BRB No. 02-0759 BLA

ALGAIN DAVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED)		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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pineville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0914) of Administrative Law Judge Robert L. Hillyard 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] In this duplicate claim, the administrative law judge found that claimant's previous claim was denied because claimant failed to establish any element of entitlement. The administrative law judge found that the evidence of record failed to establish the

[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.

existence of pneumoconiosis, or total disability due to pneumoconiosis. Accordingly, benefits were denied.[2]

On appeal, claimant contends that the administrative law judge erred in finding that

[2] Claimant's first claim, which was filed on May 10, 1993, was denied by the district director on January 5, 1995, because claimant failed to establish any element of entitlement. Director's Exhibits 28-1, 28-137. Claimant filed a second claim on June 20, 2000, the denial of which is presently before us on appeal.

In a duplicate claim, the administrative law judge is to first consider whether newly submitted evidence establishes the existence of an element previously denied. If the new evidence establishes that element, then he must consider all relevant evidence. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In this case, the administrative law judge did not make a separate finding on material change as required by *Ross*, *supra*; *see* Decision and Order at 12 n.7. Nonetheless, because the administrative law judge found that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, based on consideration of all the evidence relevant to the existence of pneumoconiosis, we affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis, and generally avers that the administrative law judge erred in finding the evidence insufficient to establish total disability. Employer responds, urging affirmance of the Decision and Order of the administrative law judge denying benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.[3]

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 first contends that the administrative law judge erred in relying solely on the qualifications of the x-ray readers and the numerical superiority of the negative x-ray readings to find that the existence of pneumoconiosis was not established. In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge placed greater weight on the majority of negative interpretations by the physicians possessing the dual qualifications of Board-certified radiologist and B reader. This was rational. 20 C.F.R. §718.202(a)(1); *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). Decision and Order at 12, 13. We, therefore, affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at

[3] We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §718.202(a)(2)-(3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. §718.202(a)(1).

Turning to the medical opinion evidence, the administrative law judge accorded little weight to Dr. Baker's opinion diagnosing the existence of legal pneumoconiosis, *i.e.*, that claimant's mild chronic obstructive pulmonary disease was caused by both cigarette smoking and coal dust exposure, as he found it was outweighed by the opinions of Drs. Rosenberg, Repsher, Broudy and Vuskovich, that claimant did not have pneumoconiosis or a respiratory impairment arising out of coal mine employment. This was rational. Decision and Order at 13; Director's Exhibits 9, 23; Employer's Exhibits 1, 2. 20 C.F.R. §§718.201, 718.202(a)(4). Likewise, the administrative law judge rationally accorded little weight to Dr. Baker's finding of clinical pneumoconiosis in 1992 because it was based in part on a positive x-ray (1/0), which Dr. Baker subsequently found may not have been positive (0/1), and which was subsequently reread as negative by four better qualified physicians. Decision and Order at 12, 13. Additionally, the administrative law judge noted that Dr. Baker subsequently examined claimant on July 21, 2000 and read an x-ray at that time as negative (0/1). Accordingly, contrary to claimant's argument, the administrative law judge properly found that the medical opinion evidence did not establish the existence of pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).

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 if the administrative law judge's findings are supported by substantial evidence. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that the evidence of record has failed to establish the existence of pneumoconiosis. Further, because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, after considering all the evidence of record, the claim must be denied and we need not address claimant's argument regarding total disability. *Trent*, *supra*; *Perry*, *supra*.

In any case, however, we note that contrary to claimant's argument, the administrative law judge properly found that claimant failed to establish a totally disabling respiratory impairment, after weighing the non-qualifying pulmonary function and blood gas studies and the medical opinions, which found that claimant had the respiratory capacity to perform his usual coal mine employment. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*). Further, contrary to claimant's argument, an opinion that claimant should avoid further dust exposure is not sufficient to establish that

claimant has a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), nor was the administrative law judge required to consider claimant's ability to perform comparable and gainful work where he found that claimant failed to establish a totally disabling respiratory impairment, *see Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Thus, the administrative law judge's finding that claimant failed to establish a totally disabling respiratory impairment is, likewise, affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge