BRB No. 01-0885 BLA

HOLLY P. VANCE	)	
	)	
Claimant-	)	
Petitioner	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	DATE ISSUED:
	)	_____
Employer-	)	
Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
		DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Ray E. Ratliff, Jr., Charleston, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2000-BLA-1102) of Administrative Law Judge Daniel L. Leland 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] The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant?s November 30, 1999 filing date. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. ?718.204(b). However, he found the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ?718.202(a) and also insufficient to establish that claimant?s total respiratory disability was due to pneumoconiosis pursuant 20 C.F.R. ?718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the evidence of record sufficient to establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that claimant?s pneumoconiosis was a contributing cause of his total respiratory disability. In response, employer urges affirmance of the administrative law judge?s denial of benefits as supported by substantial evidence. The Director, Office of Workers? Compensation Programs, has filed a letter stating that he will not file a brief on the merits of this case.[2]

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[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, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Inasmuch as the parties do not challenge the administrative law

The Board?s scope of review is defined by statute. The administrative law judge?s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance 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 (1965).

In order to establish entitlement to benefits under 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; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id*.

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judge's findings pursuant to 20 C.F.R. ??718.202(a)(2), (a)(3), 718.204(b), these findings are affirmed. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

After consideration of the administrative law judge?s Decision and Order, the issues raised on appeal and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge?s finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge, within a reasonable exercise of his discretion, found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 3-4, 7-8. Initially, we reject claimant?s contention that employer?s x-ray evidence is duplicative and cumulative and thus should be excluded by the Board. Claimant?s Brief at 12. Subject to the constraints of 20 C.F.R. ?725.456, the administrative law judge is required to admit timely developed evidence. While relevancy is the critical issue in the admission of evidence, court rulings favor the admission of all evidence, even where relevancy is questionable, with reliance on the trier-of-fact to determine the weight to be assigned to the evidence. *Cochran v. Consolidation Coal Co*., 12 BLR 1-136 (1989); *see also Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Martinez v. Clayton Coal Co*., 10 BLR 1-24 (1987). Inasmuch as claimant did not challenge the admissibility of the x-ray evidence at the time of its submission, *see* Hearing Transcript at 23-24, the administrative law judge properly admitted all of the x-ray evidence into the record. 20 C.F.R. ?725.456; *Cochran, supra*.

Weighing the x-ray evidence, the administrative law judge reasonably concluded that the preponderance of the x-ray readings by physicians dually qualified as B readers and Board-certified radiologists was negative for the existence of pneumoconiosis and, therefore, found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 7-8; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991)(*en banc*); *Edmiston v. F & R Coal Co*., 14 BLR 1-710 (1990); *Roberts v. Bethlehem Mines Corp*., 8 BLR 1-211 (1985).

We also affirm the administrative law judge?s finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge, within a reasonable exercise of his discretion, accorded less probative weight to the opinion of Dr. Durham, in which the physician diagnosed chronic obstructive pulmonary disease due in part to coal dust exposure, because the physician did not adequately explain his conclusion. Decision and Order at 8. As claimant contends, Dr. Durham provided a medical history, conducted a physical examination of claimant and administered a chest x-ray, pulmonary function study and a blood gas study. Director?s Exhibits 9-12. The administrative law judge however reasonably found that Dr. Durham did not provide an adequate rationale for how this underlying documentation supported his diagnosis. Decision and Order at 8; Director?s Exhibits 9-12; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Hicks, supra; Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp*., 8 BLR 1-46 (1985).

The administrative law judge also found that the opinion of Dr. Bellotte, that claimant is suffering from coal workers? pneumoconiosis, is entitled to little weight inasmuch as it was based on two positive x-ray interpretations, which have been reread as negative by a preponderance of the other physicians, and claimant?s history of coal mine employment. Decision and Order at 8. Contrary to claimant?s contention, the administrative law judge did not mischaracterize Dr. Bellotte?s diagnosis of coal workers? pneumoconiosis when he found that it was based on these two factors. The record indicates that Dr. Bellotte stated that these were the factors that he relied upon and had it not been for the positive x-ray reading, he would not have rendered a diagnosis of coal workers? pneumoconiosis. Employer?s Exhibit 20 at 21-22. Moreover, Dr. Bellotte stated that his x-ray interpretation of pneumoconiosis was a very liberal interpretation of a positive x-ray as the changes seen on the film were not typical findings of pneumoconiosis and therefore ?giving the miner the benefit of the doubt, as he was exposed to coal mine dust for 20 years. I read this out as being consistent with the ILO classification of 1/0 t/q.? Employer?s Exhibit 14. Consequently, it was not irrational for the administrative law judge to accord less weight to the diagnosis of pneumoconiosis by Dr. Bellotte. *See Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989); *see also Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

· In his April 9, 2001 deposition, Dr. Bellotte stated:

Furthermore, we reject claimant?s contention that the administrative law judge erred in failing to weigh the inconsistency in Dr. Fino?s medical opinion wherein the physician initially diagnosed the existence of simple pneumoconiosis, but changed his opinion in a later report. Claimant?s Brief at 10. The administrative law judge, in weighing the medical opinion of Dr. Fino, stated that the physician modified his original diagnosis of simple pneumoconiosis based on the review of additional x-ray evidence. Decision and Order at 8; *see* Employer?s Exhibits 4, 15. Contrary to claimant?s contention, the administrative law judge weighed the reason for Dr. Fino?s modification of his original diagnosis, i.e., the consideration of additional evidence, and, therefore, reasonably found this opinion to be credible. *Id*.; *see Justice, supra; Campbell, supra*.

Q. In diagnosing simple pneumoconiosis in Mr. Vance, is your diagnosis premised on that positive chest x-ray reading?

A. It?s premised on that positive chest x-ray reading and his twenty (20) years of coal mine exposure.

Q. If you had [read] the x-ray as negative [for] pneumoconiosis would you have diagnosed the coal workers? pneumoconiosis in this case?

A. Probably not.

Q. You say ?probably not?, would there have been any reason to diagnose - - -

A. You can diagnose coal mine workers? pneumoconiosis in a patient without x-ray changes; I wouldn?t have in this case, no.

Employer?s Exhibit 20 at 21-22.

Lastly, we reject claimant?s contention that the qualifying blood gas study evidence provides ?qualifying other objective evidence under 202(a)(4),? and, thus, shows the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant?s Brief at 5. Contrary to claimant?s contention, the results of a blood gas study, while indicative of the presence or absence of a pulmonary or respiratory impairment, is not dispositive on the issue of the cause of any such impairment under Section 718.202(a) and does not establish the absence or presence of pneumoconiosis. *See Morgan v. Bethlehem Steel Corp*., 7 BLR 1-226 (1984); *see generally Trent, supra; Piniansky v. 70-`Director, OWCP*, 7 BLR 1-171 (1984).

Inasmuch as the administrative law judge considered all of the relevant evidence and he reasonably determined that the medical opinions diagnosing chronic obstructive pulmonary disease were insufficient to establish the existence of pneumoconiosis, and the Board is not empowered to reweigh the evidence of record, as suggested by claimant, we affirm his finding as supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988); *see also Lafferty, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Since claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, an award of benefits is precluded. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Hicks, supra; Trent, supra; Perry, supra*.

Accordingly, the administrative law judge?s Decision and Order - Denying 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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PETER A. GABAUER, Jr.
Administrative Appeals Judge