Kichuk, who had found the existence of pneumoconiosis established based on the medical opinion evidence, in his prior decision, because the medical opinions of the physicians diagnosing the existence of pneumoconiosis outweighed the opinions of those physicians who concluded that claimant did not suffer from pneumoconiosis. Pursuant to *Compton*, however, the administrative law judge concluded that, after weighing the x-ray and medical opinion evidence together, claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence.

Contrary to claimant's argument, the administrative law judge did not rely on negative x-ray evidence to find that the existence of pneumoconiosis was not established; instead, the administrative law judge relied on the "majority of the more qualified physicians" who interpreted x-rays as negative and those physicians' opinions which found that claimant did not have pneumoconiosis, to find that the existence of pneumoconiosis was not established. This was rational. *See Compton*, *supra*; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Moreover, the Act specifically requires that "all relevant evidence shall be considered." 30 U.S.C. §923(b); *Compton* at 211 F.3d at 208, 22 BLR at 2-173-174. Thus, the Fourth Circuit in *Compton* held that "there is nothing in the language of §718.202(a) to support a conclusion that satisfaction of the requirements of one of the subsections conclusively proves the existence of pneumoconiosis even in the face of conflicting evidence." *Compton*, 211 F.3d at 209, 22 BLR at 2-171. Further, we reject claimant's argument that the disparity in resources between the parties has dictated the outcome of this case. The administrative law judge is charged with weighing all the relevant evidence, 30 U.S.C. §923(b); *see* 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Compton*, *supra*; *see also Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989), and it is within the

discretion of the administrative law judge to limit the impact of evidence which he determines to be voluminous and duplicative evidence. *See Woodward*, *supra*; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Cochran*, *supra*.[2] Nor, contrary to claimant's contention, is Dr. Tuteur's opinion hostile to the Act. *See Stiltner*, *supra*. We, must, therefore, affirm the administrative law judge's finding that the preponderance of the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4) pursuant to *Compton*. Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement under the Act, entitlement is precluded, *Compton*, *supra*; *Trent*, *supra*; *Perry*, *supra*, and we need not consider claimant's arguments regarding cause of pneumoconiosis and cause of disability.

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[2] The amended regulation at 20 C.F.R. §725.414(a)(3)(i), which limits the submission of evidence by the responsible operator, applies only to claims filed after January 19, 2001. 20 C.F.R. §725.2.

Accordingly, the Decision and Order on Remand Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to affirm the administrative law judge's Decision and Order denying benefits. I believe that the administrative law judge has violated the Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), in failing to explain how the negative weight of the x-ray evidence affected his consideration of the positive weight of the medical opinion evidence, when he considered them together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), to hold that claimant failed to establish the existence of pneumoconiosis. Accordingly, I would vacate the administrative law judge's finding at Section 718.202(a) and remand for reconsideration of the relevant evidence thereunder. Further, if reached, the administrative law judge must consider Dr. Tuteur's opinion pursuant to *Scott v. Mason Coal Co.*, No. 99-1495 (4th Cir. May 2, 2002) on the issue of causation.

REGINA C. McGRANERY
Administrative Appeals Judge