BRB No. 00-1057 BLA

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| JAMES E. HOLCOMB<br><br>Claimant-Petitioner<br><br>v.<br><br>CARTER-ROAG COAL COMPANY, INCORPORATED<br><br>and<br><br>WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED:_____<br><br>DECISION and ORDER |

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James E. Holcomb, Webster Springs, West Virginia, *pro se*.

Robert Weinberger, Charleston, West Virginia, for carrier.

Helen H. Cox (Howard M. Radzely, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.
PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2000-BLA-0238) of Administrative Law Judge Gerald M. Tierney denying benefits on a claim[1] 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 claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer argues that the administrative law judge's decision is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds on the merits addressing his role in providing claimant an opportunity to substantiate his claim pursuant to 30 U.S.C §923(b) and insuring that all tests comply with the appropriate regulatory standards pursuant to 20 C.F.R. §725.406(b). Claimant, in his reply brief, reiterates that the evidence of record is sufficient to establish the existence of pneumoconiosis.[2]

[1]This claim was filed on October 29, 1998. Director's Exhibit 1.

[2]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

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the

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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.

Pursuant to a lawsuit challenging revisions to 47 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*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable 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 (1985).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2000); *Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*).

After consideration of the Decision and Order and the relevant evidence of record we conclude that the administrative law judge's decision is supported by substantial evidence and contains no reversible error. Under Section 718.202(a)(1)(2000), claimant concedes that the majority of the interpretations of the November 30, 1998 x-ray[3] are negative, but argues that the administrative law judge erred in finding that the existence of pneumoconiosis was not established under Section 718.202(a)(1)(2000). Claimant's Brief at 3. In weighing the x-ray evidence of record, the administrative law judge properly found that although there were four positive readings by dually qualified physicians,[4] Drs. Patel and Alexander, there were

[3]Contrary to claimant's assertion regarding the negative readings of the x-ray taken on November 30, 1998, the rereadings to which claimant objects were mostly obtained and submitted into evidence by the West Virginia Coal Workers' Pneumoconiosis Fund, the insurer of Carter-Roag Coal Company, the responsible operator and a party to this case. Director's Exhibits 27-29. The Director obtained a single rereading by a B reader that the administrative law judge did not rely on in finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)(2000). Decision and Order at 3. Therefore, claimants' arguments are without merit.

[4]A dually qualified physician is a B reader and a Board-certified radiologist. A "B-reader" is a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2000); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135, 145 n. 16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied,* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A designation of "Board-certified" means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the

also four negative readings by equally qualified physicians. Decision and Order at 3; Director's Exhibits 25, 27-29; Claimant's Exhibit 1. The administrative law judge permissibly found that as the better qualified physicians were equally divided on their interpretations of the x-ray evidence, the preponderance of the x-ray evidence does not support a finding of pneumoconiosis under Section 718.202(a)(1)(2000). Decision and Order at 4; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir 1992).

Further, although the administrative law judge did not make a finding under 20 C.F.R. §718.202(a)(2)-(3)(2000), the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000), and the presumption contained in 20 C.F.R. §§718.305 and 718. 306 (2000) are inapplicable in this miner's claim filed after January 1, 1982. Therefore, claimant may not establish, as a matter of law, the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3)(2000).

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American Osteopathic Association. *See* 20 C.F.R. §718.202(a)(1)(ii)(C) (2000).

Under Section 718.202(a)(4)(2000), claimant argues that the medical opinion evidence is sufficient to establish that claimant suffers from chronic pulmonary disease resulting in impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Claimant's Brief at 6. We disagree. The administrative law judge considered the medical opinion of Dr. Bennett that claimant is totally disabled due to the secondary complications of occupational pneumoconiosis. However, he rationally found that while Dr. Bennett's opinion "could merit special consideration as claimant's longtime treating physician," its credibility is lessened because he does not address claimant's approximately twenty-seven years smoking history. Decision and Order at 5; *Perry, supra.* Further, the administrative law judge reasonably discredited the medical opinions of Drs. Rasmussen and Durham as unreasoned because the physicians failed to adequately explain how their findings support whether claimant's pulmonary impairment is significantly related to, or substantially aggravated by, his coal mine dust exposure.[5] *Id; Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Clark v. Karsts-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibits 7, 12, 25, 26; Claimant's Exhibits 1, 2. Accordingly, substantial evidence supports the administrative law judge's finding that after weighing all the evidence of record together under Section 718.202(a)(2000), the x-ray and the medical opinion evidence are insufficient to establish the existence of pneumoconiosis.[6] Decision and Order at 5; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4 th Cir. 2000).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As the administrative law judge permissibly concluded that the evidence does not establish that claimant has pneumoconiosis, claimant has not met his burden of proof on this critical element.

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

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[5]Dr. Rasmussen stated that claimant suffers from a disabling pulmonary insufficiency that is a "consequence of his cigarette smoking and coal mine dust exposure." Director's Exhibit 7. Dr. Durham diagnosed chronic obstructive pulmonary disease and coal workers' pneumoconiosis caused by tobacco and coal dust exposure. Director's Exhibit 12.

[6]Dr. Zaldivar concluded that claimant does not have coal workers' pneumoconiosis and that his severe pulmonary impairment is "not the result of his occupation," but due to his smoking history. Director's Exhibit 33.

affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge