BRB No. 02-0178 BLA

JOSEPH KOWALCHICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits On Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits On Remand (99 -BLA-0009) of Administrative Law Judge Ainsworth H. Brown 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] This case is before the Board for a second time. In *Kowalchick v. Director, OWCP*, BRB No. 99-1239 (Nov. 30, 2000), the Board affirmed the

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

administrative law judge's admission of Dr. Rashid's medical opinion into the record, but agreed with claimant that the administrative law judge erred in denying claimant an enlargement of time to complete the submission of rebuttal evidence, vacated the administrative law judge's Decision and Order, and remanded the case for the administrative law judge to consider claimant's request for an extension of time to complete the submission of rebuttal evidence. Additionally, the Board ordered the administrative law judge to clarify the contents of the official record and evaluate the x-rays and medical opinions separately under Section 718.202(a)(1) and (4), before weighing all types of evidence together to determine whether claimant suffers from pneumoconiosis. The Board further ordered the administrative law judge to address whether claimant's pneumoconiosis arose out of coal mine employment and whether claimant's pneumoconiosis was totally disabling, if reached. On remand, the administrative law judge reopened the record to provide claimant the opportunity to submit evidence to rebut Dr. Rashid's opinion. The May 24, 2001 report of Dr. Matthew Kraynak was accepted into evidence. Considering the evidence of record, the administrative law judge again found it insufficient to establish the existence of pneumoconiosis at each subsection of 20 C.F.R. §718.202(a) and insufficient when weighed together to establish the existence of pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established at Section 718.202(a)(1) and (4), and failed to provide adequate explanation and rationale for his determination. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order - Denying Benefits On Remand.[2]

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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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, 718.202, 718.203, 718.204(2000). Failure to establish any one 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 contends that the administrative law judge provided an inadequate

[2] The Director's Motion to Accept Response Brief is granted.

explanation for finding that the x-ray evidence failed to establish the existence of pneumoconiosis based on the superior qualifications of Dr. Barrett, a Board-certified radiologist and B-reader, when three equally qualified physicians, Drs. Cappiello, Mathur and Smith, Board-certified, B-readers, found the x-ray positive for the existence of pneumoconiosis.

In finding that the existence of pneumoconiosis was not established in this case, the administrative law judge, after considering all the x-ray readings of record and the qualifications of the readers, accorded determinative weight to the negative reading of Dr. Barrett because, in addition to being a Board certified radiologist and B reader, like the other physicians of record, he was also a lecturer in pneumoconiosis at the Harvard School of Public Health and an associate clinical professor of radiology at Tufts Medical School. Decision and Order On Remand at 4. This was rational. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). We, therefore, affirm the administrative law judge's finding that the x-ray evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant next contends that the administrative law judge erred in crediting the opinion of Dr. Rashid over that of claimant's three treating physicians, without any legitimate basis and erred in relying on the pulmonary function study evidence to determine the credibility of the medical opinion evidence on the existence of pneumoconiosis since pulmonary function studies are relevant only to the degree of impairment, not the existence of pneumoconiosis.

The administrative law judge accorded greater weight to the opinion of Dr. Rashid based on his superior qualifications as a Board-certified internist than to the opinions of Drs. Raymond and Matthew Kraynak and the opinion of Dr. Tobash, as they were only Board-certified in family practice. This was rational. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, while the administrative law judge acknowledged that both Dr. Kraynak and Dr. Tobash were claimant's treating physicians, he accorded them less weight as he found their opinions not well-reasoned and documented. This was rational. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Additionally, the administrative law judge acted within his discretion in determining that Dr. Rashid's opinion was better supported by the underlying objective evidence, and therefore entitled to determinative weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). After determining that the reports of Drs. Raymond and Matthew Kraynak invalidating the pulmonary function study relied on, in part, by Dr. Rashid were not credible, the administrative law judge acted rationally when he accepted the opinion of Dr. Rashid, which was based on examination, x-ray and the results laboratory testing. Decision and Order at 7; *see Clark, supra*. Moreover, contrary to claimant's argument, the administrative law judge properly considered the pulmonary function study conducted by Dr. Rashid in evaluating the overall reliability of Dr. Rashid's opinion on the existence of pneumoconiosis pursuant to 20

C.F.R. §718.202(a)(4) as that section specifically refers to pulmonary function studies as providing a basis for physician's reasoned opinion.[3] Decision and Order at 7; 20 C.F.R. §718.202(a)(4); *see Clark, supra*; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-91 (1986). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as it was fully explained and supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *see also Minnich* at 9 BLR 1-91.

[3] Section 718.202(a)(4) provides:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion

20 C.F.R. §718.202(a)(4).

Accordingly, the administrative law judge's Decision and Order Denying Benefits On Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge