BRB No. 01-0948 BLA

NICHOLAS A. RICHTSCHEIT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MUSTANG COAL & CONTRACTING	)	
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DATE ISSUED:
	)	
	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Ronald E. Archer , Houtzdale, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2000-BLA-0857) 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 miner filed a claim for benefits on May 3, 1973, which was administratively denied by the district director on January 29, 1980. On August 1, 1989, claimant filed a second claim for benefits. The district direct denied this claim as well. Thereafter, claimant filed a motion for modification, which was denied on January 23, 1991. On November 30, 1999, the instant claim was filed.[2] After conducting a hearing, and evaluating all of the evidence of record, the administrative law

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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] In this claim, employer has conceded that the evidence establishes that claimant is now totally disabled. *See* Hearing Transcript at 5. Therefore, the administrative law judge properly held that the evidence established a material change in conditions pursuant to Section 725.309(d)(2000), and that claimant was thus entitled to review of all of the evidence of record. *See Labelle Processing Co., v. Swarrow,* 72 F. 3d 308, 20 BLR 2-76 (3d Cir. 1995).

judge found that the x-ray and medical opinion evidence submitted in this case was insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4).[3] Thus, the administrative law judge found that claimant failed to establish an essential element of entitlement. Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in failing to find that the one positive x-ray interpretation of record, and the medical reports of Drs. Bizousky and McLane, establish the presence of pneumoconiosis. The employer responds, urging affirmance of the Decision and Order denying benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a statement that he will not participate in this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *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.

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[3] Based on the employer's stipulation, the administrative law judge credited claimant with 38.84 years of coal mine employment. Decision and Order at 2. The administrative law judge found that the evidence establishes a smoking history of one-half pack of cigarettes per day for forty years. Decision and Order at 6 n.3. This finding is not challenged on appeal, and therefore, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge concluded that the preponderance of the x-ray evidence failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In assessing the medical report evidence, the administrative law judge declined to credit the opinions of Drs. Bizousky and McLane that claimant suffers from chronic obstructive pulmonary disease arising out of coal mine employment. Instead, he determined that the opinions of Drs. Fino and Solic, that claimant does not suffer from a respiratory impairment related to his coal dust exposure, were the most credible opinions of record. Decision and Order at 7. Therefore, the administrative law judge held that claimant failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(4). *Id.*

On appeal, claimant asserts that the evidence of record establishes the presence of pneumoconiosis by x-ray, as well as by medical report evidence. In evaluating the x-ray evidence of record, the administrative law judge found that the preponderance of this evidence failed to establish the presence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 6. Beyond asserting that a single positive x-ray interpretation of record shows the presence of pneumoconiosis, claimant's brief does not set out any argument alleging error by the administrative law judge in the weighing of the x-ray evidence. Inasmuch as claimant has failed to allege specific error in the weighing of the x-ray evidence, we decline to disturb the administrative law judge's finding. S*ee Fish v. Director, OWCP,* 6 BLR 1-107 (1983). Thus, we affirm the administrative law judge's finding that the x-ray evidence of record failed to establish the presence of pneumoconiosis.[4]

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[4] The administrative law judge properly noted that there is no biopsy evidence in the record of this case. Decision and Order at 6. *See* 20 C.F.R. §718.202(a)(2). The administrative law judge also properly found that none of the presumptions at 20 C.F.R. §718.202(a)(3) was applicable to the instant case. Decision and Order at 6. On appeal, claimant does not challenge these findings, and therefore, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With respect to the medical opinion evidence at Section 718.202(a)(4), claimant first asserts that the administrative law judge confused the determination as to the presence of pneumoconiosis with the question of whether claimant's impairment arose out of coal mine employment. We disagree. Given that none of the physicians of record stated unequivocally that claimant suffers from coal workers' pneumoconiosis, the administrative law judge was required to make an assessment as to whether any of the other respiratory or pulmonary impairments diagnosed by the physicians meets the legal definition of pneumoconiosis set forth at 20 C.F.R. §718.201(a). By definition, a respiratory or pulmonary impairment can establish the presence of legal pneumoconiosis only if it meets the statutory requirement that it has arisen out of coal mine employment. 20 C.F.R. §718.201; *Pavesi v. Director, OWCP*, 758 F.2d 956, 964-965, 7 BLR 2-184, 2-198 (3d Cir. 1985); *Crow v. Peabody Coal Co*., 11 BLR 1-54, 1-56 (1988); *Biggs v. Consolidation Coal Co*., 8 BLR 1-1-317, 1-322 (1985). Thus, in assessing whether "pneumoconiosis", as defined under the Act, was present, the administrative law judge properly considered whether claimant's diagnosed pulmonary impairments arose out of coal mine employment.

Claimant further asserts that the administrative law judge erred in declining to credit the diagnoses of chronic obstructive pulmonary disease by Drs. Bizousky and McLane as diagnoses of pneumoconiosis under the Act. Based on a smoking history of three years, Dr. Bizousky initially diagnosed chronic obstructive pulmonary disease arising from coal dust exposure. He noted that smoking was a minor contributing factor, given the miner's limited smoking history. Director's Exhibit 10. After learning about the miner's true smoking history of one-half pack of cigarettes per day for forty years, the doctor revised his opinion to state that coal dust exposure "contributed to a portion of [the miner's] present day lung impairment." Director's Exhibit 12. Based on a smoking history of two to three years, Dr. McLane diagnosed chronic obstructive pulmonary disease and chronic bronchitis due to "cigarette smoking" and "industrial dust exposure." Director's Exhibit 69. The administrative law judge rejected both of these opinions, finding that neither physician adequately explained why he found that the miner's symptoms were due to coal dust exposure, rather than cigarette smoking. Despite the fact that Dr. Bizousky subsequently acknowledged a far greater smoking history than the three-year history noted in his original report, the administrative law judge properly held that he failed to explain why the symptoms of claimant's impairment were "necessarily related to coal dust exposure rather than due solely to cigarette smoking." Decision and Order at 6. Likewise, with respect to Dr. McLane's opinion, the administrative law judge properly

determined that the doctor failed to explain his conclusion as to the etiology of claimant's impairment, and that the opinion was therefore unreasoned. An administrative law judge may require a medical opinion to state in clear and definite terms the etiology of the miner's impairment. *See generally Brazzalle v. Director, OWCP,* 803 F.2d 934*,* 9 BLR 2-133, 2-137 (8th Cir. 1986). Thus, we hold that the administrative law judge did not err in rejecting the opinions of Drs. Bizousky and McLane. *See generally Gilliam v. G&O Coal Co.,* 7 BLR 1-59 (1984). Furthermore, the administrative law judge properly accorded greater weight to the opinions offered by Drs. Fino and Solic, that claimant does not suffer from any respiratory or pulmonary impairment arising out of coal dust exposure, in that these physicians are both Board-certified in pulmonary diseases, while Dr. Bizousky is a family practice physician and Dr. McLane's qualifications are not in the record. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (19900(*en banc*), *rev'd on other grounds*, 60 F.3d 1138 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Inasmuch as we affirm the administrative law judge's finding that claimant has failed to establish the presence of pneumoconiosis at Section 718.202(a)(1)-(a)(4), an essential element of entitlement, a finding of entitlement is precluded. *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Trent, supra*; *Perry, supra.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETY JEAN HALL
Administrative Appeals Judge