BRB No. 97-1343 BLA

IRVIN M. CLARK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAGLE NEST, 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 Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Foreman & Crane, L.C.), Charleston, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1338) of Administrative Law Judge Henry B. Lasky (the administrative law judge) 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). The administrative law judge credited claimant with thirty-five years and seven months of coal mine employment and adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R. Part 718. Although

[1]Claimant filed his initial claim on August 16, 1989. Director's Exhibit 44. On January 13, 1990, the Department of Labor denied the claim because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on January 20, 1995.

the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), he found the evidence insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4)[2] and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order, and contending that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs, has declined to participate 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Director's Exhibit 1.

[2]The administrative law judge did not specifically address whether the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). However, claimant does not allege that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3), and the evidence of record does not support such a finding. The record does not contain any biopsy evidence demonstrating the presence of pneumoconiosis. Moreover, the presumptions at 20 C.F.R. §718.304, 718.305 and 718.306 are not applicable to this claim.

Initially, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge considered all of the relevant x-ray evidence of record.[3] Of the thirty-two x-ray interpretations of record, twenty-five readings are negative for pneumoconiosis, Director's Exhibits 18-20, 34-39, 44; Employer's Exhibit 1, and seven readings are positive, Director's Exhibit 40; Claimant's Exhibits 1, 2. The administrative law judge properly accorded greater weight to the numerical superiority of the negative x-ray readings provided by physicians with superior qualifications.[4] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Thus, we reject claimant's assertion that the administrative law judge erred by merely relying on the numerical superiority of the negative x-ray readings.[5] Moreover, since twenty-five of the

[3]Although the administrative law judge acknowledged that claimant must establish a material change in conditions, he nonetheless considered all of the newly submitted evidence along with the previously considered evidence on the merits.

[4]Whereas Drs. Ahmed and Pathak read the June 9, 1995 x-ray as positive for pneumoconiosis, Drs. Francke, Hayes, Shipley, Spitz and Wiot read the same x-ray as negative. While Drs. Hayes and Pathak are B-readers, the administrative law judge correctly stated that "they are not...Board-certified radiologists." Decision and Order at 5. Further, the administrative law judge stated that "[o]f the remaining physicians interpreting the [June 9, 1995] x-ray--all of whom are Board-certified radiologists and B-readers--only [Dr. Ahmed] found evidence of the disease." *Id*. However, the administrative law judge observed that "Dr. Shipley...has served...as an assistant professor of radiology since 1984 at the University of Cincinnati College of Medicine...[and] Dr. Wiot has been a full professor of radiology at that institution since 1966." *Id*. In addition, whereas Drs. Ahmed, Aycoth, Bassali, Cappielo and Pathak read the October 25, 1995 x-ray as positive for pneumoconiosis, Drs. Duncan, Laucks, Leef, Shipley, Spitz and Wiot read the same x-ray as negative. The administrative law judge observed that "Dr. Pathak...[is] a B-reader." *Id*. The administrative law judge also stated that the October 25, 1995 "film was also interpreted by 10 physicians who are...B-readers and Board-certified radiologists." *Id*. Further, the administrative law judge stated that "[t]he evidence in the record...reveals that Drs. Leef, Spitz, Laucks, Duncan, Cappiello, Ahmed, Aycoth, and Bassalli are well trained and highly qualified, but their curriculae vitae do not indicate any particular distinctions that would justify according superior weight to the opinion of one over another." *Id*. at 6. However, as previously noted, the administrative law judge observed the credentials of Drs. Shipley and Wiot as professors in radiology.

[5]Claimant asserts that the administrative law judge mischaracterized the x-ray evidence by considering x-ray readings as negative for pneumoconiosis which cannot be counted as negative. Contrary to claimant's assertion, the record does not indicate that the administrative law judge considered any x-ray readings as negative for pneumoconiosis which were properly classified as positive for pneumoconiosis. *See* 20 C.F.R. §718.102; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Further, claimant asserts that the

thirty-two x-ray interpretations of record are negative for pneumoconiosis, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

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administrative law judge erred by failing to exclude evidence submitted by employer because it is cumulative. The administrative law judge stated "that the evidence was not cumulative because it was relevant to [the] contested issues of fact." Decision and Order at 2. Claimant does not assert that employer submitted its evidence untimely. Thus, since the administrative law judge, within a proper exercise of his discretion as trier of fact, determined that the evidence submitted by employer is relevant, we reject claimant's assertion that the administrative law judge erred by failing to exclude the cumulative evidence submitted by employer. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

Next, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge considered all of the relevant medical opinions of record. Whereas Drs. Walker and Rasmussen opined that claimant suffers from pneumoconiosis,[6] Director's Exhibits 15, 16; Claimant's Exhibit 2, Drs. Castle and Crisalli opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 37; Employer's Exhibits 2, 4, 5.[7] The administrative law judge properly accorded determinative weight to the opinions of Drs. Castle and Crisalli over the contrary opinion of Dr. Rasmussen because he found the opinions of Drs. Castle and Crisalli to be better reasoned and documented.[8] *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); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Further, the administrative law judge properly accorded greater weight to the opinions of Drs. Castle and Crisalli than to the contrary opinion of Dr. Walker because of the superior

[6]Although Dr. Walker opined that claimant does not suffer from coal workers' pneumoconiosis, he nonetheless diagnosed severe chronic obstructive pulmonary disease related to occupational dust exposure. Director's Exhibits 15, 16.

[7]The administrative law judge discounted the opinion of Drs. Previll and Smith, that claimant does not suffer from pneumoconiosis, because "[t]heir report is cursory, and their qualifications do not appear in the record." Decision and Order at 6; Director's Exhibits 15, 16. Although the administrative law judge considered Dr. Ranavaya's opinion, that claimant does not suffer from pneumoconiosis, the administrative law judge stated that "Dr. Ranavaya is a NIOSH-approved B-reader, but the record does not reveal his other qualifications." *Id*.; Director's Exhibit 44. Lastly, the administrative law judge stated that Dr. Zaldivar's opinion, that claimant does not suffer from pneumoconiosis, "is not critical to [his] ultimate holding on the issue of whether the Claimant suffers from coal workers' pneumoconiosis." *Id.* at 10; Employer's Exhibit 3.

[8]The administrative law judge observed that "the opinions of Drs. Castle and Crisalli [are] consistent, well supported by the objective evidence of record, thorough, and well reasoned." Decision and Order at 10. However, the administrative law judge stated that "[m]uch of Dr. Rasmussen's opinion consists of a literature review." *Id.* at 9. The administrative law judge observed that Dr. Rasmussen's "nine-page opinion devotes a single paragraph to an evaluation of the Claimant's medical condition." *Id*. Further, the administrative law judge observed that "[w]hile Dr. Rasmussen's report recites the medical evidence, he does not analyze the Claimant's condition in light of it." *Id*. Moreover, the administrative law judge observed that Dr. Rasmussen's "conclusion is stated in equivocal terms...[and] that Dr. Rasmussen's report does not refute or even address the premise underlying the opinions of Drs. Crisalli and Castle--namely, that it is possible to distinguish between lung disease caused by smoking and lung disease caused by occupational dust exposure." *Id*.

qualifications of Drs. Castle and Crisalli.[9] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Claimant asserts that the administrative law judge erred by relying on the medical opinions of Drs. Castle and Crisalli because they are hostile to the Act.[10] Contrary to claimant's assertion, Drs. Castle and Crisalli did not assume that coal mine employment can never cause chronic obstructive pulmonary disease. Director's Exhibit 37; Employer's Exhibits 2, 4, 5. Rather, the doctors provided explanations for concluding that claimant's chronic obstructive pulmonary disease is due to his cigarette smoking and not coal dust exposure.[11] *Id*. Thus, we reject claimant's assertion that the opinions of Drs. Castle and Crisalli are hostile to the Act. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d

[9]The administrative law judge observed that "[t]he record shows that Dr. Castle...is Board-certified in internal medicine and pulmonary medicine." Decision and Order at 8. The administrative law judge also observed that Dr. Castle "serves as a clinical professor of medicine at the University of Virginia College of Medicine." *Id*. Additionally, the administrative law judge observed that "[t]he record reflects that Dr. Crisalli is Board-certified in internal medicine and in the subspecialty of pulmonary diseases." *Id.* at 7. Further, the administrative law judge observed that Dr. Crisalli "is a clinical assistant professor in the Department of Medicine of West Virginia University Medical Center." *Id*. However, the administrative law judge stated that "[t]he record does not provide evidence of Dr. Walker's qualifications." *Id*.

[10]Claimant asserts that the opinions of Drs. Castle and Crisalli are hostile to the Act because they are based on the erroneous assumption that obstructive disorders cannot be caused by coal mine employment. In *Warth v. Southern Ohio Coal Co.,* 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, noting that chronic obstructive lung disease is encompassed within the definition of pneumoconiosis under the Act, rejected a physician's opinion that the miner did not suffer from pneumoconiosis inasmuch as this opinion was based on the assumption that since pneumoconiosis causes a purely restrictive form of impairment, obstructive disorders cannot be caused by coal mine employment. However, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the court explained that administrative law judges are not precluded from relying on physicians' opinions that, while noting the absence of a restrictive impairment, are not based upon the erroneous assumption that coal mine employment can never cause chronic obstructive pulmonary disease.

[11]The administrative law judge stated "that Dr. Rasmussen's report does not refute or even address the premise underlying the opinions of Drs. Crisalli and Castle--namely, that it is possible to distinguish between lung disease caused by smoking and lung disease caused by occupational dust exposure." Decision and Order at 9. Further, the administrative law judge observed that Dr. Rasmussen's "statement that 'It should be noted...that there is a very large body of medical evidence linking chronic obstructive lung disease to coal mine dust exposure' seems to be disputing a point that neither Dr. Castle nor Dr. Crisalli made." *Id*.

337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Furthermore, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as supported by substantial evidence.[12]

[12]We reject claimant's assertion of bias by the administrative law judge in weighing the conflicting medical evidence because there is no evidence in the record to support this assertion. *See generally Cochran, supra*.

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits on the merits under 20 C.F.R. Part 718.[13] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[13]In view of our disposition of this case on the merits at 20 C.F.R. §718.202(a), we need not address the administrative law judge's findings at 20 C.F.R. §§718.204(c), 718.204(b) and 725.309.