BRB No. 04-0820 BLA

JOSEPH VERNON, SENIOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES STEEL MINING COMPANY	)	DATE ISSUED: 04/29/2005
	)	
	)	
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 – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Daniel L. Chunko (Chunko Law Firm), Washington, Pennsylvania, for claimant.

Sondra L. Binotto (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-6082) of Administrative Law Judge Richard A. Morgan (the administrative law judge) on a subsequent 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). The administrative law judge found that fourteen and one-half years of coal mine employment were established and that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and thereby, a change in an applicable condition of entitlement since the prior denial of benefits pursuant to 20 C.F.R. §725.309(d). The

administrative law judge also found, however, that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, denied the subsequent claim for benefits.[1]

On appeal, claimant challenges the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that the medical opinion evidence fails to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). Claimant contends that the administrative law judge should have given deference to claimant's physicians and that the administrative law judge erred in not adequately considering that claimant was awarded benefits by the Pennsylvania State Occupational Disease Board. Employer responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.[2]

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[1] The relevant procedural history of this case is as follows. Claimant filed his first claim with the Department of Labor (DOL) on December 21, 1983. That claim was denied by the district director on September 4, 1986. Director's Exhibit 1-40. Claimant took no further action on that claim, and the denial became final. Director's Exhibit 1-34. Claimant filed a second claim with DOL on March 14, 1996, which was denied by the district director, on June 11, 1996, because claimant failed to establish any of the elements of entitlement pursuant to 20 C.F.R. Part 718. Director's Exhibit 1-41. Claimant submitted additional evidence to the district director on the same day. *Id*. Claimant then filed a third claim with DOL on August 14, 1998. Director's Exhibit 1-1. Following a hearing, Administrative Law Judge Robert J. Lesnick issued a Decision and Order dated February 9, 2000, wherein he found that the evidence failed to establish a material change in conditions pursuant to Section 725.309(d)(2000), as the evidence did not establish any element of entitlement. Director's Exhibit 1. Claimant took no further action on that claim and the denial became final. Claimant then filed the instant, subsequent, claim with DOL on June 17, 2002. Director's Exhibit 2. Following another hearing, Administrative Law Judge Richard A. Morgan (the administrative law judge) issued a Decision and Order, dated July 16, 2004, which is now before us on appeal.

[2] No party challenges the administrative law judge's findings that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) or that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and thereby a change in an applicable condition of entitlement. We affirm, therefore, these findings. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal*

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, 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, 718.201, 718.202, 718.203, 718.204. Failure to establish any 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 initially challenges the administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(4), citing to the opinion of Dr. Setty. Dr. Polepalli S. Setty, a specialist in internal medicine and pulmonary diseases, issued an opinion on September 11, 2002 and opined that claimant suffered from chronic obstructive pulmonary disease and restrictive pulmonary disease. Director's Exhibit 12. Dr. Setty further opined that exposure to coal dust was strongly suspected as a cause of claimant's respiratory condition. *Id*. Later, on November 7, 2002, Dr. Setty opined that claimant's chronic obstructive pulmonary disease "can be considered pneumoconiosis as Chronic Dust Disease of the lung associated with Hypoxemia." Director's Exhibit 19. In the same report, Dr. Setty stated that this diagnosis "could be related to [claimant's] 14 years exposure to Coal Dust." *Id.* Dr. Peter D. Kaplan, who was Board-certified in internal medicine, pulmonary diseases, and critical care medicine, examined claimant on February 28, 2003. Dr. Kaplan reported a cigarette smoking history of approximately one pack per day from age 17 to age 61. On the basis of examination, history symptoms, clinical testing, and x-ray, Dr. Kaplan concluded that claimant did not suffer from pneumoconiosis and that his respiratory impairment was unrelated to coal mine dust exposure. Employer's Exhibits 1, 2.

The administrative law judge acknowledged that both Drs. Setty and Kaplan were pulmonary specialists. Decision and Order at 12. The administrative law judge noted that claimant testified to a smoking history of somewhere between "a 37 and 55 1/2 pack/year smoking history between 1941 and 1988." Decision and Order at 9, n. 8; Hr. Tr. at 11-12. Accordingly, the administrative law judge concluded that Dr. Setty relied upon a grossly understated cigarette smoking history of only 12 pack years. Decision and Order at 9. The

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Co., 6 BLR 1-710 (1983).

administrative law judge, therefore, permissibly accorded less weight to Dr. Setty's opinion because she relied on an inaccurate smoking history. *See Trumbo v. Director, OWCP*, 17 BLR 1-85 (1983); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 12. Further, the administrative law judge permissibly accorded Dr. Setty's opinion less weight because it was "somewhat equivocal." *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 12. Moreover, the administrative law judge did not abuse his discretion when he accorded more weight to Dr. Kaplan's opinion because he found Dr. Kaplan's analysis was more thorough than that of Dr. Setty's and because it was consistent with the negative x-ray evidence and claimant's extensive cigarette smoking history and comparatively short coal mine employment history. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Gilliam v. G & O Coal Co.*, 7 BLR 1-59 (1984); Decision and Order at 12.[3]

Claimant also asserts that the administrative law judge erred by failing to "give deference to the opinions of claimant's physicians." Claimant's Brief at 1. There is no authority, however, for a requirement that the administrative law judge must give deference to the opinions of one party's physicians over those of the other. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Rather, the administrative law judge has a duty to independently evaluate all of the relevant evidence of record. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). The regulations state only that, in appropriate cases, claimant's treating physician's opinion may receive deference, but there is no evidence in the record that Dr. Setty was claimant's treating physician. Hr. Tr. at 13; *see*

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[3] The record also contains an opinion by Dr. Tarwater who submitted an opinion dated July 12, 1984 and stated that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 1-41. Drs. Lapp, Martin, Cho and Morgan submitted opinions which stated that claimant did not have pneumoconiosis and that his respiratory problems were due exclusively to claimant's cigarette smoking history. *Id*. The record also contains hospital records from the U.S. Department of Veteran Affairs which are silent as to whether claimant suffers from pneumoconiosis. Director's Exhibit 10. The administrative law judge found that the opinions of Drs. Lapp, Martin, Cho and Morgan outweighed Dr. Tarwater's contrary opinion. Decision and Order at 12. As claimant does not challenge the administrative law judge's consideration of these opinions, we affirm the administrative law judge's findings regarding these opinions. *See Coen*, 7 BLR 1-30; *Skrack*, 6 BLR 1-710.

20 C.F.R. §718.104(d); *see also Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). We reject, therefore, claimant's contention that the medical opinion evidence established the existence of pneumoconiosis.

Claimant also contends that the administrative law judge erred by failing to weigh the determination by the Pennsylvania State Occupational Disease Board that claimant was totally disabled due to pneumoconiosis. Claimant's Brief at 3. A review of the record, however, shows that neither the determination of the Pennsylvania State Occupational Disease Board nor the legal and medical criteria utilized by the State Board are in the record. The only indication in the record that claimant was receiving state benefits is claimant's testimony at the hearing. Hr. Tr. at 14-15. While a State Board's determination can be found to be relevant to a determination of whether claimant suffers from pneumoconiosis pursuant to Section 718.202(a)(4), *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), its finding is not binding on the administrative law judge, *Schegan v. Waste Management and Processors, Inc.*, 18 BLR 1-41, 1-46 (1994); *Miles v. Appalachian Coal Co.*, 7 BLR 1-744 (1985). In this case, the decision of the State Board, along with the medical and legal criteria relied upon by the State Board, were not in the record. *See Clark*, 12 BLR at 1-152. We reject, therefore, claimant's contention that the administrative law judge erred by failing to consider the findings of the Pennsylvania State Occupational Disease Board. Accordingly, we affirm the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Williams*, 114 F.3d 22, 21 BLR 2-104. Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, we must affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-29; *Perry*, 9 BLR at 1-2.[4]

[4] We decline to address the administrative law judge's finding that the evidence fails to establish total disability due to pneumoconiosis at Section 718.204 (c), as it is rendered moot by our disposition of the case. *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge